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How to Save Superman from a Death Sentence: Could It Be North Carolina's Racial Justice Act?

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FEATURE ARTICLE

**HOW TO SAVE SUPERMAN
FROM A DEATH SENTENCE:
COULD IT BE NORTH
CAROLINA'S RACIAL
JUSTICE ACT?**

by SAREN STIEGEL

Guy LeGrande, convicted of murder, wore a Superman t-shirt at his sentencing hearing.¹ LeGrande also believed he was receiving signals from Oprah Winfrey and Dan Rather through the television.² The jury got a further glimpse of his mental incompetency when LeGrande, whom the trial court

had permitted to represent himself, told the panel during his closing statement to “pull the switch.”³ The all-white jury then obliged and sentenced LeGrande to death.⁴ A North Carolina Superior Court Judge suspended his death sentence because of his potentially severe mental illness.⁵

LeGrande, still on death row, now has an opportunity to avoid the death sentence.

In August, LeGrande, along with 95 percent of North Carolina’s death row inmates, filed motions to have their death sentences vacated under the state’s historic new legislation, the Racial Justice Act (RJA).⁶ This new law is a highly controversial response to death penalty criticism that may allow many like LeGrande to escape capital punishment.⁷



After recent exonerations for eyewitness misidentification, invalid forensic science, false confessions, government misconduct, unreliable informants, and inadequate counsel, many states have reexamined the death sentence.⁸ In response to these issues, Maryland suspended the death penalty pending an investigation into lethal injection’s undue pain.⁹ Texas passed a law requiring better representation for death penalty appeals.¹⁰ New Jersey and New Mexico abolished the punishment completely.¹¹

For its part, North Carolina chose to focus on the influence of racial bias on sentencing. The RJA, passed in August 2009, requires courts to overturn the death sentence of any defendant who can prove that race was a significant factor in the sentencing process.¹² North Carolina is the first state to try and sever the link between race and the death penalty, and the rest of the country is watching to see how the cases unfold. It is possible that the RJA may save Guy LeGrande—Superman—from death.¹³

PROVING RACIAL BIAS

Twenty-three years ago, in the landmark case of *McCleskey v. Kemp*, the United States Supreme Court issued a challenge; by enacting the RJA, the North Carolina General Assembly accepted.¹⁴ In *McCleskey*, the Supreme Court ruled that statistical evidence of systemic racial bias may not be used to challenge a death sentence, even as McCleskey presented a statistically valid study suggesting racial bias.¹⁵ The Court held that merely establishing that an inordinate amount of death row inmates are of the defendant's race is not enough to prove that that specific defendant was discriminated against.¹⁶

The Court instead delegated the responsibility for deciding death penalty issues to state legislative bodies, which respond to the will and, consequently, the moral values of the people.¹⁷

In his dissent, Justice Brennan pointed out that statistics show a “better than even chance” that race will determine whether a defendant lives or dies.¹⁸ Even though proof of discriminatory purpose can be shown with circumstantial or direct evidence, Loyola University Chicago Constitutional Law Professor Alexander Tsesis explains, “The hurdle is a high one to get over.”¹⁹ According to Prof. Tsesis, in states with a death penalty, the likely result of *McCleskey* is an increase in the number of executions.²⁰

NORTH CAROLINA'S RACIAL JUSTICE ACT

By enacting the RJA, the North Carolina General Assembly showed that it rejects racial discrimination in the application of the death penalty.²¹ The RJA attempts to root out the legacy of racial tension that still persists decades after Congress passed the Civil Rights Act of 1964.²²

The passage of the RJA followed the exonerations of three black death row inmates.²³ Glen Edward Chapman, Levon “Bo” Jones, and Jonathon Hoffman were all wrongfully arrested, charged, and convicted by juries with no or only one black member.²⁴ These exonerations convinced the North Carolina General Assembly that race could be a factor in convictions.²⁵

Under the RJA, a court may consider whether statistical evidence clearly indicates “race was a significant factor in decisions . . . in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.”²⁶ The RJA notes three categories a defendant may present to satisfy the “significant factor” standard: death sentences were generally sought or imposed upon one race more frequently, death sentences were sought or imposed as punishment for capital offenses for one race more frequently, or race was a considerable factor in peremptory challenges.²⁷

If a defendant can establish with particularity how the evidence shows racial bias in any of these categories, the court shall schedule a hearing on the claim.²⁸ At the hearing, a defendant is given the opportunity to establish a *prima facie* case of substantial racial differences and the State can respond with its own statistics.²⁹ Proof of racial disparities does not warrant a new trial or sentencing hearing; rather, if the defendant proves an RJA violation, the death sentence is simply reduced to life imprisonment without parole.³⁰

Unlike *McCleskey*, the North Carolina statute does not require proof of intent or purpose.³¹ In other words, a showing that racial discrimination played a generally significant role in the imposition or even request for the death sentence appears to be a different standard than the one in *McCleskey*.³² However, like Prof. Tsesis notes, the true test is a case.³³

THE TEST CASES

Because the law applied retroactively, persons under a death sentence imposed before the August 2009 passage of the RJA were given a year to file their motions and can subsequently explore different methods of establishing their cases.³⁴ LeGrande, along with 152 of North Carolina’s death row inmates, filed petitions by the August deadline to take advantage of the RJA.³⁵ LeGrande’s motion notes that even though the RJA does not require the defen-

dant to show specific discrimination, LeGrande, like many of the other death row inmates, can show that race discrimination swayed the trial.³⁶ A witness from LeGrande's trial described him as a "N——- from Wadesboro."³⁷ At the trial of another death row inmate, Kenneth Rouse, a juror admitted that race was considered in the jury deliberation and stated, "Blacks do not care about living as much as whites do."³⁸ While this evidence illustrates that bias influenced some trials, unconscious, systemic racism is more difficult to show. Fortunately, the RJA allows various avenues of proof.

LeGrande and Rouse are two of 33 North Carolina death row inmates sentenced to death by all-white juries.³⁹ Proof of racial discrimination in exercising peremptory challenges during jury selection is one way to show that race was a significant factor in the death sentence.⁴⁰ Depending on the laws of the state, parties are given a certain number of peremptory strikes, allowing the attorneys to challenge a juror without giving reason.⁴¹

Perhaps the most noteworthy evidence of the all-white jury trend in North Carolina is a study conducted by researchers at Michigan State University. The study analyzed strike patterns of qualified black jury members in 173 proceedings involving 159 defendants on death row (including multiple proceedings for some of the defendants).⁴² The study found that from 1990 to 2010, prosecutors throughout the state of North Carolina challenged black jurors at higher rates when the defendant was black.⁴³ Further, prosecutors struck 52.5 percent of qualified black jury members but only 25.8 percent of qualified non-black jury members.⁴⁴ In other words, prosecutors were more than twice as likely to strike qualified potential jurors who were black.⁴⁵ The cases of the North Carolina inmates could change the practice of picking all-white juries.⁴⁶

The inmates' motions are replete with statistics showing that race played a deeper role in the development of their cases. In another Michigan State study of charging and sentencing, researchers found that in more than 1,500 cases between 1990 and 2009, North Carolina defendants of all races were more than twice as likely to be sentenced to death if at least one of their alleged victims was white.⁴⁷

Bias can also be demonstrated in the science phase. In the past year, a series of reports showing incomplete scientific evidence was released from North Carolina's State Bureau of Investigation (SBI).⁴⁸ The reports, "Agent's Secrets", cited numerous cases in which analysts misrepresented or even fabricated evi-

dence to prove the defendant's guilt or suppressed evidence that could have led to exoneration.⁴⁹ An SBI agent testified that analysts did not always provide comprehensive results of blood tests submitted to the court.⁵⁰ The agent's testimony resulted in an inmate's exoneration after serving almost 17 years.⁵¹ Evidence of the SBI's dubious practices, masked as valid science, reveals that there may be a link with racial bias.

With evidence of racial discrimination in the justice system, the RJA allows death row inmates to present evidence of pervasive racial bias and to show that race played a significant role in the imposition or request of the death penalty.

IS THIS THE ANSWER?

Under North Carolina's RJA, the evidence of particular and systemic racial bias seems sufficient enough to warrant a change in LeGrande's sentence, along with other death row inmates, to life without parole. The outcome could have national influence. Prof. Tsesis explains, "If the constitutionality of the North Carolina statute were upheld, other states could relax the defendant's burden of proof."⁵²

On the contrary, Tsesis goes on to say, in states where defendants are limited in presenting statistical proof for biased death sentences, the defense could argue that the standards are too onerous.⁵³ Furthermore, in states where no statistical proof is allowed, defendants could argue that the state must create sentencing guidelines similar to the upheld North Carolina RJA.⁵⁴ The RJA could have profound effects for limiting racial bias in death sentences.

However, while the effort to purge the systematic racism present in criminal justice systems is laudable, is the death penalty itself too flawed a remedy?⁵⁵ Elliot Cramer, University of North Carolina Psychometrics professor, notes that the act only focuses on one aspect of "racially driven mistreatment."⁵⁶ A system laced with racial discrimination, allowing death sentences to be pursued or carried out based on these influences, must be changed.⁵⁷

A moratorium on the death penalty or its entire abolishment may be one answer. Cramer presents the example of one county where *white* defendants received a disproportionate number of death sentences.⁵⁸ Does this suggest

sending more black murderers to death row?⁵⁹ Clearly, the RJA could have muddled consequences.⁶⁰

Despite dressing in a Superman t-shirt, Guy LeGrande was sentenced to death. Cramer, like Brennan in the *McCleskey* dissent, shows that race may have had too great an impact on LeGrande's path through the criminal justice system.⁶¹ The issue is not whether LeGrande should receive punishment, but whether death is the answer if the sentence is influenced by race. North Carolina seems to reject this influence, but we have yet to see if the Racial Justice Act is enough to save Superman.

NOTES

1 Alexa Woodward, *It Takes a Village to Save a Life: A Statewide Model for Indigent Capital Defense*, 11 N.Y. CITY L. REV. 159, 163 (2007).

2 *Id.*; Motion for Appropriate Relief, *North Carolina v. Guy Tobias LeGrande*, No. 95 CRS 567 (N.C. Sup. Ct. Aug. 2010), available at http://www.aclu.org/files/assets/LeGrande_RJA_motion-r.pdf.

3 Woodward, *supra* note 1.

4 ACLU.org, Five North Carolina Death Row Inmates File Petitions Under North Carolina's Historic Racial Justice Act, <http://www.aclu.org/capital-punishment-racial-justice/five-north-carolina-deathrow-inmates-file-petitions-under-north-c> (last visited Oct. 20, 2010).

5 Woodward, *supra* note 1.

6 *North Carolina Law Renews Hope for Death Row*, WALL ST. J., available at <http://online.wsj.com>.

7 Nathan Koppel, *Death Penalty Goes on Trial in North Carolina*, WALL ST. J., available at <http://online.wsj.com>.

8 The Innocence Project, Understand the Causes, <http://www.innocenceproject.org/understand/> (last visited Oct. 20, 2010).

9 *Id.*

10 *Id.*

11 Koppel, *supra* note 7.

12 ACLU, *supra* note 4.

13 Cassandra Stubbs, *Can the Racial Justice Act Change the Practice of Picking All-White Juries in North Carolina?*, THE SEMINAL, Aug. 10, 2010, <http://seminal.firedoglake.com/diary/64339>; ACLU, *supra* note 4.

14 *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987).

15 Email Interview with Alexander Tsesis, Constitutional Law Professor, Loyola University Chicago (October 9, 2010).

16 *Id.*

17 *McCleskey*, *supra* note 14.

18 *Id.* at 317 (J. Brennan Dissenting).

19 Tsesis, *supra* note 15.

20 *Id.*

21 Motion, *supra* note 2.

22 *Id.*

23 Brief of Advocates for the Wrongly Convicted as *Amici Curiae*, *State of North Carolina v. Melvin Lee White*, No. 95 CRS 1352 (N.C. Sup. Ct. Aug. 2010), available at <http://www.aclu.org/capital-punishment/north-carolina-v-white-advocates-wrongfully-convicted-amicus-brief-support-defend>.

24 *Id.*

25 *Id.*

26 N.C. Gen. Stat. §15A-2012(a).

27 N.C. Gen. Stat. §15A-2011(b)(1)-(3).

28 N.C. Gen. Stat. §15A-2012(a) and (a)(2); Motion, *supra* note 2.

29 Motion, *supra* note 2.

30 *Id.*

31 Tsisis, *supra* note 15.

32 *Id.*

33 *Id.*

34 N.C. Gen. Stat. §15A-2012(2).

35 Koppel, *supra* note 7.

36 Motion, *supra* note 2.

37 ACLU, *supra* note 4.

38 *Id.*; Stubbs, *supra* note 13.

39 Stubbs, *supra* note 13.

40 N.C. Gen. Stat. §15A-2011(b)(3).

41 *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*. Equal Justice Initiative of Alabama, Aug. 2010.

42 Affidavit of Catherine Grosso & Barbara O'Brien on Behalf of Kenneth Bernard Rouse's RJA Petition, paragraph 6, available at http://www.aclu.org/files/assets/Rouse.MSU_expert_affidavit.pdf. A jury member was "qualified" if he or she was present at the *voir dire* selection and was not excluded for cause.

43 Stubbs, *supra* note 13.

44 Grosso & O'Brien, *supra* note 42, at paragraph 13.

45 Stubbs, *supra* note 13.

46 *Id.*

47 Koppel, *supra* note 7.

48 Bob Geary, *The SBI: Another Reason to Oppose the Death Penalty*, INDEP. WEEKLY, Sept 1, 2010, available at <http://www.indyweek.com/indyweek/the-sbi-another-reason-to-oppose-the-death-penalty/Content?oid=1640363>; *Critics Want to End the Death Penalty*, ASSOCIATED PRESS, Aug. 31, 2010, available at <http://www2.journalnow.com/content/2010/aug/31/critics-want-end-to-death-penalty/>.

49 Geary *supra* note 48.

50 *Critics Want to End the Death Penalty*, ASSOCIATED PRESS, Aug. 31, 2010, available at <http://www2.journalnow.com/content/2010/aug/31/critics-want-end-to-death-penalty/>.

51 *Id.*

52 Tsisis, *supra* note 15.

53 *Id.* For example, Kentucky raises a higher bar on the defendant who must show that the statistical proof is directly linked to the defendant's case. Ky. Rev. Stat. Ann. § 532-300(4)(2008).

54 *Id.*

55 Elliot Cramer, *Beyond Fixing*, NEWS & OBSERVER, Jul 19, 2009, available at <http://www.newsobserver.com/>; *Critics Want to End the Death Penalty*, ASSOCIATED PRESS, Aug. 31, 2010, available at <http://www2.journalnow.com/content/2010/aug/31/critics-want-end-to-death-penalty/>.

56 Cramer, *supra* note 55.

57 *Critics Want to End the Death Penalty*, ASSOCIATED PRESS, Aug. 31, 2010, available at <http://www2.journalnow.com/content/2010/aug/31/critics-want-end-to-death-penalty/>.

58 Cramer, *supra* note 55.

59 *Id.*

60 *Id.*

61 *Id.* “African-Americans, for a host of regrettable reasons, are too often caught up in the wheels of the court system, and the chance that they will pay a price for flaws in that system is high.”