An Interview with James E. Ferguson II

James E. Ferguson II’s career as a civil rights advocate began in junior high, when he helped form an interracial committee to discuss issues of race — no small feat in western North Carolina in the early 1950s. In high school, he led sit-ins that helped desegregate Asheville's lunch counters, libraries, and other public buildings. The injustices he lived through in the Jim Crow South inspired him to become an attorney. After earning his law degree from Columbia University in 1967, he helped found North Carolina’s first racially integrated law firm, which is today called Ferguson Chambers & Sumter. Ferguson is its president.

During his more than 50-year career, Ferguson has been part of some of the biggest civil rights cases in North Carolina history. He defended and later won pardons of innocence for the Wilmington 10. He led the litigation that desegregated Charlotte public schools, brought a lawsuit against Duke Power that had national impact in striking down racially discriminatory tests for employment, and successfully challenged a legislative districting scheme that violated the voting rights of African-Americans. He was also part of the team that helped to free Darryl Hunt, a black man who spent 20 years imprisoned for a murder he did not commit. He co-founded a trial advocacy program that trained black lawyers in South Africa, both during and
after apartheid.

Since 2009, when a new civil rights law was enacted by the North Carolina Legislature, he has been one of the lead attorneys on the Racial Justice Act (RJA) litigation that has exposed racial bias in the administration of North Carolina’s death penalty. In a historic hearing in Cumberland County, Ferguson and other members of the RJA team, including attorneys from the Center for Death Penalty Litigation, proved that African-American jurors were being systematically denied the right to serve on capital juries.

In this interview, Ferguson reflects on his work on the RJA cases, how they reveal a pressing and ongoing civil rights crisis in our state, and how his efforts under the Racial Justice Act have continued his long career fighting for the rights of citizens of color.

What’s been the overarching theme of your career?

I went into law because I had seen so much injustice in my own short life. I wanted to be able to help build a better society, including a justice system that was based on fairness, and that was designed to help people and not hurt people, and to try to make us a better society rather than a worse one. Growing up as I did in Jim Crow society, I saw racism at its worst. I saw it grip a society and hold on with a vengeance. But fortunately, we had people involved in trying to wipe out racism who were as persistent as racism itself. I had the opportunity to try to make a difference, and I’ve tried to do that, and I hope I’ve been successful along the way.

By the time the RJA came along in 2009, you’d already had a long career and made a big difference. What made you decide that the RJA was something you wanted to be a part of?

By that time, I had been practicing close to 50 years. In all of those years, although a few changes had been made, the role of race was still very strong in our system. The Racial Justice Act had the potential for exposing the influence of race in our system in a way that nothing before had ever done. It was a unique opportunity to do the very thing that I’d gone into law to do, that is, to try to address racism in a direct way. So, I wanted to be a part of that. I had to be a part of that. I am eternally grateful that I had the opportunity to participate.

How does the RJA fit into North Carolina’s civil rights history?

It’s one of the most important civil rights laws that’s ever been on the books. It was a major step in addressing the role of race in the criminal justice system, and the death penalty was a great place to start. But the truth of the matter is, we need a Racial Justice Act for every aspect of our criminal justice system, so we can ferret out this racial cancer that has been growing in our system. Just look at mass incarceration, which was fueled by the drug war. We know now that blacks were getting longer sentences, higher bail, more strict conditions of release. Race plays a role in virtually every aspect of our criminal justice system, and that’s what resulted in this mass incarceration that we see now.
**What was the RJA intended to do?**

It was always palpable to me, in any death penalty case that I did, that black jurors were being excluded by the prosecution in numbers far greater than whites. But the Racial Justice Act was the very first time that the law provided a full opportunity to view the way race actually operated in our court system. The study that was done by professors from Michigan State University demonstrated, in a very graphic way, that race was not only a factor, but race was a predominant factor in the way the justice system and the death penalty operated. [The study of North Carolina death penalty cases from 1990-2010 found that prosecutors were twice as likely to use peremptory strikes against qualified black jurors as against white jurors.]

The Racial Justice Act invited us to take a searing look at just how race manifested itself in the way our death penalty operated. With the study, we were able to show without the slightest qualm that race was a strong factor in jury selection in death penalty cases in North Carolina over a period of 20 years.

**When people think about race in capital trials, they’re usually thinking about the race of the defendant. But why is it also important to take the consideration of race out of the jury selection process?**

The issue is not just that a black defendant is discriminated against. The real issue is, does race play an improper role in the way our criminal justice system works? Wherever that racism is present, it doesn’t matter whether the defendant is white or black, we have to correct it. The Racial Justice Act enabled us to demonstrate that race has played an improper role, and that this affects not just black people, but all people. That’s true wherever race is improperly invoked, whether that’s in the criminal justice system, whether it’s in the school system, whether it’s in the workplace, whether it’s in a place of public accommodations. It adversely affects everybody, not just the person being discriminated against.

**I’ve heard you say that one of the most meaningful parts of being involved in the RJA was that the hearings were the first time you stood in court and heard people acknowledging the role that race plays in the system. Can you explain why that was important to you?**

One of the things I’ve been working for all my life is to address the pernicious impact of race in our criminal justice system. Everybody knew it was there. Certainly, black folks knew it was there; they’ve always known that. But no one was taking it on directly because there was nothing in the procedures we had to go by. And there was always this feeling that somehow you were not supposed to talk directly and openly about race.

I even had a judge one time, long before the RJA was enacted, who chastised me for raising bias in jury selection. We were objecting to blacks being excluded from the jury, and this was before the Supreme Court had decided that it was improper to do that. The judge called me back to his chambers and said, “Mr. Ferguson, why are you always raising the issue of race and seeing race in everything?” I said, “Well judge, I didn’t raise the issue of race. The issue of race raised itself. It’s there, and I think it’s part of my obligation as a lawyer to address it.”
Even today, people in general are uncomfortable dealing with race, and one of the reasons for that is we never really addressed racism as a country and we haven’t learned how to do it. We have to deal directly with it because if we don’t, we’ll continue along the path we’ve been going: avoiding discussions about race and acting as though we don’t live in a society that is defined by race. One thing that the Racial Justice Act did was give us the opportunity to address it in ways we never have before.

I’m wondering how you were treated as a lawyer early in your career at a time when you were probably dealing with very racist judges and prosecutors, and if you see any parallels between that and how black jurors are still treated today in our justice system.

It’s an interesting phenomenon how I and other black lawyers were treated during the era of Jim Crow and segregation. It’s not as clear-cut as one might think. Here in the South, people liked to pretend — and still do — that there were no real issues of race. So, there was not that much overt discrimination that I faced in the sense of white judges, white lawyers being openly racist. There were some instances where it inevitably came out, though.

I remember in one trial that I had in Wilson, North Carolina, and riots had broken out after MLK’s assassination. That would have been in 1968, just a year after I’d started practicing. I went out to Wilson to represent some youth who had been charged with crimes, and there was a
judge who really didn’t want me in his court. He was talking to a group of people he thought were white, and he said something about “that dark lawyer from Charlotte coming in and trying to take over this court.” But what he didn’t know was that among the people he was talking to was a light-skinned black person, and that person reported to me and my colleagues the racist attitude and remarks. So, it was there but it wasn’t flagrant.

In a way, that’s what makes it pernicious. That’s very similar to how jurors today might feel. They get dismissed from the jury, and they leave the courtroom wondering, “Hmm, did that have anything to do with race?” But most of the time, they’ll never know for sure. It’s not being openly acknowledged, but it’s still having a big effect.

Yes, it’s had a tremendous effect. It always has. But there were some who wanted to believe that it wasn’t there. In 1971, I was involved in the Wilmington 10 case [in which nine young black people and one white woman were wrongly convicted of firebombing a white-owned business during a time of racial tension in Wilmington]. We saw the same thing in that case that was later discovered in death penalty cases. We uncovered that the prosecutor in the Wilmington 10 case was making notations during jury selection concerning white jurors, black jurors, Ku Klux Klan [KKK], that sort of thing. We didn’t know it at the time, although we knew that black jurors were being taken off.

Was he allowing the KKK people to remain on the jury?

Yes! I saw in his notes: “KKK good.” And similar racial notations were made in the Racial Justice Act cases that we tried. Notations about what types of neighborhoods they lived in. Notations that indicated they were trying to get black jurors off. So, it’s something that’s been going on for years, in cases that were capital and non-capital.

Many prosecutors today have no intention to discriminate. Can you explain how racial bias still infects the system, even when most prosecutors are trying to be even-handed?

You don’t have to be what we classically think of as racist: someone who spews racist epithets or harbors an obvious bias against African-Americans or other minorities. We all have biases. From birth, we begin to see things through racial prisms. And because of the legacy of slavery and white supremacy, many white people have racial bias without knowing it. They don’t know it because they don’t want to know it, and they don’t want to believe it, and they don’t want to see it. Prosecutors would like to believe that they’re correct when they say that race plays no role in our criminal justice. They try to convince themselves, and sometimes actually convince themselves, that that’s true. Studies of implicit bias tell us that people are often biased racially and they don’t know it. But it’s there and it affects everything they do.

One judge who was a witness at the RJA hearing testified on the stand about how he came to recognize implicit bias that he would never have believed he had until he saw it demonstrated in court. A black defendant and a white defendant were charged with the same crime. The white defendant was out on bail and had witnesses to come to court and talk about what a wonderful person he was, how he would be no risk if he were to remain out on bail, and he was surrounded
by “respectable” people. The black defendant was not out on bail, so he came into court shackled, wearing the orange suit. He had nobody to speak on his behalf. The judge himself said he viewed these two defendants in different ways without realizing that there was implicit bias involved. Whether we acknowledge it or not, implicit bias plays a strong role in our criminal justice system and virtually every part of our lives.

One thing you pointed out in your closing arguments is how powerful this denial is. Even when prosecutors had the studies and evidence laid out before them during the RJA hearings, they still did not acknowledge that race had ever played a role in capital trials, now or at any time in history. Were you surprised at how complete their denial was?

I really wasn’t surprised by it because I’ve seen it my entire career. Prosecutors who convince themselves, even as they strike black jurors in disproportionate numbers, that it’s not racist. They can always give you a whole list of reasons that have nothing to do with race for why they take black jurors off the jury panel. We even discovered that they had little cheat sheets they used during jury selection, so when they took a juror off who was black, they could give a reason why it was not race but the way the juror looked, the way the juror dressed, the way the juror responded to a question. Instead of teaching prosecutors how not to be biased in jury selection, they were teaching them how to mask it and say it wasn’t bias.

A year after your clients won the first RJA cases, the law was repealed. How do you explain the intense backlash against the RJA? And in light of the backlash and hard feelings it created, do you ever feel that the RJA was a mistake?

It was a law that was necessary and still is. But there’s nothing unusual about that kind of reaction. Think about the reaction to the Emancipation Proclamation, which was supposed to end slavery. The truth of the matter is, you had a brief period of reconstruction after the Civil War and within a very short period of time, many of those who were enslaved were back in a sharecropper system that closely resembled slavery. Blacks were forced to the bottom of society in education, in jobs, in whatever we did. You had white violence against blacks. People just couldn’t accept the fact that black people should now be treated as human beings.

So anytime you’ve had a great step forward, you’ve had a step backwards. That’s what happened with the Racial Justice Act. The legislature repealed it because it worked. It exposed the bias it was supposed to, and relief was given by a courageous judge, and of course some people couldn’t accept that.

The RJA cases are still making their way through the courts. What are your hopes for them?

The one thing that could not be repealed was the evidence that was brought out in the cases that we tried under the Racial Justice Act. We showed that racism has been a defining factor in jury selection in capital cases. So, the repeal of the act doesn’t change the facts. Our courts have the power, when racism is demonstrated as it has been under the Racial Justice Act, to take action and make sure that we don’t have people going to the death chamber because race played a role in jury selection or any other aspect of the case. I hope they will use their authority to ensure a
more fair system, one that is not tainted by racial prejudice.

Kristin Collins is the associate director of public information at the Center for Death Penalty Litigation, a nonprofit law firm that represents prisoners on death row. Before beginning her career in nonprofits, Collins worked as a newspaper reporter for 13 years, 11 of them with The News & Observer in Raleigh.