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Surviving Implicit Bias: Why the Appellate Court's Interpretation of the 2012 Amendment to the Racial Justice Act Will Be a Life or Death Decision for North Carolina Death Row Prisoners

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SURVIVING IMPLICIT BIAS: WHY THE APPELLATE COURT'S INTERPRETATION OF THE 2012 AMENDMENT TO THE RACIAL JUSTICE ACT WILL BE A LIFE OR DEATH DECISION FOR NORTH CAROLINA DEATH ROW PRISONERS

ALI EACHO*

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I. INTRODUCTION

Gregg v. Georgia reinstated capital punishment with the understanding that states had rewritten their statutes to ensure that capital punishment would no longer be applied on an arbitrary or discriminatory basis.¹ Unfortunately, history demonstrates that the legislatures have not upheld their promises.² In North Carolina, minorities currently make up nearly sixty percent of death row inmates, but the minority population of the state is only twenty-seven percent.³ In an attempt to correct the racial injustice in North Carolina, the state legislature passed in 2009, and later amended in 2012, a statute called the Racial Justice Act to permit courts to commute death sentences that were sought or imposed on the basis of racial discrimination.⁴ Though the purpose of the 2009 Racial Justice Act and the 2012 Amendment may facially appear to be the same, the content of the statute plays a critical role in determining whether it seeks to dispel explicit or implicit bias; this in turn has an effect on whether a defendant will be granted relief.⁵

Part II of this Comment explores the problems caused by explicit and implicit bias in the jury selection of capital trials and examines what the law has implemented as procedural safeguards to counteract different kinds of racial bias.⁶ Part III applies both the 2009 Racial Justice Act and the 2012 Amendment to *State v. Golphin*⁷ to argue that relief from implicit bias will only be granted under the 2009 Racial Justice Act.⁸ Part IV reviews

1. See 428 U.S. 153, 173 (1976) (noting that although the constitutionality of the death penalty is derived from public opinion of evolving standards of decency, it remains the Court's responsibility to protect the dignity of man from cruel and unusual punishment prohibited by the Eighth Amendment).

2. See EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN THE UNITED STATES 1 (2011) (finding that eighty percent of executions since 1977 have been carried out by southern states; eighty percent of all executions involved a white victim while whites are only the victims of fifty percent of crime nationwide).

3. See NAACP, DEATH ROW USA, WINTER 2012, at 37 (reporting eighty-five Blacks, four Latinos, nine Native Americans, and one Asian on North Carolina's death row).

4. See N.C. GEN. STAT. ANN. § 15A-2010 (West 2011) ("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.").

5. Compare *id.* (granting relief based on disparate impact showings of implicit bias), with Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(a) (2012) (granting relief based on an explicit showing of discrimination).

6. See *infra* Part II (comparing the remedies offered by *Batson v. Kentucky*, 476 U.S. 79 (1986); the 2009 Racial Justice Act; and the 2012 Amendment).

7. *State v. Golphin (Golphin I)*, 533 S.E.2d 168 (N.C. 2000); see also *Golphin v. Branker (Golphin II)*, 519 F.3d 168 (4th Cir. 2008) (denying petition for writ of habeas corpus).

8. See *infra* Part III (arguing that if the 2012 Amendment is construed narrowly so as to constrain the use of statistical evidence and require proof of intentional discrimination, then it will have the effect of allowing for implicit racial bias to

the recent decision on Golphin's Motion for Appropriate Relief by the Cumberland County, North Carolina, Superior Court, which addressed the 2012 Amendment as a matter of first impression.⁹ Part V advocates for the reinstatement of the 2009 Racial Justice Act, since the 2012 Amendment will allow implicit bias to pervade the jury selection process.¹⁰ Finally, Part VI concludes that *Golphin* proves that relief from implicit racial bias can only be granted using the 2009 Racial Justice Act.¹¹

II. BACKGROUND

A. The Supreme Court's Racial Bias Jurisprudence Reflects a Focus on Addressing Explicit Bias in the Courtroom.

Until the passage of the 2009 Racial Justice Act, American courts have concentrated on implementing legal standards that only address the concept of explicit racial bias.¹² Explicit racial bias occurs when individuals demonstrate intentional acts of racial discrimination.¹³ The Supreme Court addressed one mechanism of explicit bias in examining prosecutorial peremptory strikes in *Batson v. Kentucky*.¹⁴ In *Batson*, the Court reasoned that a prosecutor's peremptory strikes are invalid if they are based on the juror's race or the assumption that a juror of one race cannot adequately

continue in jury selection).

9. While this Comment was in publication, Judge Gregory Weeks handed down a decision on Golphin's Motion for Appropriate Relief. See *North Carolina v. Golphin (Golphin III)*, No. 97 CRS 47314-15 (N.C. Super. Ct. Dec. 13, 2012). Though Judge Weeks's holding reflects a liberal interpretation of the 2012 Amendment to the Racial Justice Act, his interpretation of the statute could be struck down later in the appeals process. Therefore, this Comment proceeds by analyzing the 2012 Amendment as if a narrow interpretation has already been adopted. This magnifies the significant impact a reviewing court could have if it decided to overturn Judge Weeks's current interpretation. In either case, this Comment argues that the provisions found in the 2009 Racial Justice Act are the most effective in combatting implicit racial bias stand. See *infra* Part IV.

10. See *infra* Part V (insisting that the 2009 Racial Justice Act was the most successful rule of law thus far in tempering the effects of implicit bias).

11. See *infra* Part VI (concluding that the 2012 Amendment is unsuccessful in granting relief because it lacks the capacity to account for implicit bias).

12. Thus far the Kentucky Racial Justice Act is the only piece of state legislation to be passed addressing racial discrimination in death penalty sentencing. The effectiveness of the Kentucky statute has yet to be tested in the courts. The United States Congress twice attempted to pass national legislation on the issue but failed, in 1988 and 1994.

13. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012) (defining explicit bias as stereotypes and attitudes that are "consciously accessible through introspection and endorsed as appropriate").

14. See *Batson v. Kentucky*, 476 U.S. 79, 82-83 (1986) (examining a situation where the prosecutor struck all four black potential jurors, creating an all-white jury to try a black man accused of burglary and receipt of stolen goods).

consider a case against a person of that same race.¹⁵ The Court also announced a test called the *Batson* challenge designed to aid trial courts in detecting peremptory strikes motivated by explicit bias.¹⁶ The challenge begins when the defense objects on the record to a peremptory strike that appears to be motivated by race.¹⁷ Next, the prosecution must offer a race-neutral reason for striking the juror.¹⁸ Finally, the trial court judge renders an immediate decision as to whether to allow the peremptory strike.¹⁹

The *Batson* challenge is utilized in capital cases today only to root out explicit racial bias.²⁰ The trial court judge's decision usually turns on the strength of the prosecution's race-neutral explanation.²¹ Thus, the court ultimately tests whether the prosecutor's strike was an intentional act of discrimination, not whether implicit bias motivated the strike.²² As long as the prosecutor provides a race-neutral explanation to the court, the peremptory strike stands.²³

B. The Court Has Failed to Address Implicit Bias That Pervades Jury Selection in the Death Penalty Process.

Implicit biases are "attitudes and stereotypes that are not consciously accessible through introspection."²⁴ Thus, when implicit bias prevails, individuals do not recognize their discriminatory actions because the

15. See *id.* at 89 (grounding its ruling in the Equal Protection Clause of the Fourteenth Amendment). *Contra* *Swain v. Alabama*, 380 U.S. 202, 222 (1965) (refusing to examine a prosecutor's peremptory strike under a Fourteenth Amendment Equal Protection analysis).

16. See *Batson*, 476 U.S. at 85-86 (recognizing that although a defendant is not entitled to a jury including members of his own race, he is entitled not to have those jurors excluded on the basis of race (citing *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880))).

17. See *id.* at 96 (placing the initial burden of proof on the defense counsel to make a prima facie showing of discrimination).

18. See *id.* at 97 (emphasizing that a prosecutor does not have to meet the same threshold as justifying a juror struck for cause).

19. See *id.* at 99 (omitting any possible guidelines for trial court judges to follow to weigh the respective arguments raised by both parties).

20. See Jeffrey Bellin & Junichi Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1085-86 (2011) (juxtaposing the need for peremptory strikes to be free of racial discrimination with the entrenched history of peremptory strikes as a part of the justice system).

21. See, e.g., *Golphin I*, 533 S.E.2d 168, 215 (N.C. 2000) (giving deference to the trial court's ruling by refusing to find the peremptory strikes discriminatory).

22. See, e.g., *id.* at 211 (setting forth the various factors to be considered to determine whether the prosecutor has exhibited intentional discrimination).

23. See, e.g., *Golphin II*, 519 F.3d 168, 183-84 (4th Cir. 2008) (affirming the ruling of the lower court to deny relief based on prejudicial jury strikes).

24. See Kang et al., *supra* note 13, at 1130.

behavior is a subconscious product of social constructs.²⁵ These social constructs are often based on racial stereotypes that alter interaction with an individual believed to be part of an associated group.²⁶ These subconscious behaviors may specifically guide decisions in a courtroom during jury selection.²⁷

As critics of *Batson* note, the framework prohibits courts from considering discrimination in any context other than an intentional act by the prosecutor.²⁸ This creates a problem when dealing with implicit racial bias.²⁹ For example, a prosecutor may subconsciously associate black jurors with a stereotype that assumes that blacks generally distrust authority.³⁰ This social construct may in turn cause the prosecutor to approach questioning the juror differently or to interpret the juror's responses differently.³¹ Subconscious social constructs may dictate that a simple "yes" or "no" response from a black juror reflects the juror being uncooperative or unresponsive, while the juror likely believes that he or she is simply answering the prosecutor's question.³² The prosecutor's perception of an uncooperative juror may then lead to a peremptory strike.³³ Both the judge and the prosecutor may be unaware of the implicit discrimination that caused the prosecutor to make the strike.³⁴ Once the prosecutor proffers the juror's demeanor as a race-neutral reason for the

25. See Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1143 (2010) (providing a model of racial mechanics to articulate how race is a social construction).

26. See *id.* (focusing on the bilateral interaction between the perceiver and the target that follows a pattern of classifying the target individual based on mapping rules provided by cultural perceptions).

27. See Kang et al., *supra* note 13, at 1142 (suggesting that there is no evidence that courtrooms would be absent of implicit bias).

28. See Bellin & Semitsu, *supra* note 20, at 1078 (blaming persistent racism in jury selection on the *Batson* framework rather than the judges making decisions).

29. See *id.* (explaining but not excusing the mechanics of implicit bias that occurs at the subconscious level and where the actor is only sometimes aware of implicit bias through a conscious effort not to engage in such actions).

30. See generally Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012) (citing research that supports the notion that most people harbor negative attitudes towards blacks and other disadvantaged groups).

31. See *id.* at 819 (proposing that implicit bias provides a plausible explanation for the disproportionate strikes made by prosecutors who insist on egalitarian intentions).

32. See generally *id.* at 802 (observing that results from the Implicit Association Test reveal that participants associate blacks with negative characteristics such as bad, unpleasant, aggressive, or lazy).

33. See *id.* at 819 (recognizing that prosecutors may strike black jurors for behaviors implicitly associated with race that on the surface will appear race neutral).

34. See *id.* at 818 (quoting Justice Powell in *Batson* as advocating for the abolition of the peremptory strike because it was too easy for discrimination to go undetected).

strike, the strike will likely stand.³⁵

Just one year after *Batson*, the Court missed another opportunity to address implicit bias in *McCleskey v. Kemp*, the case of a Georgia death row inmate who contested his death sentence under the Eighth and Fourteenth Amendments using statistical analysis.³⁶ The analysis in the case showed disparate patterns that indicated a defendant was more likely to receive a death sentence if the victim of the crime was white.³⁷ Despite the statistical evidence presented, the Court failed to find that race had influenced the imposition of the death sentence since McCleskey could not prove that the prosecutor intentionally sought the death sentence based on his race.³⁸

The Court distinguished capital punishment from other instances where statistics are often used to prove discrimination, explaining that in the latter, an institution facing accusations of racism often has the opportunity to rebut the assumptions made by the statistics.³⁹ In capital sentencing, however, the Court felt that extraneous variables within the statistics would prevent reliable conclusions.⁴⁰ Nevertheless, the Court invited state legislatures to curb racial discrimination by incorporating statistical analysis into their own death penalty review schemes.⁴¹

*C. The 2009 Racial Justice Act Accounts for Both Explicit and Implicit Racial Bias.*⁴²

After *McCleskey*, it was clear that innovative methods were needed to combat the implicit prejudices of the capital punishment system.⁴³ In 2009,

35. *See id.* at 819 (noting that although most prosecutors today do not strive to intentionally exclude black jurors, implicit bias persists in strike decisions).

36. *See* *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987) (reviewing a study performed by Professor Baldus that included over 2000 Georgia murder cases that occurred during the 1970s).

37. *See id.* (finding that crimes involving white victims received the death penalty in eleven percent of cases while crimes involving black victims only received the death penalty in one percent of cases).

38. *See id.* at 298 (explaining that for McCleskey to prove racial discrimination, he had the more difficult burden of proving discriminatory intent rather than only proving a disparate pattern, as the study showed).

39. *See id.* at 296 (drawing on examples of claims of discrimination in Title VII cases).

40. *See id.* at 295-96 n.15 (including variables such as the drafting of capital punishment legislation, decisions to arrest and prosecute, and decisions made by the jury).

41. *See id.* at 319 (arguing that since legislatures are elected bodies, they are better qualified to weigh evidence).

42. The 2009 Racial Justice Act was interpreted as a matter of first impression in *Robinson v. North Carolina*, discussed in Part II.D.

43. *See* Shaila Dewan, *Study Finds Blacks Blocked from Southern Juries*, N.Y. TIMES (June 1, 2010), <http://www.nytimes.com/2010/06/02/us/02jury.html>

North Carolina passed the Racial Justice Act, which commutes any death sentence to life imprisonment without the possibility of parole if a prisoner can prove that race was a significant factor in seeking the death penalty.⁴⁴ The statute detailed three methods by which relief could be granted: (1) the prisoner can demonstrate that race was a significant factor based on the race of the defendant; (2) the prisoner can demonstrate that race was a significant factor based on the race of the victim; and (3) the prisoner can demonstrate that race was a significant factor in jury strikes.⁴⁵

Some of the key statutory provisions in the 2009 Racial Justice Act suggest that it was implemented to combat implicit racial bias.⁴⁶ The most striking example is the statute's overt endorsement of using statistical evidence to satisfy a showing of racial discrimination, a notion that the *McCleskey* Court had previously refused.⁴⁷ During a debate, North Carolina State Senator Doug Berger implored the Senate to accept statistics as proof of racial discrimination because of the difficult nature of proving racial discrimination.⁴⁸ The senator drew parallels to the Civil Rights Act of 1964 and underscored that plaintiffs often use statistics to prove discrimination in employment decisions.⁴⁹

Another key provision of the North Carolina statute is that it requires no evidence of intentional discrimination in the defendant's case.⁵⁰ The legislative history encourages a plain reading of the statute which states that a prisoner may win relief simply by proving discrimination within the

(demonstrating the continuing need for racial justice legislation that considers implicit bias by recognizing that North Carolina has never had a *Batson* challenge overturned).

44. See N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (defining a significant factor as having or likely to have influence or effect (citing *State v. Sexton*, 336 N.C. 321, 375 (1994)).

45. See *id.* § 15A-2012 (recognizing from a body of evidence presented in the legislature that the death penalty is sought more often for black defendants and crimes involving white victims).

46. See *id.* § 15A-2011 (allowing for the use of statistics to show patterns of discrimination over time and not requiring evidence of intent or a showing of prejudice).

47. See *Robinson v. North Carolina*, No. 91 CRS 23143, slip op. at 31 (N.C. Super. Ct. Apr. 20, 2012) (guiding this determination by the Federal Judicial Center's Reference Manual on Scientific Evidence and previous North Carolina Supreme Court decisions that define significant factor as something that has or is likely to have influence or effect).

48. See Seth Kotch & Robert Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2112-13 (2010) (arguing that if the Civil Rights Act of 1964 did not incorporate statistical evidence, society would not have moved forward).

49. See *id.* at 2113 n.360 (agreeing with Senator Glazier that if statistics are allowed as evidence for individuals to keep their jobs, statistics should be allowed as evidence to save a man's life).

50. See *Robinson*, No. 91 CRS 23143, slip op. at 34 (interpreting the statute to grant relief upon a showing of race as a significant factor in the county, prosecutorial district, judicial division, or state).

county, prosecutorial district, judicial division, or state.⁵¹ Earlier versions of the bill indicate that the words “in his or her case” initially appeared in the text of the bill, suggesting a requirement to prove discrimination in the case at issue.⁵² During a floor debate, Senator Doug Berger advocated for the Senate to consider the reality of discrimination, where he said no reasonable person, including prosecutors, would ever admit to acting from racial bias, demonstrating a clear need to exclude evidence of an intent requirement.⁵³

D. The Robinson Trial Proves That the 2009 Racial Justice Act Can Be Successful in Combating Implicit Racial Bias.

On April 20, 2012, the first application of the 2009 Racial Justice Act was decided by Judge Gregory Weeks in *North Carolina v. Robinson*.⁵⁴ Marcus Robinson’s death sentence was commuted to life in prison after he proved that race was a significant factor in the improper jury strikes made at his trial.⁵⁵

Using a statistical analysis as evidence of racial discrimination was critical to counteracting implicit bias because the results were able to show patterns of bias over time.⁵⁶ Robinson’s defense counsel used a statistical analysis performed by a team of professors from Michigan State University (MSU Study) that included unadjusted data and a controlled-regression analysis to prove that patterns of racial discrimination existed in his trial, in Cumberland County, in the Prosecutorial District 12,⁵⁷ in the Second Judicial Division, and in the state of North Carolina.⁵⁸ The MSU Study

51. See § 15A-2011(b) (enacting such a provision in support of incorporating disparate impact analysis into racial discrimination statutes that address arbitrary application of the death penalty).

52. See *Robinson*, No. 91 CRS 23143, slip op. at 36 (“The General Assembly removed a provision contained in an earlier version of the bill that required a defendant to show ‘with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek or impose a death sentence *in his or her case*.’”).

53. See *Kotch & Mosteller*, *supra* note 48, at 2112 (insisting that in modern times, individuals will not admit to actions being motivated by “the color of a [person’s] skin”).

54. See *Robinson*, No. 91 CRS 23143, slip op. at 167 (ordering that Marcus Robinson’s life be spared, and his death sentence be changed to life imprisonment without the possibility of parole).

55. See *id.* at 166 (handing down a decision that detailed a statistical study that was commended by the court for incorporating proper sample size, methodology, and for being responsive to new information).

56. See *generally* Kang et al., *supra* note 13, at 1130 (chronicling the extensive psychological research that utilizes the Implicit Association Test to track the relationship between stereotypes and implicit bias).

57. Cumberland County and Prosecutorial District 12 constitute the same geographical area.

58. See *Robinson*, No. 91 CRS 23143, slip op. at 165 (proving that Robinson

predicted a ninety-five percent or better chance that the peremptory strikes were based on race, and the court found the study statistically significant.⁵⁹ Using the data from the MSU Study, the court was also able to adopt the four-fifths rule, which assumes practical significance when the minority's success rate is less than four-fifths of the success rate of the majority, as it was in Robinson's trial.⁶⁰

The state had a difficult task rebutting the presumption of bias created by the defense counsel.⁶¹ In *Robinson*, the court ruled that the prosecution was unable to overcome that presumption, and the unadjusted data alone proved that race was a significant factor in the peremptory strikes in Robinson's case.⁶²

Though Robinson was able to prove that the racially motivated peremptory strikes in his case were intentional, there was no requirement to prove intent under the 2009 Racial Justice Act.⁶³ The court, however, heard lengthy testimony on the difficulty of proving implicit bias in racial discrimination cases, including testimony by an expert witness for the defense.⁶⁴ The expert witness discussed implicit bias in the context of a *Batson* challenge.⁶⁵ The witness explained that when individuals are confronted with the notion of their own prejudicial tendencies, they often try to rationalize their behavior by disguising the prejudice as something different.⁶⁶ Therefore, in the context of a *Batson* challenge, when the court asks a prosecutor why a potential juror was struck, the prosecutor is unable

suffered discrimination under both a disparate treatment and disparate impact analysis).

59. See *id.* at 31-32 (allowing only a five percent margin of error due to chance (citing *Castaneda v. Partida*, 430 U.S. 482, 495-96 n.17 (1977) and *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 n.4 (1977))).

60. See *id.* at 32-33 (borrowing the standard from the Equal Opportunity Employment Commission and applying it to the Racial Justice Act whereby the prima facie burden is met if less than four-fifths of qualified black jurors are seated compared with qualified white jurors).

61. See, e.g., *id.* at 119-20 (requiring the prosecution to rebut a statewide statistical regression analysis rather than simply stating a race-neutral reason for the peremptory strikes).

62. See *id.* at 162 (concluding that race was a significant factor in prosecutors' peremptory strike decisions in the county, judicial division, and state in 1994); see also *id.* at 105-07 (refuting the prosecution expert's own analysis of jury strikes due to improper sampling and study design).

63. See *id.* at 164-65, 167 (granting relief since defense counsel proved intentional discrimination in Robinson's trial, Cumberland County, the Second Judicial Division, and North Carolina).

64. See *id.* at 116-17 (testifying as to findings of his own published research exploring implicit racial bias in the context of jury selection).

65. See *id.* at 117 (noting specifically that *Batson* challenges are not conducive to uncovering implicit racial bias because of the intentional nature of the response expected of prosecutors for courts to prove discrimination).

66. See *id.* (expressing that scientific studies have shown that most people are genuinely unaware of their subconscious biases).

to articulate a reason that accurately takes implicit bias into account.⁶⁷ One of the prosecutors from Robinson's own trial even admitted in testimony that a person who may not intend to discriminate may do so unconsciously.⁶⁸

E. The 2012 Amendment Eviscerates the Purpose of the Act to Eliminate Implicit Bias.

Despite the court recently granting relief in Robinson's case under the 2009 Racial Justice Act, North Carolina state legislators voted to amend the statute on June 13, 2012, curtailing the provisions that worked to neutralize implicit bias.⁶⁹ This raises serious concerns for North Carolina's death row prisoners who raised appeals under the previous version of the Racial Justice Act that their chances of bringing a successful claim have diminished.⁷⁰

The 2012 Amendment limits the use of statistics in the courtroom to prove discrimination under the statute.⁷¹ Although the statute still allows for statistical evidence regarding jury selection in the individual case, county, and prosecutorial district, judicial division and statewide statistics are no longer acceptable.⁷² Furthermore, statistical evidence alone is insufficient to grant relief under the amended statute.⁷³ In addition to geographical limitations, the statistics allowed into evidence must be confined to a time frame from ten years before the commission of the offense to two years after the imposition of the death sentence.⁷⁴ Constraining the use of statistics will be detrimental to the defense counsel's likelihood of successfully establishing a prima facie showing of

67. See *id.* (asserting that the Baldus study from the *McCleskey* trial largely supported the notion that prosecutors may be unaware of their bias and therefore unable to acknowledge it in court challenges).

68. See *id.* at 118 (admitting specifically that there was a chance that he engaged in discrimination in jury selection for Robinson's own trial).

69. See generally James Eng, *North Carolina Lawmakers Move to Scale Back Racial Justice Act*, NBC NEWS BLOG (Jun. 14, 2012, 3:01 PM), <http://usnews.nbcnews.com/news/2012/06/14/12223532-north-carolina-lawmakers-move-to-scale-back-racial-justice-act?lite> (voting to pass the bill by a landslide count of seventy-three in favor of the bill to forty-seven against after overriding Governor Perdue's veto).

70. See generally Bryan Mims, *North Carolina Judge Sets Racial Justice Act Appeals for October*, WRAL (July 5, 2012), <http://www.wral.com/news/state/story/11284405/> (reporting that over 150 death row prisoners of all races have filed appeals under the 2009 version of the Racial Justice Act).

71. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(a) (2012) (eliminating the possibility of granting relief based on the judicial division or statewide discriminatory practices).

72. *Id.*

73. *Id.* sec. 3, § 15A-2011(e).

74. *Id.*

discrimination.⁷⁵

A narrow interpretation of the 2012 Amendment would also appear to incorporate the intentional discrimination requirement that the North Carolina State Senate fought so desperately to avoid in 2009.⁷⁶ An intent provision would require defense counsel to prove explicit bias by showing that a prosecutor intentionally discriminated based on race, a burden that becomes nearly impossible given the prosecutor's surreptitious decision-making process, which unavoidably includes implicit bias.⁷⁷

F. Golphin Illustrates How Both Versions of the Racial Justice Act Address Explicit and Implicit Bias.

In his Motion for Appropriate Relief to the Cumberland County Superior Court, Tilman Golphin challenged his sentence under the third method of the Racial Justice Act, arguing that race was a significant factor in the juror strikes in his trial.⁷⁸ Golphin and his younger brother were convicted of first-degree murder and sentenced to death for the killing of two law enforcement officers during a traffic stop.⁷⁹ Throughout the appeals process, Golphin challenged the use of the prosecution's peremptory strikes against two black jurors.⁸⁰ None of the courts, however, found error in the trial court's *Batson* ruling that the prosecutor's strikes were not made on the basis of race.⁸¹

The lower courts rejected Golphin's contention that race played a part in the prosecution's peremptory strikes of two black jurors.⁸² While the court may have been correct in judging the outcome of the *Batson* challenge based on explicit bias, the test did not allow the court to test for implicit bias.⁸³ At the time of Golphin's case, the only way to challenge a racially

75. See *id.* sec. 3, § 15A-2011(d)-(f) (limiting the types of evidence available to the defense counsel to only anecdotal and historical evidence).

76. See *id.* sec. 3, § 15A-2011(f) (including the words "in the defendant's case" to parts of the statute which suggests an individual intent requirement).

77. See *id.* (refuting the notion that evidence of discrimination in the relevant geographic regions alone is sufficient to establish a pattern of discrimination and to grant relief under the statute).

78. See generally Mims, *supra* note 70 (reporting that Judge Gregory Weeks held a preliminary hearing for Golphin's appeal on July 6, 2012).

79. See *Golphin I*, 533 S.E.2d 168, 184-85 (N.C. 2000).

80. See *id.* at 210 (alleging that the trial court did not conduct an adequate inquiry into the peremptory strikes of jurors Holder and Murray); see also *Golphin II*, 519 F.3d 168, 179 (4th Cir. 2008) (challenging the Supreme Court of North Carolina's application of *Batson*).

81. See *Golphin II*, 519 F.3d at 187-88 (denying relief under the Fourteenth Amendment's Equal Protection Clause after failing to find evidence of explicit racial bias but failing to consider whether implicit bias played a part in the strikes).

82. See *Golphin I*, 533 S.E.2d at 212-14.

83. See generally *Robinson v. North Carolina*, No. 91 CRS 23143, slip op. at 114-

motivated peremptory strike was using *Batson* criteria.⁸⁴ Since *Batson* only considers explicit racial bias, it is possible that the prosecutor's peremptory strikes were fueled by implicit bias and completely overlooked by the courts.⁸⁵

In Golphin's most recent Motion for Appropriate Relief, originally filed under the 2009 Racial Justice Act, the parties requested to brief the case under the 2009 Racial Justice Act and the 2012 Amendment.⁸⁶ Briefing both versions of the statute gave the parties an opportunity to highlight the key differences between the 2009 Racial Justice Act and the 2012 Amendment.⁸⁷

III. ANALYSIS

A racial justice statute should include statutory elements that allow for consideration of both explicit and implicit racial bias.⁸⁸ Elements favorable to uncovering both kinds of bias, such as including statistics as permissible evidence and excluding a requirement for proof of intentional discrimination, are examined through a comparison of the 2009 North Carolina Racial Justice Act and the 2012 Amendment as applied to Tilmon Golphin's case.⁸⁹

A. Allowing Statistical Analysis as Sufficient Evidence to Prove Discrimination and Grant Relief Under the Racial Justice Act Is Imperative to Counteract Implicit Bias in Jury Selection in the Golphin Case.

1. The 2009 Racial Justice Act Will Provide Relief for Golphin Using Statistics as Evidence of Discrimination.

If *Golphin* were to be decided under the 2009 Racial Justice Act, the

16 (N.C. Super. Ct. Apr. 20, 2012) (explaining that to reduce the chance of making an incorrect judgment on racial bias, we should improve conditions of decision-making).

84. See *Golphin I*, 533 S.E.2d at 210 (forbidding the use of peremptory strikes for a discriminatory purpose).

85. See Smith & Levinson, *supra* note 30, at 818 (explaining that policing peremptory strikes has not been successful).

86. See Mims, *supra* note 70 (requesting a breadth of argument in light of the uncertainty of the retroactivity of the newly amended Racial Justice Act).

87. Compare N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (enumerating various provisions that will address the racial biases inherent in jury selection through varying thresholds of evidence presented by defense counsel and the prosecution), with Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011 (2012) (providing for different evidence allowable under the statute to grant relief).

88. See, e.g., N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (providing relief to a defendant based on improper racial bias during jury selection).

89. See *Golphin II*, 519 F.3d 168, 179 (4th Cir. 2008) (citing a narrow spectrum of available evidence of discrimination and a requirement to prove intentional discrimination).

court should follow the ruling in *Robinson* and find that race was a significant factor in jury selection based on statistics alone, as was the case in *Robinson*.⁹⁰ Under the 2009 Racial Justice Act the burden of proof would remain with the defendant, Golphin, to prove a prima facie case of discrimination.⁹¹ The type of evidence available to Golphin to prove racial discrimination in the peremptory strikes, however, would be broader under the 2009 Racial Justice Act and would enable the court to consider implicit bias.⁹² For example, Golphin would be able to use any statistics, as well as other empirical or anecdotal evidence, to prove that race was a significant factor under the statute.⁹³ In *Robinson*, the court ruled that the unadjusted data in the MSU Study showed that race was a statistically significant factor in peremptory strikes in capital cases in the county, prosecutorial district, judicial division, and state where the case was tried.⁹⁴

Since Golphin's trial took place in the same geographic location and time frame as *Robinson*, applying the same study in *Golphin* would likewise reveal disparate patterns in jury selection.⁹⁵ In Golphin's trial, a special venire was chosen from Johnston County to resolve defense counsel's motion for a change of venue.⁹⁶ The MSU Study confirms that of the seven capital cases tried in Johnston County, 52.38% of black venire members were struck from the jury panel, whereas 28.23% of white venire members were struck from the jury panel.⁹⁷ The numbers were similar for Cumberland County in the *Robinson* case, where in eleven capital cases, 52.69% of black venire members were struck from the jury panel while only 20.48% of white venire members were struck.⁹⁸ The experts

90. See *Robinson v. North Carolina*, No. 91 CRS 23143, slip op. at 162 (N.C. Super. Ct. Apr. 20, 2012) (finding statistics alone sufficient to prove race as a significant factor).

91. See N.C. GEN. STAT. ANN. § 15A-2011(c) (West 2011) (explaining that the court has the final determination in weighing whether the prosecution has successfully rebutted the defense counsel's prima facie showing).

92. See *id.* § 15A-2011(b) (listing statistical evidence and other evidence such as sworn testimony as acceptable); cf. *Batson v. Kentucky*, 476 U.S. 79, 95 (1986) (accepting only accounts of the prosecutor's intentions and strike patterns as evidence of racial discrimination).

93. Cf. *Robinson*, No. 91 CRS 23143, slip op. at 69 (holding that race was a significant factor in the peremptory strikes in Golphin's trial, county, and state).

94. See *id.* at 70 (basing the holding on the study's finding of statistically significant strike patterns in all three geographic areas).

95. Cf. *id.* at 1 (bearing the date of the trial as 1994); *Golphin I*, 533 S.E.2d 168, 183 (N.C. 2000) (indicating that Golphin was convicted in 1998).

96. See *Golphin I*, 533 S.E.2d at 189 (recording that both defendants requested a change of venue and after a disputed conference, all parties stipulated to keeping the trial in Cumberland County, but drawing a special venire from neighboring Johnston County).

97. See *Robinson*, No. 91 CRS 23143, slip op. at 64 (combining for a strike rate ratio of 1.9).

98. See *id.* at 63 (reporting a strike rate ratio of 2.6).

conducting the study considered the results statistically significant in both counties since blacks were struck nearly twice as often as whites.⁹⁹ Under the 2009 Racial Justice Act, based on the statistics and expert testimony, a court should hold that the peremptory strikes made in Johnston County are evidence that race was a significant factor in the peremptory strike decisions.¹⁰⁰

The study also suggests that implicit racial bias played some part in each individual trial examined.¹⁰¹ In Golphin's trial 71.4% of black venire members were struck, in contrast with only 35.8% of white venire members.¹⁰² Again, these numbers were only slightly less irregular than Robinson's case, where 50.0% of black venire members were struck compared to 14.3% of white venire members.¹⁰³ The study noted that in only one capital trial was the peremptory strike rate ratio of races of jurors almost equivalent and thus not statistically significant.¹⁰⁴

Applying the four-fifths statistical inquiry used in *Robinson* to the MSU Study in *Golphin* would also demonstrate that peremptory strikes in both Johnston County and in Golphin's individual trial indicate the presence of implicit racial bias.¹⁰⁵ In Johnston County, 71.77% of whites were successfully seated on a jury, but only 47.62% of blacks were successfully seated.¹⁰⁶ In Golphin's individual trial, 64.2% of whites were successfully seated, whereas only 28.6% of blacks were seated.¹⁰⁷ These numbers illustrate a stark racial disparity in jury selection in Johnston County and in Golphin's case that can be explained by implicit, but not explicit, racial bias.¹⁰⁸

99. See *id.* at 63-64 (noting that the strike rate ratio in Cumberland County in *Robinson* was slightly higher at 2.6 than Johnston County in *Golphin* with 1.9, measuring against an ideal strike rate ratio of 1).

100. See *id.* at 67 (finding that strikes used in neighboring counties demonstrated that black jurors were struck from juries at a disproportionate rate).

101. See *id.* (finding a nearly equal strike rate for death row inmate Richard E. Cagle's trial).

102. See *id.* at 66 (combining for a strike rate ratio of 1.99).

103. See *id.* (recording a strike rate ratio of 3.50).

104. See *id.* at 66-67 (indicating that implicit bias played a role in all but one capital trial since blacks were being struck at a disproportionate rate).

105. See *id.* at 65-66 (computing the four-fifths rule using the difference of the reported number of jurors struck).

106. See *id.* at 63-64 (falling short of the 57.41% threshold needed to pass a four-fifths inquiry).

107. See *id.* at 66 (falling far below the requisite 51.36% required by the four-fifths test).

108. See *id.* at 66 (finding that both inquiries fail the four-fifths challenge analysis in *Golphin* despite the fact that no court previously found a *Batson* violation which would have indicated explicit bias).

2. *Allowing Statistics as Evidence to Prove Implicit Bias Under the 2009 Racial Justice Act Weakens the Prosecution's Rebuttal Argument in Golphin.*

Once Golphin asserts statistical evidence in an effort to prove that the jury strikes in his case were products of implicit bias and racial discrimination, the prosecution has the opportunity to present its own rebuttal case, which may also include the use of statistics.¹⁰⁹ If Golphin's defense counsel uses the MSU Study or a similar statistical analysis that shows such widespread bias in jury selection in North Carolina, it will be more difficult for the prosecution to effectively rebut defense counsel's argument under the 2009 Racial Justice Act.¹¹⁰

In *Robinson*, the prosecution attempted to counteract the evidence presented by defense counsel by hiring an expert, Joseph Katz, to analyze the defense's MSU Study.¹¹¹ Katz conducted several regression analyses, specifically with the intent to find some combination of variables that made the peremptory strikes in Robinson's trial statistically insignificant.¹¹² Katz, however, found no instances where the results were statistically insignificant, which further substantiated the defense counsel's claim that the peremptory strikes were motivated by implicit bias.¹¹³

If Golphin similarly presents a study examining the statewide peremptory strike ratios in North Carolina, it will be difficult for the prosecution to rebut his conclusion that the strikes were motivated by implicit bias.¹¹⁴ Since the *Golphin* trial fits into the same time frame and geographic location that the MSU Study covers, the statistical conclusions should remain unchanged, thus favoring relief for Golphin under the 2009 Racial Justice Act.¹¹⁵

109. See generally N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (maintaining that the burden of proof remains with the defense).

110. Cf. *Robinson*, No. 91 CRS 23143, slip op. at 107 (finding that the prosecution's expert witness failed to create a reliable analysis to discredit the defense counsel's findings that race was a significant factor in the strike decisions).

111. See *id.* at 25-26 (testifying at a discovery hearing that his research would include either an investigation into the accuracy of the MSU Study by confirming results with local prosecutors or a compilation of non-racial explanations for black struck jurors).

112. See *id.* (presenting an analysis with the goal of explaining that there are many possible reasons for a peremptory strike, rather than seeking to find the true reason for each strike against a black juror).

113. See *id.* at 105-07 (deeming the Katz study to be unreliable since the methodology employed is not generally accepted by the scientific community because it spreads the data set too thinly to draw meaningful conclusions and produces models that are unreliable because they are over fit).

114. See *id.* at 108 (concluding, based on statistical evidence presented at trial, that race was a significant factor in peremptory strike decisions in North Carolina from 1990 to 2010).

115. See N.C. GEN. STAT. ANN. § 15A-2011(c) (West 2011) (defining the

3. The Time Frame Constraints on Available Statistics Under the 2012 Amendment Will Not Greatly Affect Golphin, but the Constraints Will Harm Future Defendants.

The 2012 Amendment that limits the use of statistics in the courtroom to prove discrimination will not affect Golphin, but it will unfairly bar future defendants in smaller counties from procuring relief under the statute.¹¹⁶ The statistics allowed into evidence must be confined to a time frame of ten years before the commission of the offense to two years after the imposition of the death sentence.¹¹⁷ Constraining the scope of statistics would have a negative effect on defendants in the majority of counties in North Carolina by limiting the history of discriminatory strikes that could be considered by the court.¹¹⁸ Although Cumberland and Johnston County where the *Robinson* and *Golphin* jurors were drawn have hosted eighteen combined capital trials, the average county in North Carolina will see less than three capital trials in the allowed time span.¹¹⁹ This means that even though statistics are permitted at the county level, most counties will not be able to supply data that will provide meaningful conclusions because there simply will not be enough data to compare.¹²⁰ While the new standards for statistical evidence would not greatly affect the availability of statistics in *Golphin*, such standards would force many of the other counties to make decisions without the statistics.¹²¹ Leaving statistics out of the courtroom will allow for implicit bias to continue without any meaningful tool for the courts to detect it.¹²²

4. A Narrow Interpretation of the 2012 Amendment Will Not Provide Relief to Golphin Because of the Geographical Constraints of Available Statistics.

Although the statute allows for statistical evidence regarding jury

defendant's burden to prove that race was a significant factor in the decision to seek or impose the death penalty).

116. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(a) (2012) (excluding the clause that allows for statistical evidence of discrimination in the judicial district and state, which in turn diminishes the Act's ability to showcase patterns of racial discrimination).

117. *Id.*

118. See *Robinson*, No. 91 CRS 23143, slip op. at 63-64 (relying on statistical evidence regarding the average rate per case in which prosecutors struck jurors).

119. See *id.* (averaging only 2.8 trials per county).

120. See *id.* (recognizing the need for a statewide analysis to show complete patterns and comparisons).

121. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(a) (2012) (restraining the availability of statistics to ensure that only those immediately and explicitly relevant to the trial at hand will be presented to the court).

122. See N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (addressing implicit bias outright in an effort to seek justice in jury selection).

selection in the individual case, county, and prosecutorial district, statistical evidence alone is insufficient to grant relief under a narrow interpretation of the 2012 Amendment.¹²³ While the new statute allows for statistics to be used as supporting evidence, the 2012 Amendment removed the portion of the statute that allowed for statistical evidence from the relevant judicial district as well as statewide evidence.¹²⁴ As a result, the statewide statistics used in the MSU Study in Robinson's trial would not be permitted as evidence under a narrow interpretation of the 2012 Amendment.¹²⁵

Similarly, a narrow interpretation of the 2012 Amendment would prohibit Golphin from using the controlled regression analysis used in *Robinson* since the statistics sample statewide data.¹²⁶ Under the 2009 Racial Justice Act, the MSU Study from Robinson's trial was successful in proving that a racial disparity in seated jurors persisted even when the top four race-neutral reasons for striking jurors were controlled.¹²⁷ When the cross-tabulation study removed many of the factors that would make for a sympathetic juror, such as someone with reservations about the death penalty, someone who had been accused of a crime or had a close friend or family member accused of a crime, or someone knowing a trial participant, qualified black jurors were disproportionately removed from the jury 2.1 times more often than white jurors.¹²⁸ Additionally, when the study removed all jurors who were unemployed, qualified black jurors were 2.0 times more likely than white jurors to be removed.¹²⁹ The study demonstrates that the current jury strikes are motivated by implicit racial bias that cannot be explained by non-racial justifications.¹³⁰

The statewide controlled regression analysis, however, is not irrelevant to the determination of the peremptory strikes in *Golphin*.¹³¹ It illustrates

123. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(c) (2012) (granting relief only where the defendant can prove that race was a significant factor in the relevant county or prosecutorial district where the strike took place).

124. See *id.* sec. 3, § 15A-2011(a) (allowing for statistical evidence only to be used in a supporting role for the defense).

125. See *Robinson*, No. 91 CRS 23143, slip op. at 71 (using a controlled regression analysis that examined juror strikes on the statewide level).

126. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(a) (2012) (deleting the availability of statewide data used as statistical evidence of racial discrimination).

127. See *Robinson*, No. 91 CRS 23143, slip op. at 72 (calculating the specific rates at which the remaining jurors were struck by race).

128. See *id.* at 72-73 (questioning the persistence of racial disparities in peremptory strikes after typical explanatory categories have been removed).

129. See *id.* at 72 (persisting in recognizing that implicit bias must be playing a role since other common variables have been controlled).

130. See *id.* (finding the strike rates to be almost identical even when the most popular race-neutral proffered reasons are omitted from the calculation).

131. See *id.* (showing a pattern of biased behavior by the prosecutor dispelling the most common instances of implicit bias).

that even when race-neutral explanations are controlled, black venire members are struck at a higher rate than white venire members.¹³² This type of analysis indicates that implicit racial bias persists in peremptory strikes despite the implementation of the *Batson* challenge.¹³³ By eliminating the breadth of available statewide statistics under a narrow interpretation, the courts will be forced to ignore these telling patterns of implicit bias—patterns that would not otherwise become known using an explicit bias inquiry such as the *Batson* challenge.¹³⁴

5. The Prosecution's Rebuttal Will Be Stronger in Golphin Under a Narrow Interpretation of the 2012 Amendment Because the Statute Does Not Place Limitations on the Prosecution's Use of Statistics.

In addition to limiting the defense's use of statistics to prove discrimination, a narrow interpretation of the 2012 Amendment places no limitation on the prosecution's use of statistics as evidence.¹³⁵ Since the statute lacks such a mandate, the extent of the prosecution's reliance on statistics would therefore be left to a judge's discretion, which may result in an unfair advantage to the prosecution.¹³⁶

If *Robinson* had been decided under a narrow interpretation of the 2012 Amendment, the stark differences in admissible evidence would have heavily favored the prosecution.¹³⁷ For example, the MSU Study would not have been allowed into evidence because of the scope of the study, but the statute would not bar the prosecution's rebuttal inquiry conducted by Joseph Katz.¹³⁸

Katz's initial inquiry involved a survey that was sent out to each prosecution office that was previously involved in a capital trial reviewed

132. *See id.* at 74 (implying the presence of implicit racial bias at work).

133. *See id.* (noticing that the sample size of a county or district is not large enough to produce statistically significant results when removing specific categories of jurors).

134. *See Batson v. Kentucky*, 476 U.S. 79, 82-83 (1986) (harboring no discussion throughout the opinion of implicit bias issues).

135. *See Act of July 2, 2012*, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(e) (2012) (mandating that the state may offer rebuttal evidence including but not limited to statistical evidence while explicitly stating that the defense may not rely solely on statistics to make its case).

136. *Cf. Batson*, 476 U.S. at 82-83 (utilizing a test that employs a presumption in favor of the prosecutor).

137. *Compare N.C. GEN. STAT. ANN. § 15A-2011* (West 2011) (allowing statistics into evidence with no limitations), *with Act of July 2, 2012*, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(a) (2012) (restricting the statistical evidence that the defense counsel may present).

138. *Cf. Act of July 2, 2012*, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(a) (2012) (placing no similar geographical restrictions on the statistics the state is allowed to present).

by the MSU Study.¹³⁹ The inquiry essentially replicated the role of a judge in a *Batson* challenge, asking what the race-neutral reason was for striking each juror involved in the study.¹⁴⁰ In *Robinson*, the trial court never seriously considered these inquiries because of the low response rate.¹⁴¹ If, however, the state had ample time to complete the survey, the outcome would be detrimental to Racial Justice Act claims like Golphin's.¹⁴²

For Golphin's case, the state would have ample time to complete the survey and transfer the responses to a reliable statistical analysis, which would likely indicate the absence of any racial bias.¹⁴³ Under a narrow interpretation of the 2012 Amendment, Golphin's defense would be void of any meaningful statistics because they would be prohibited by the statute, and the prosecution's rebuttal would consist of a statistical analysis showing that the strikes were race-neutral.¹⁴⁴ Once again, implicit bias would persist, and it would be difficult for the court to find that any racial discrimination had occurred.¹⁴⁵

B. To Uncover Implicit Bias in Golphin, the Racial Justice Act Should Not Require Proof of Intentional Discrimination.

The use of statistics and intent requirements serve the same essential purpose—to root out discriminatory practices.¹⁴⁶ The language of a statute will determine whether the statute prohibits acts motivated by explicit or implicit bias.¹⁴⁷ Proving explicit bias tends to be more difficult because the

139. See *Robinson v. North Carolina*, No. 91 CRS 23143, slip op. at 120 (N.C. Super. Ct. Apr. 20, 2012) (employing *Batson* methodology by asking prosecutors to offer the best race-neutral reason possible for the strikes against black jurors).

140. See *id.* at 121 (failing to pose the research question as open-ended and failing to consider possible mixed motives for a peremptory strike that include race-neutral and racially motivated explanations).

141. See *id.* at 27 (receiving responses for only one half of the surveys that were distributed).

142. Cf. *id.* at 127 (recognizing that the expert witness' testimony and analysis may have been strengthened if the State had provided him with its own race-neutral reasons for striking jurors).

143. Cf. *id.* at 121 (realizing that if data is self-reported, it will often reflect race-neutral intentions because there is a strong psychological motive to deny racially motivated actions).

144. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(a) (2012) (focusing the evidentiary requirements on evidence that will tend to prove explicit rather than implicit bias).

145. Cf. N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (permitting evidence that illuminates jury selection tactics fueled by implicit bias).

146. Compare *id.* (intending to remedy death sentences sought on the basis of race), with Act of July 2, 2012, 2012 N.C. Sess. Laws 135, sec. 3, § 15A-2011(a) (2012) (agreeing to commute death sentences to life imprisonment if discriminatory intent can be shown).

147. See N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (noting that since the scope of the inquiry is generally broader for implicit bias, a finding of implicit bias will

scope of the inquiry is much narrower, focusing only on the intentional actions of the person accused of the discrimination.¹⁴⁸ Conversely, proving implicit bias tends to be somewhat easier since the scope of the inquiry is broad.¹⁴⁹ Therefore, implicit bias often lends itself to using statistical evidence that can illustrate broad patterns that prove discriminatory intent.¹⁵⁰

These two distinctive methods of proving racial discrimination can lead to extremely different outcomes.¹⁵¹ By omitting the proof of intentional discrimination requirement in the 2009 Racial Justice Act, the legislature indicated an understanding that implicit bias is best understood by examining patterns of behavior over time.¹⁵² By requiring proof of intentional discrimination under a narrow interpretation of the 2012 Amendment, the law has the capacity to only counteract explicit racial bias.¹⁵³

1. Golphin Will Be Granted Relief Under the 2009 Racial Justice Act Because the Act Recognizes the Role of Implicit Racial Bias by Omitting a Requirement for Proof of Intentional Discrimination.

The outcome of *Golphin* will likely depend on whether it is decided under the 2009 Racial Justice Act or a narrow interpretation of the 2012 Amendment because granting relief may turn on evidencing the intent requirement.¹⁵⁴ In *Robinson*, the MSU Study was able to prove that race was a significant factor in the peremptory strikes in the relevant county, prosecutorial district, judicial division, and state.¹⁵⁵ The court found that

also incorporate a finding of explicit bias).

148. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011 (2012) (including an element that requires proof of intentional discrimination).

149. See N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (incorporating patterns of discrimination into the inquiry).

150. See generally *Robinson v. North Carolina*, No. 91 CRS 23143, slip op. at 135-36 (N.C. Super. Ct. Apr. 20, 2012) (encouraging studies to examine as many cases as possible to compare data points to inform instances of implicit bias since an individual accused of bias may not have intended or even recognize the discrimination).

151. Compare *id.* at 167 (using a statute that incorporates implicit bias inquiries to grant relief), with *Golphin II*, 519 F.3d 168, 181 (4th Cir. 2008) (refusing to grant relief under an inquiry that only took explicit bias into account).

152. See N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (responding to *McCleskey's* invitation for legislatures to consider passing death penalty laws that incorporate statistics as valuable evidence).

153. See *Robinson*, No. 91 CRS 23143, slip op. at 110-11 (explaining the difficulty in proving individual intent in cases of implicit bias in the context of historical discrimination against blacks).

154. Compare *id.* at 164-65 (granting relief where no evidence of intent was required), with *Golphin*, 519 F.3d at 191-92 (refusing to grant relief where evidence of intent was required and defense counsel failed to prove explicit bias caused the peremptory strikes of two black jurors).

155. See *Robinson*, No. 91 CRS 23143, slip op. at 164 (finding that race was a

the statistical pattern from the unadjusted data in the study alone was sufficient to establish implicit racial bias in Robinson's trial.¹⁵⁶ Therefore, the purpose of the 2009 Racial Justice Act was met simply by providing the statistics showing a disparate impact.¹⁵⁷ Applying the same test to Golphin's case, he would likely prevail since the MSU statistical analysis also showed race was a significant factor in jury selection in his county, prosecutorial district, and the state.¹⁵⁸ This statistical showing would be enough to satisfy the requirement for relief under the 2009 Racial Justice Act since the statistical pattern would be established, indicating the presence of implicit racial bias.¹⁵⁹ There would be no additional intent showing required for Golphin to prevail under the 2009 Racial Justice Act.¹⁶⁰

The absence of an individualized intent requirement in the 2009 Racial Justice Act allowed Golphin to supplement his statistics with anecdotal evidence consistent with the disparate impact model.¹⁶¹ Robinson provided numerous case examples of discrimination in North Carolina, tending to show that blacks were being struck from juries when giving similar answers to whites, blacks were being asked different questions than whites, and blacks were being asked questions specifically targeted at their race.¹⁶²

In the examples Robinson presented to the court, targeted questioning during voir dire was permissible because, when challenged under the *Batson* test, the prosecutors were able to conceal their implicit bias by offering race-neutral reasons for the strikes to the court.¹⁶³ Under the 2009 Racial Justice Act, however, those same cases were found by the *Robinson*

significant factor in the preemptory strikes occurring in Robinson's specific trial).

156. *See id.* at 164-65 (concluding additionally, that the preemptory strikes in Robinson's individual trial were intentional).

157. *See generally* N.C. GEN. STAT. ANN. § 15A-2010 (West 2011) (intending for relief to be granted to remedy the racial injustice that is instrumental in imposing the death penalty based on race).

158. *Cf. Robinson*, No. 91 CRS 23143, slip op. at 62-64 (computing that blacks were twice as likely as whites to be struck from the jury in Johnston County).

159. *See* N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (requiring the defendant to make a showing that race was a significant factor in the decision to seek or impose the death penalty).

160. *See id.* (triggering relief upon an effective showing of discrimination by defense counsel).

161. *See Robinson*, No. 91 CRS 23143, slip op. at 132 (including a case where one juror was struck because he was a member of the NAACP and another where a juror was struck because she was a graduate of North Carolina State A&T University).

162. *See id.* at 133 (recounting the voir dire of one prosecutor asking black jurors if their black friends would criticize them for finding the defendant guilty of a crime).

163. *But see id.* at 163-64 (finding that when considering the evidence as a whole, the anecdotal evidence contributed to the finding that race had been a significant factor in the preemptory jury strikes).

court to be examples of racially motivated implicit bias.¹⁶⁴ While similar case law may not be conclusive as to establish a relevant pattern of discrimination, anecdotal evidence could be used to support Golphin's claim similar to the way *Robinson* utilized anecdotal evidence.¹⁶⁵

This practical evidence is important because it supports the notion that implicit bias is present in jury selection in North Carolina.¹⁶⁶ Independently, a few isolated case studies would not be enough proof to convince the court that race had been a significant factor in the strikes, but taken together with the statistics, the court is likely to be more convinced that implicit bias persists.¹⁶⁷ Furthermore, in an inquiry only considering explicit bias, it is unlikely that this anecdotal evidence would be allowed into court since it has no relevance to the prosecutor's isolated intent in *Golphin*.¹⁶⁸

2. Under a Narrow Interpretation of the 2012 Amendment, Golphin Will Not Be Granted Relief Because an Intentional Discrimination Requirement Creates a Burden Equivalent to the Batson Challenge That Ignores Implicit Bias.

If a narrow interpretation of the 2012 Amendment is applied, Golphin must prove intentional discrimination in his individual case.¹⁶⁹ If *Golphin* is affirmed under this standard, relief will be denied since it is unlikely that Golphin will be able to prove the prosecutor intentionally struck two jurors because of their race.¹⁷⁰

The *Robinson* court recognized that if an intentional discrimination

164. See *id.* at 134 (stating that one of the experts during the trial discussed a practice known as targeting where jurors are asked different voir dire questions, sometimes based on race); *id.* at n.18 ("While the Supreme Court upheld the trial court's overruling of the *Batson* challenge in *Golphin*, this Court may consider the facts and circumstances of Murray's voir dire as evidence supporting an RJA claim.").

165. See *id.* at 163 (noting that the Court utilized all relevant evidence, from historical to anecdotal to statistical, in coming to its decision that North Carolina prosecutors were culpable for a history of racially motivated jury strikes).

166. See N.C. GEN. STAT. ANN. § 15A-2011 (West 2011) (allowing for both practical and statistical evidence to be used to make a showing that race was a significant factor under the statute).

167. See, e.g., *Robinson*, No. 91 CRS 23143, slip op. at 163-64 (considering the totality of the evidence, including witnesses; affidavits; and anecdotal, historical, and statistical evidence, and concluding by a preponderance of the evidence that race was a significant factor in the jury selection of Robinson's trial).

168. See, e.g., *Golphin II*, 519 F.3d 168, 181 (4th Cir. 2008) (incorporating no discussion of other similar case law in North Carolina that exhibited acts of implicit bias in jury selection).

169. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011 (2012) (requiring defense counsel to prove the prosecutor intended to strike the juror based on race).

170. See *Golphin I*, 533 S.E.2d 168, 218-19 (N.C. 2000) (showing great deference to the trial court's *Batson* analysis).

requirement was added to the 2009 Racial Justice Act, the statute would essentially become a recapitulation of *Batson* and *McCleskey*, both of which require proof of intentional discrimination.¹⁷¹ The court specified in *Robinson* that the legislature would not have created a law like the Racial Justice Act if it did not announce a new principle of law.¹⁷² By requiring Golphin to prove discrimination in his individual case, the 2012 Amendment only considers the explicit racial bias exhibited by the prosecutor under the narrow interpretation.¹⁷³ This is the same inquiry that occurs in a *Batson* challenge.¹⁷⁴

Unfortunately, the *Batson* test was already applied to Golphin's case when the peremptory strikes occurred and when an appellate court subsequently reviewed the case.¹⁷⁵ The court accepted the prosecutor's race-neutral reasons for striking the black jurors, which included demeanor, age, and familial relations.¹⁷⁶

Because the inquiry was only allowed to encompass the intentional acts of the prosecutor, defense counsel was limited in the strategy and evidence it could provide to challenge the peremptory strikes.¹⁷⁷ First, defense counsel contended that the prosecutor's strikes were pretextual by arguing that similarly situated white jurors were seated on the jury.¹⁷⁸ These

171. See *Robinson*, No. 91 CRS 23143, slip op. at 36 (using the Rule Against Surplusage method of statutory interpretation to determine that legislatures generally do not pass laws that will not have any new substantial effect).

172. See *id.* (recognizing that were the court to interpret the 2009 Racial Justice Act as including an evidence of intent requirement, it would have the same intent requirement as previous Supreme Court case law).

173. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(a) (2012) (returning the state of the law to the same burden that existed before the 2009 Racial Justice Act was passed).

174. See *Batson v. Kentucky*, 476 U.S. 82 (1986) (creating a burden that falls on defense counsel to prove discrimination rather than allowing for a broad inquiry into state practices).

175. See *id.* (failing to find that the peremptory strikes were motivated by race); *Golphin II*, 519 F.3d 168, 188 (4th Cir. 2008) (affirming the denial of habeas corpus by the district court and thereby refusing to recognize the pretextual nature of the peremptory strikes).

176. See *Golphin I*, 533 S.E.2d 168, 212 (N.C. 2000) (reciting the trial transcript during jury selection which includes statements by the prosecutor speculating that Holder was shy when she was unresponsive to his attempts to engage her in more than simple answers); see also *id.* at 213 (recounting trial transcripts where the prosecutor complained that Murray gave short answers to some questions while elaborating his answers to other questions).

177. See *Golphin II*, 519 F.3d at 183 (identifying that despite the disproportionate number of strikes of black jurors, the trial court appropriately weighed the evidence in deciding the *Batson* challenge).

178. Compare *Robinson v. North Carolina*, No. 91 CRS 23143, slip op. at 143 (N.C. Super. Ct. Apr. 20, 2012) (finding that in Cumberland County when white jurors and black jurors had similar characteristics, white jurors were seated whereas black jurors were struck), with *Golphin II*, 519 F.3d at 181-82 (refusing to find disparate treatment even after recognizing differential treatment between white and black jurors in jury

examples were not convincing enough for the court to find that explicit bias played a role in the strikes.¹⁷⁹ Next, defense counsel highlighted examples of similarly situated black and white jurors being questioned differently about their family members' criminal records, a factor that ultimately became a race-neutral reason proffered for striking one black juror.¹⁸⁰ Despite the inconsistent questioning from the prosecutor, the court still refused to find that explicit bias fueled the strike.¹⁸¹ Finally, the prosecutor articulated one black juror's demeanor, including his wearing a gold earring and giving answers filled with militant animus, as one of the race-neutral reasons for striking him.¹⁸² Although the trial court judge openly disagreed with the prosecutor, stating that the juror's demeanor had been thoughtful and entirely appropriate, the judge failed to inquire further into the prosecutor's intentions for striking the black juror.¹⁸³

While on the surface these may seem like reasonable race-neutral reasons for a peremptory strike, they have nothing to do with whether the jurors would be able to follow the law or impose the death penalty.¹⁸⁴ The *Batson* test, however, does not call for any reasonableness standard to apply to the race-neutral reasons given by a prosecutor for striking a potential jury member.¹⁸⁵ As long as the prosecutor offers any reason not tied to race, the strike will stand as it has previously in *Golphin*.¹⁸⁶ With such a limited scope of inquiry into the bias that occurred during *Golphin*'s jury selection, it is unlikely that an appeal will affirm intentional

selection).

179. See *Golphin II*, 519 F.3d at 182 (allowing for Murray to be struck from the jury in part for his prior DUI conviction when two other white jurors also had previous convictions, one of which was a DWI).

180. See *id.* at 182-83 (permitting a white juror, Virginia Broderick, to remain seated on the jury after the prosecution questioned her further about her involvement with family members who had numerous drug convictions).

181. See *id.* at 182 (accepting the strike against Murray in part because his father had been convicted of a robbery years earlier, even though he did not remain in contact with his father and it would not have affected his ability to remain impartial during the case).

182. See *id.* at 181-82 (questioning the deference of Murray since he gave both elaborate and short answers to the court).

183. See *id.* at 182 (reprimanding the prosecutor and declining to include the juror's demeanor as a reason for the strike).

184. See *id.* (reprimanding the prosecutor for contending that the jurors were acting less than deferential to the court when they failed to elaborate on their answers to simple yes or no questions).

185. See *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (noting that the prosecutor need only offer any explanation not tied to the race of the juror for the strike).

186. Cf. *Robinson v. North Carolina*, No. 91 CRS 23143, slip op. at 132 (N.C. Super. Ct. Apr. 20, 2012) (detailing past cases where peremptory strikes were passed by the court but exhibited implicit bias because of the nature of the questioning target groups with traditionally black membership).

discrimination under a narrow interpretation of the 2012 Amendment.¹⁸⁷

IV. SUBSEQUENT HISTORY: JUDGE WEEKS'S BROAD INTERPRETATION OF THE 2012 AMENDMENT IN *NORTH CAROLINA V. GOLPHIN*

On December 13, 2012, the Cumberland County Superior Court handed down an opinion consolidating three cases, all interpreting the 2012 Amendment as a matter of first impression.¹⁸⁸ The court found race to be a significant factor in the prosecution's peremptory strikes in all three instances.¹⁸⁹ The court held that Golphin proved that race was a significant factor in prosecutorial peremptory strikes and decisions to seek the death penalty in his case and in Cumberland County.¹⁹⁰ For the court to properly decide the case, it was first required to interpret the new 2012 Amendment to the Racial Justice Act.¹⁹¹

A. Judicial Division and Statewide Statistics Are Permissible Evidence.

A significant change in the 2012 Amendment was the temporal and geographical restrictions on statistics relied on for a defendant to prevail on a claim.¹⁹² While this stringent language suggested that statistics falling outside these parameters would not be permissible evidence, the court took a different stance.¹⁹³ The court cited the statute's broad language as one justification for allowing statistical evidence that fell outside the enumerated parameters to be considered.¹⁹⁴ This notion was supported by basic evidentiary principles specifying that relevant evidence, both direct and circumstantial, should be admitted.¹⁹⁵

187. See *Golphin II*, 519 F.3d at 186 (declining to adopt defense counsel's argument that a comparison between Holder and Murray and similarly situated white jurors who were passed by the prosecution displayed a pretextual undertone).

188. See *Golphin III*, No. 97 CRS 47314-15 (N.C. Super. Ct. Dec. 13, 2012) (considering whether the death sentences of Tilmon Golphin, Christina Walters, and Quintel Augustine were sought or obtained on the basis of race).

189. See *id.* at 208, 210 (asserting that all three defendants had met their burden under both the 2009 Racial Justice Act and the 2012 Amendment).

190. See *id.* at 207 (finding that although not required under either statute, Golphin proved that the prosecution's peremptory strikes were intentional).

191. *Id.* at 9.

192. See Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011 (a), (d) (2012) (establishing a time frame of permissible statistics as "from [ten] years prior to the commission of the offense to the date that is two years after the imposition of the death sentence" and specifying the county and prosecutorial district as the appropriate geographical measure).

193. *Golphin III*, No. 97 CRS 47314-15, slip op. at 14.

194. See *id.* at 13 (noting that section 15A-2011 (d) states that "other evidence" may be used to establish that race was used as a significant factor in decision to seek or impose a death sentence).

195. See *id.* (defining relevant evidence as "evidence having any tendency to prove a fact at issue").

The court noted that statistical evidence falling outside the enumerated provisions would constitute circumstantial “other evidence” that should be admitted because it would tend to prove that discrimination occurred in Golphin’s individual case.¹⁹⁶ The MSU Study used in *Robinson*¹⁹⁷ was therefore admissible as circumstantial evidence in *Golphin*.¹⁹⁸ In addition to the statewide data discussed at length in *Robinson*, the court also examined unadjusted data from the same experts regarding the Second judicial division, Cumberland County, and Golphin’s individual trial.¹⁹⁹ The results of the study established that blacks of the Second judicial division were struck at a rate of 51.5%, while whites were struck at a rate of 25.1%.²⁰⁰ Additionally, the study recognized that in Cumberland County blacks were struck at a rate of 52.7%, contrasted with a 20.5% rate for all other jurors.²⁰¹ Finally, the study listed the strike rate ratio in Golphin’s own trial as 2.0.²⁰²

Two regression analyses also supported the unadjusted data conclusions that the strikes of black jury members in Golphin’s trial were statistically significant.²⁰³ The first regression produced a statistically significant strike rate ratio of 2.11.²⁰⁴ The second strike rate ratio of 2.09 was also deemed statistically significant.²⁰⁵

This court’s interpretation of the 2012 Amendment will aid future defendants, as it did Golphin, in establishing that race was a significant factor in the decision to seek or impose the death penalty.²⁰⁶ Unfortunately, the 2012 Amendment does not go so far as to grant relief based only on

196. *See id.* at 14 (holding that the additional statistical information is helpful to the court in reaching its determination and also recognizing that the Reference Manual on Scientific Evidence supports using additional studies when possible to support a conclusion).

197. *See generally supra* Part II.D.1.

198. *See Golphin III*, No. 97 CRS 47314-15, slip op. at 200-01 (finding the statewide data to be indicative of the prosecution’s peremptory strike patterns in North Carolina in the designated time period); *see also id.* at 188 (detailing the statistical significance of the MSU Study as applied to *Golphin*).

199. *See id.* at 158-61.

200. *See id.* at 159 (reflecting a strike rate ratio of 2.05).

201. *See id.* (underscoring that with a strike rate ratio of 2.57, Cumberland County has a higher strike rate for blacks than the state average of 2.05).

202. *See id.* at 162 (detailing further the strike rates for the statutory time frame as increasing when the study employs a smoothing analysis to give a more accurate indication of strike rates).

203. *See id.* at 175-76.

204. *See id.* at 176 (adjusting the data by screening for appropriate control variables which ultimately mirrored the Cumberland County analysis).

205. *See id.* (refining the analysis by using data only from the appropriate statutory time frame for Golphin’s case).

206. *See id.* at 164 (highlighting the advantage of using all data within the study to prove the prima facie case of discrimination).

statistics.²⁰⁷ The 2009 Racial Justice Act remains the paramount alternative to ferreting out implicit bias by allowing relief to be granted on statistical evidence alone.²⁰⁸

B. The Legislature Did Not Intend to Include a Case-Specific Intent Requirement.

Though the 2012 Amendment employs the terminology “in the defendant’s case” in several instances, the court did not read this language as a requirement that the defendant prove that intentional discrimination occurred within his or her individual trial.²⁰⁹ Instead, the *Golphin* court concluded that “in the defendant’s case” is a mere reflection of the temporal and geographic constraints that are original to the 2012 Amendment.²¹⁰ The court noted the different contexts of the legislature’s use of “in the defendant’s case” as support for its finding.²¹¹ The court focused first on the legislature’s choice of using “may” in the clause that establishes what types of proof may be offered to establish race as a significant factor.²¹² This choice, the court reasoned, reflects the intention of the legislature for defendants to be able to prove their cases using either evidence from their own cases or other types of evidence.²¹³ Additionally, the court noted that legislature omitted the “in the defendant’s case” language in the key portion of the statute dictating the standard for the burden of proof.²¹⁴ Finally, although the 2012 Amendment constrained the breadth of admissible statistics, the legislature’s concentration on the statutory time frame, as well as the county and prosecutorial district, suggests that it intended for the court to be able to consider evidence outside of the defendant’s individual case.²¹⁵ Without an explicit statement from the legislature for courts only to consider evidence of intentional discrimination from the defendant’s case, the remaining language of the 2012 Amendment suggests that no proof of trial-specific discrimination is

207. Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(e) (2012).

208. See N.C. GEN. STAT. ANN. § 15A-2012 (West 2011) (delineating no prohibition on granting relief based entirely on statistical findings).

209. See *Golphin III*, No. 97 CRS 47314-15, slip op. at 17 (acknowledging that the word “trial” does not appear anywhere in the 2012 Amendment to indicate that proof of case-specific discrimination is required).

210. See *id.* (distinguishing the significance of the phrase by noting its absence in the 2009 Racial Justice Act).

211. See *id.* at 16 (reasoning that if this phrase carried the same meaning in all contexts of the statute, the additional language would carry no independent meaning).

212. See *id.* at 17-18 (quoting N.C. GEN. STAT. ANN. § 15A-2011(a) (West 2011)).

213. *Id.* at 18.

214. *Id.* at 17.

215. *Id.* at 18.

necessary.²¹⁶

C. The 2012 Amendment Is Not Retroactive.

Important to *Golphin* was whether the court would interpret the 2012 Amendment to be retroactive.²¹⁷ The 2012 Amendment does not explicitly state that it applies retroactively.²¹⁸ Therefore, the court employed a four-part analysis to consider legislative intent, constitutional issues, equitable considerations, and arbitrariness.²¹⁹ The court explained that it is required to recognize the 2012 Amendment as prospective, noting that the word “retroactive” does not appear anywhere in the statute.²²⁰ Numerous references were made to the 2009 statute, yet at no point did the legislature indicate that the 2012 Amendment should be applied to previously filed claims.²²¹ Finally, the stated intent of the legislature, to provide “amelioration of the death sentence,” obliged the court to allow previously filed claims to proceed under both versions of the Racial Justice Act.²²²

The Court also concluded that the 2012 Amendment could not be applied retroactively if *Golphin*’s constitutional rights had vested in his claim under the 2009 Racial Justice Act.²²³ Since the 2009 Racial Justice Act mandates that a hearing be scheduled when a defendant files a proper claim under the statute, *Golphin*’s right to a hearing under the 2009 Racial Justice Act vested when he filed his particularized claim.²²⁴ Therefore, applying the 2012 Amendment retroactively would destroy *Golphin*’s vested constitutional right to a hearing under the 2009 Racial Justice Act.²²⁵

Equitable considerations also suggest that the 2012 Amendment should

216. *Id.* at 17 (leveling the playing field for future defendants who otherwise would have been faced with an insurmountable burden of proof).

217. *See id.* at 32 (indicating that the *Golphin*, *Walters*, and *Augustine* all filed their claims under both the 2009 Racial Justice Act and the 2012 Amendment).

218. *See generally* Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011 (2012).

219. *Golphin III*, No. 97 CRS 47314-15, slip op. at 32.

220. *See id.* at 34-35 (referencing a statute passed by the state legislature stating, “There is always a presumption that statutes are intended to operate prospectively only . . .”).

221. *See id.* at 33 (noticing that the legislature failed to specify whether the 2009 Racial Justice Act should be applied in conjunction with or in place of the 2012 Amendment for previously filed claims).

222. *See id.* at 33-34 (explaining that case law dictates an ameliorative law to entertain claims under the most expansive law for granting a defendant relief (citing *Dobbert v. Florida*, 432 U.S. 282, 294 (1977))).

223. *See id.* at 36 (stating that vesting has occurred “at the time of the injury that gives rise to the cause of action”).

224. *See id.* at 40 (acknowledging that *Golphin*’s claim was filed within the statutory deadline).

225. *Id.* at 41.

not be applied retroactively.²²⁶ In reviewing the procedural history of Golphin's claim under the 2009 Racial Justice Act, the court found numerous delays in both *Robinson* and in Golphin's proceedings that were the result of the prosecution's incessant requests for continuance.²²⁷ Also considered along with the equitable concerns was the constitutional principle of arbitrariness.²²⁸ The court took notice of the State's collective actions: once *Robinson* was handed down, the prosecution worked closely with the legislature to ensure that future defendants would not be able to secure relief under the 2009 Racial Justice Act.²²⁹ Since Golphin's claim was filed properly under the 2009 Racial Justice Act, and application of the 2012 Amendment would produce arbitrary results, both equitable principles and arbitrariness in addition to legislative intent and constitutional issues weighed against applying the 2012 Amendment retroactively.²³⁰

D. The Court Explicitly Addresses Implicit Bias.

In addition to interpreting the 2012 Amendment in a manner most favorable to proving implicit bias, the court explicitly addressed the testimony provided on implicit bias.²³¹ The court first acknowledged Professor Stevenson's testimony regarding the historical discrimination blacks have experienced in both the United States and in North Carolina.²³² Stevenson explained that one common response to civil rights legislation was to increase the number of peremptory strikes available to the prosecution to ensure blacks were kept off juries.²³³ Stevenson additionally explained the circular logic that results in the prosecution's peremptory strikes of black jurors; prosecutors often feel that blacks perceive the police authority in a negative light due to past discrimination.²³⁴ Applying this

226. *Id.* at 43.

227. *See id.* at 42-43 (noting that if the court had not granted the prosecution's copious requests for continuance, *Robinson* would have been decided as much as five months earlier and Golphin's hearing would have taken place before the 2012 Amendment was passed by the legislature).

228. *Id.* at 43.

229. *See id.* at 44 ("In *Robinson*, this Court found precisely this insidious form of discrimination in cases throughout North Carolina between 1990 and 2010. Instead of confronting these findings with concern however, in July 2012, the legislature attempted to ignore them by enacting the amended [Racial Justice Act], which extinguishes at least some capital defendants' ability to pursue statewide claims.").

230. *Id.* at 45.

231. *See id.* at 87 (outlining the testimony of experts Stevenson, Trosch, and Sommers).

232. *See id.* at 88 (noting that some of the earliest civil rights efforts for blacks to be able to serve on juries resulted in violence like the Wilmington riots).

233. *See id.* (detailing that in capital cases in North Carolina, peremptory strikes increased from six to nine in 1971, and again to fourteen in 1977).

234. *See id.* at 90 (explaining that prosecutors strike blacks for what they believe is a race-neutral reason—that blacks will not convict, especially in capital cases, because of

social science conclusion to *Golphin*, the court concluded that unconscious bias did play a role in the prosecutor's strikes in Cumberland County.²³⁵

The court continued its discussion focusing on the evidence presented by the defense in experts Trosch's and Sommers' testimony.²³⁶ Judge Trosch addressed the process of decision-making and the interplay of unconscious bias, emphasizing the danger of this process occurring in the courtroom.²³⁷ He quoted studies demonstrating that people tend to make gut decisions and rationalize those decisions later, dismissing any conclusions that do not fit into their original preconceived notions.²³⁸

Professor Sommers educated the court on his own study, where he tested the influence of unconscious bias on peremptory strikes, and found significant racial disparities.²³⁹ In light of the studies presented, the court noted the opportunity for unconscious bias to become prevalent in emotionally charged capital cases such as *Golphin's*.²⁴⁰ The court concluded that there was ample opportunity for unconscious bias to play a role in the Cumberland County cases, quoting the prosecutor's own testimony that he used a "gut feel" to determine peremptory strikes.²⁴¹ Social science undoubtedly played a pivotal role in the court's conclusion that implicit bias has no place in jury selection.²⁴²

V. POLICY RECOMMENDATION

Both explicit bias and implicit bias can have a monumental effect on the outcome of a defendant's sentence.²⁴³ Whether a peremptory strike used against a black juror is motivated by explicit or implicit bias, the result is the same: a miscarriage of justice done to both the defendant and the community.²⁴⁴ While the process and consequences of explicit bias are

their distrust of authority).

235. *See id.* at 91 (asserting that this bias cloaked in reason is an unacceptable practice of discrimination that must cease).

236. *Id.* at 92.

237. *Id.* (explaining that the quick pace of decision making in the courtroom enhances the likelihood of implicit bias coming into play undetected).

238. *Id.* (cautioning that in addition to the unsteady process, research shows that people tend to be overconfident in their own decision-making and resistant to the notion of error rates).

239. *See id.* at 93 (using graduate students and lawyers in a controlled setting).

240. *See id.* (noting the competitive nature and pressure for prosecutors to secure convictions in death penalty cases).

241. *See id.* at 94-95 (noting the particular motivations in *Golphin's* trial to secure a jury most sympathetic to a law enforcement victim).

242. *See id.* at 95.

243. *See, e.g., Golphin II*, 519 F.3d 168, 182 (4th Cir. 2008) (upholding the defendant's death sentence because no statute existed to provide relief from implicit bias during jury selection).

244. *Cf. Robinson v. North Carolina*, No. 91 CRS 23143, slip op. at 166-67 (N.C.

generally known, experts are now investigating implicit bias and have begun testing its effects in the courtroom.²⁴⁵ Currently, these experts recommend educating judges and jurors about implicit bias²⁴⁶ and controlling the decision-making environment to decrease the effects of implicit bias in the courtroom.²⁴⁷

Since the person exhibiting bias cannot detect the implicit bias, states should also consider implementing a mechanism to constantly evaluate the presence of implicit bias in jury selection. An ongoing study similar to the MSU Study would allow for a record to be kept on file so that prosecutors, defense counsel, and judges could constantly review their performance.²⁴⁸ If attorneys are able to continuously evaluate their peremptory strike behavior, they will become more conscious of patterns that may indicate that implicit bias is influencing a strike.²⁴⁹

Beyond these suggestions, state legislatures have the opportunity to make an impact by passing racial justice statutes.²⁵⁰ States should carefully craft legislation to ensure that their statutes recognize both explicit and implicit biases.²⁵¹ This should include allowing for unrestricted use of statistics by both defense counsel and the prosecution.²⁵² A successful statute will also allow for relief to be granted absent a showing of intentional discrimination in the individual case.²⁵³ Allowing race to

Super. Ct. Apr. 20, 2012) (correcting the injustice that kept Robinson on death row for over a decade).

245. See Smith & Levinson, *supra* note 30, at 826 (acknowledging that a blanket solution to curb implicit bias may never exist).

246. See generally Kang et al., *supra* note 13, at 1182-83 (recommending that jurors take a pledge against involving implicit bias in their decision making to create an awareness in the courtroom).

247. See generally *id.* at 1169-72 (suggesting that both judges and juries be exposed to counter-typical representations of blacks and whites to begin to break down subconscious stereotypes and to also allot more time for decision-making).

248. See *Robinson*, No. 91 CRS 23143, slip op. at 62-64 (tracking the number of cases, number of black jurors, number of white jurors, and the strike ratio for each capital trial).

249. See Kang et al., *supra* note 13, at 1179 (encouraging judges to count to keep track of their rulings that may involve implicit bias to deter bias influencing future decisions).

250. See, e.g., N.C. GEN. STAT. ANN. § 15A-2010 (West 2011) (mandating that no person shall be subject to a death sentence imposed on the basis of race).

251. Cf. Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011 (2012) (amending the statute to alter the required standards of proof so as to only grant relief upon a showing of explicit racial bias).

252. See N.C. GEN. STAT. ANN. § 15A-2010 (West 2011) (including statistical proof as valid evidence to show that implicit bias can be the cause of racial discrimination in peremptory strikes).

253. See *id.* (granting relief based on a showing of disparate impact or discrimination in the relevant jurisdiction over time and thus recognizing the presence of implicit bias and the difficulty in detecting such).

motivate any part of the capital punishment process is unacceptable.²⁵⁴ Therefore, it is imperative that state legislatures create laws that have the capacity to combat both forms of bias.²⁵⁵

VI. CONCLUSION

After applying both the 2009 Racial Justice Act and a narrow interpretation of the 2012 Amendment to *Golphin*, it becomes clear that *Golphin* would only receive relief under the 2009 Racial Justice Act for the same discriminatory peremptory strikes.²⁵⁶ The 2009 Racial Justice Act has the capacity to uncover both explicit and implicit racial bias in jury selection, whereas a narrow interpretation of the 2012 Amendment only addresses explicit racial bias.²⁵⁷ Even under Judge Weeks's broad interpretation of the 2012 Amendment, implicit bias considerations only play a limited role in exposing discrimination.²⁵⁸ Since both forms of racial bias have an equally devastating effect on the imposition of capital punishment, it would be an arbitrary application of capital punishment to provide for a statute that addresses one but not both forms of bias.²⁵⁹ The 2012 Amendment, therefore, should be repealed, and the legislature should adopt the previous version of the statute implemented in 2009.²⁶⁰

254. See, e.g., *id.* § 15A-2010 (refusing to allow capital punishment to be carried out when it was obtained on the basis of race).

255. Cf. Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011 (2012) (continuing the miscarriage of justice in North Carolina by repealing the elements of the 2009 Act that accounted for implicit racial bias).

256. See *id.* sec. 3, § 15A-2012 (providing relief to parties who prove that race was a significant factor in a decision to seek or impose the death penalty).

257. See, e.g., *Robinson v. North Carolina*, No. 91 CRS 23143, slip op. at 166-67 (N.C. Super. Ct. Apr. 20, 2012) (ordering relief when Robinson successfully proved that race was a significant factor in the peremptory strikes that occurred during his trial).

258. See *Golphin III*, No. 97 CRS 47314-15, slip op. at 97 (N.C. Super. Ct. Dec. 13, 2012).

259. See generally U.S. CONST. amend. VIII (mandating that no person should be subject to Cruel and Unusual punishment, which has been interpreted to include arbitrary punishments invoked against racial groups for membership in that group).

260. Compare N.C. GEN. STAT. ANN § 15A-2011 (West 2011) (providing relief for implicit bias), with Act of July 2, 2012, 2012 N.C. Sess. Laws 136, sec. 3, § 15A-2011(d)-(e) (2012) (providing relief only for acts of explicit discrimination).

