



## **The Fight for Black Lives in North Carolina State Courts**

*By Jin Hee Lee & Sherrilyn Ifill*

Something extraordinary may be happening in North Carolina. A former Confederate state, North Carolina was home to the Wilmington Massacre of 1898 — the violent overthrow of a duly elected, biracial government by white supremacists during Reconstruction. In the 20th Century, North Carolina’s strictly-enforced Jim Crow laws spurred nonviolent sit-ins at the segregated Woolworth’s lunch counter in Greensboro, that resulted in some of the most evocative scenes from the Civil Rights Movement. North Carolina is hardly where one should expect the legal rights of African Americans to be vindicated in the void left by the federal courts. And yet this southern state might serve as an example for the rest of the nation to follow.

The United States Supreme Court’s 1987 decision in *McCleskey v. Kemp* is widely seen as one of the greatest racial injustices in that court’s history and left a gaping hole in our federal constitution’s promise of equality. In *McCleskey*, the Supreme Court held that Georgia’s capital punishment system did not violate the United States Constitution even though compelling statistical evidence showed the race of the defendant and especially the race of the victim were significant factors in determining which defendants were sentenced to death, with Black defendants accused of killing white victims having the greatest likelihood of getting the death penalty. The truth of the statistical evidence was not questioned by the Supreme Court. Rather, the sharply divided court recognized “a discrepancy that appears to correlate with race” but nevertheless surmised that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system.”

*McCleskey* was a stinging loss for the NAACP Legal Defense and Educational Fund (LDF), which litigated that case after having won a brief reprieve of the death penalty in *Furman v. Georgia* — another case in which the Supreme Court had invalidated the death penalty from 1972 to 1976. The enormity of the Supreme Court’s ruling in *McCleskey* cannot be overstated. By calling racial disparities in the criminal justice system “inevitable,” our highest court effectively gave up on rooting out racial discrimination in the death penalty, as well as other aspects of the criminal justice system. To leave no doubt about their ruling, the Supreme Court made clear in *McCleskey* that accepting the “claim that racial bias has impermissibly tainted the capital sentencing decision” would open the door for “similar claims as to other types of penalty.” Instead of taking seriously the constitutional imperative to eliminate racial bias throughout our criminal punishment system, the Supreme Court definitively slammed it shut.

Having abdicated its constitutional responsibility, the *McCleskey* Court suggested that concerns about statistically significant racial disparities in the death penalty “are best presented to the legislative bodies.” The North Carolina General Assembly answered

that call by passing the Racial Justice Act in 2009, which allowed capital defendants—for the first time in North Carolina—to rely on statistical evidence to challenge capital charges or death sentences when “race was a significant factor in decisions to seek or impose the sentence of death . . . .” Armed with this legal vehicle, capital defendants have demonstrated that, in 7,000 peremptory challenges in more than 170 capital jury selections spanning over two decades, prosecutors in North Carolina struck 52.6% of eligible Black jurors, compared to only 25.7% of all other eligible jurors. The chances of this happening by chance is one in ten trillion.

A subsequent General Assembly in 2013 retroactively repealed the Racial Justice Act, placing in limbo substantial claims of racial bias in North Carolina death penalty cases. The same legislature passed an omnibus voter suppression bill, which a federal appeals court later said was drafted “with surgical precision” to disenfranchise Black voters. But a recent decision by a majority of the North Carolina Supreme Court—written by Chief Justice Cheri Beasley, North Carolina’s first African-American woman elected to that office—has brought new life to the pursuit of racial justice in a court of law. In *State v. Robinson*, the court reinstated Marcus Robinson’s life sentence, which had been imposed in place of the death penalty by a trial court under the Racial Justice Act after finding pervasive racial discrimination in the prosecutors’ use of peremptory challenges. In the opinion, Chief Justice Beasley powerfully and importantly put into historical context the ongoing racial subjugation of African Americans that underlie their exclusion from capital jury service:

The same racially oppressive beliefs that fueled segregation manifested themselves through public lynchings, the disproportionate application of the death penalty against African-American defendants, and the exclusion of African Americans from juries. Given the racially oppressive practices and beliefs that permeated every level of American society during the Jim Crow era, the constitutionally protected right of African-American defendants to be tried by a jury of their peers became increasingly important.

This history goes to the very heart of why the death penalty in America is, at its core, infected with racism. The administration of capital punishment has been grounded in—and is entirely dependent on—a criminal justice system that is itself based on a system of racial oppression, especially against Black people. The Supreme Court was absolutely correct that a ruling in favor of Mr. McCleskey would have called into question the pervasive racial discrimination throughout the criminal justice system. Indeed, that was entirely the point. The state-sanctioned killing of convicted persons, who are and remain disproportionately Black throughout this country, is the ultimate form of dehumanization within a criminal justice system that dehumanizes Black people at every turn. Black people are more likely to be targeted by police, searched by police, subject to police use of force and violence, arrested for crimes, held in pretrial detention, charged with more serious crimes, and sentenced to longer prison terms. And, as demonstrated in the *Robinson* case, Black people are more likely to be denied the opportunity to sit in judgment of the accused as a juror—a sacred right of citizenship.

Thus, the wave of protests demanding that “Black Lives Matter” must necessarily include justice for the thousands of Black lives ensnared in what has been called the

“machinery of death.” For far too long, Black lives have been diminished and devalued within the administration of the death penalty, whether they are the victims or the accused. And the United States Supreme Court’s ruling in *McCleskey* has made it virtually impossible to turn to the federal courts to remedy the rampant racial injustices in our capital punishment systems. The vacuum left by the federal courts, however, provides an important opportunity for state judiciaries to fill that void and secure the equal protection guaranteed by federal and state constitutions. The North Carolina Supreme Court’s *Robinson* decision is a glimmer of hope that it might be a leading voice in taking seriously the urgent task of securing racial equality for all.

It would be a grave mistake not to consider the death penalty to be an important part of the Black Lives Matter Movement, but it would be an even graver mistake to believe that more should not be done to eradicate racial discrimination in all the ways it pervades the criminal justice system. While the Racial Justice Act was an important first step in addressing racial bias in North Carolina, it is certainly not enough. And this past summer has demonstrated, in stark relief, the vast potential and power of grassroots movements to transform our society to achieve the racial equality that, due in part to the failures of our courts, has remained elusive. Time will tell if North Carolina emerges as a national leader in creating a more equitable criminal justice system. It is our great hope that it does.