SUPREME COURT OF NORTH CAROLINA

****

No. 406PA18 DISTRICT 4A

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Sampson
	)	15 CRS 53153-54, 53165
	)	16 CRS 50156
	)	
CORY DION BENNETT	)	

****

No. 263PA18 DISTRICT 12

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland
	)	10 CRS 63629
	)	
CEDRIC THEODIS HOBBS, JR.	)	

****

BRIEF OF AMICI CURIAE COALITION OF STATE AND NATIONAL CRIMINAL JUSTICE AND CIVIL RIGHTS ADVOCATES

****

INDEX

TABLE OF CASES AND AUTHORITIES

CASES:

STATUTES AND CONSTITUTIONAL PROVISIONS:

RULES:

OTHER AUTHORITIES:

****

BRIEF OF AMICI CURIAE
COALITION OF STATE AND NATIONAL CRIMINAL JUSTICE AND CIVIL RIGHTS ADVOCATES[1]

****

Pursuant to N.C. R. App. P. 28(i), Amici Curiae submit this brief in support of defendants Cory Bennett and Cedric Hobbs, and adopt the statements of the case and facts as set forth by defendants in *State v. Bennett*, No. 406PA18, and *State v. Hobbs*, No. 263PA18.

The Amici supporting defendants are a coalition of criminal justice and civil rights advocates including the North Carolina NAACP; North Carolina Association of Black Lawyers; North Carolina Advocates for Justice; ACLU of North Carolina; ACLU Trone Center for Justice and Equality; Black Public Defender Association; Southern Center for Human Rights; Charles Hamilton Houston Institute for Race and Justice; Center on Race, Inequality, and the Law at NYU; Promise of Justice Initiative; National Association for Public Defense; National Association of Criminal Defense Lawyers; LatinoJustice, PRLDEF; Anti-Defamation League; and Fair and Just Prosecution.[2]

---

[1] Pursuant to N.C. R. App. P. 28(i)(2), Amici state that, in addition to their members and counsel of record, the following attorneys contributed to the writing of this brief: Elisabeth Semel, Clinical Professor of Law, University of California Berkeley School of Law; Emily Coward, Project Attorney for Indigent Defense Education, UNC School of Government.

[2] An appendix to this brief describes each Amicus party in detail and their interest in the litigation.

INTRODUCTION

From slavery to Jim Crow to the start of the Civil Rights Movement in the 1950s, the history of systematic, race-based exclusion of North Carolinians from jury service is unbroken. In the modern era, that pattern has persisted. Beginning in the late 1980s, data from multiple studies — comprising nearly forty thousand peremptory strikes in North Carolina, across a twenty-year period — reveal that prosecutors excluded black citizens, and other citizens of color, from juries at about twice the rate that they removed white jurors.[3]

Over the same period, the state appellate courts failed to enforce *Batson v. Kentucky*, 476 U.S. 79 (1986), the seminal U.S. Supreme Court decision establishing the legal framework for claims of race discrimination in the exercise of peremptory strikes. The North Carolina appellate courts have never found that any juror of color was peremptorily struck because of racial bias.

This status quo cannot hold. It is "clear that racial discrimination in the jury system pose[s] a particular threat both to the promise of the [Fourteenth] Amendment and to the integrity of the jury trial." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). And "[i]t is the mark of a maturing legal system that it seeks

---

[3] The stakes involved in this issue are high for all of North Carolina's residents. Courts have acknowledged that the use of peremptory strikes to remove any prospective juror based on race or ethnicity offends equal protection guarantees. *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (adjudicating a *Batson* claim based upon exclusion of Latino jurors); *State v. Tirado*, 358 N.C. 551, 568 (2004) (deciding a *Batson* violation involving removal of a Latino juror); *State v. Floyd*, 343 N.C. 101, 105 (1996) (same as to a Hispanic juror); *State v. Locklear*, 349 N.C. 118, 136 (1998) (same as to Native American jurors).

to understand and to implement the lessons of history." *Id.* at 871. The lesson of North Carolina's jury selection history is manifest. More must be done "to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Id.* at 867.

This brief offers a roadmap to meet the challenge. At a minimum, the Court must begin by bringing its jurisprudence into alignment with that of the U.S. Supreme Court, enforcing *Batson* and its progeny with the vigor the U.S. Constitution requires, and overruling prior state case law that fails to adhere to federal standards.

Amici also ask the Court to consider protections that go beyond the floor set by the U.S. Supreme Court. *Batson* is but one tool, intended only to address purposeful discrimination, not implicit or unconscious racial bias. *Batson* cannot, therefore, protect against aspects of race discrimination that, while less patent, are no less entrenched and no less harmful to the criminal justice system. Amici therefore urge the Court to consider safeguards beyond *Batson*. This Court has authority to embrace other approaches as a matter of discretion, or under the state constitution, which mandates, in a distinctive provision not found in the federal constitution, that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, § 26.

Over the past thirty years, North Carolina courts have fallen woefully short of ensuring that jury selection is untainted by racial or ethnic bias. The Court, through decisive action, can put an end to this indefensible record.

ARGUMENT

I. Overwhelming evidence demonstrates that the North Carolina judiciary has failed to redress race discrimination in jury selection.

The infiltration of racial bias into North Carolina jury selection is well documented. The evidence has amassed over the last decade. Its breadth and depth place it beyond dispute.

In 2010, researchers found that thirty of the 150 prisoners then on North Carolina's death row were sentenced to death by all-white juries, including cases from four counties with African American populations of about 20%, and an additional five counties with African American populations between 10% and 20%. *See* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2110-11, n.356 (2010).

In 2012, a study of capital cases found — from a data set including more than 7,400 peremptory strikes by North Carolina prosecutors in 173 capital proceedings between 1990 and 2010 — that the State struck 53% of eligible African American jurors but only 26% of all other eligible jurors. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1548-49 (2012) (hereinafter referred to as the "MSU study").[4] The researchers, from

[4] The jurors in the MSU data set were 81.6% white, 16.3% black, 2% other races, and 0.1% unknown. The MSU study compared the strike rates against black jurors versus "all other venire members." *Id.* at 1548-49.

Michigan State University College of Law, found that "[t]his difference is statistically significant . . . there is less than a one in one thousand chance that we would observe a disparity of this magnitude if the jury selection process were actually race neutral." *Id.* at 1548 n.86. Even after adjusting for about 65 nonracial variables that might explain the State's strike decisions, the researchers still found that prosecutors removed black jurors at 2.5 times the rate that they struck all other jurors.[5] The MSU study concluded that "the statistically significant influence of race on the odds of being struck was robust; its predictive power did not depend on the inclusion or exclusion of any particular variable or variables in the model." *Id.* at 1553.[6]

In 2018, a study uncovered the same disparities in non-capital cases. Researchers at the Wake Forest School of Law, two of whom are former federal prosecutors, examined data on 29,000 potential North Carolina jurors in all noncapital felony trials from 2011 to 2012. They found, as in the MSU study of capital cases, that prosecutors struck black jurors at twice the rate they removed white jurors. The State's exclusion rate was 16% for black jurors but only 8% for

---

[5] Nonracial variables examined by the MSU study include factors such as whether a juror had reservations about the death penalty, was not married, was accused of a crime, was worried jury service would impose a hardship, was a homemaker, had ties to law enforcement, or ties to the defendant or a witness. *Id.* at 1556 Table 5.

[6] *See also* Federal Judicial Center, Reference Manual on Scientific Evidence 260 (3d ed. 2011) ("Regression models are used by many social scientists to infer causation from association. Such models have been offered in court to prove disparate impact in discrimination cases, to estimate damages in antitrust actions, and for many other purposes."). Available online at: https://www.fjc.gov/content/reference-guide-statistics-2

white jurors. Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407, 1425 Table 2 (2018) (hereinafter referred to as the "Wake Forest study").[7] In Winston-Salem, black jurors were removed three times as often as white jurors. In Durham and Charlotte, they were removed two-and-a-half times as frequently. Raleigh, Greensboro, and Fayetteville prosecutors had a disproportionate removal ratio of 1.7 for black jurors. *Id.* at 1428 Table 6.

In addition, in 2015, a group of former federal and state prosecutors submitted an amicus brief to the U.S. Supreme Court highlighting evidence in North Carolina that "[s]ome district attorney offices train their prosecutors to deceive judges as to their true motivations." In a 1995 N.C. Conference of District Attorneys program, a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives" counseled prosecutors not to state their actual reasons for striking jurors, but to choose from a laundry list of vague and generic reasons, such as inappropriate dress, poor attitude or body language, or evasive answers. As explained in the prosecutors' amicus brief, "[c]ourts have held that this practice of offering a 'laundry list' of strike justifications is evidence of race discrimination."[8]

---

[7] The Wake Forest study similarly found that the State excluded 15% of "other" jurors, which included the racial categories of Asian, Hispanic, Native American, and other. *Id.* at 1425 n.76.

[8] The "Juror Negatives" handout is available online at: https://www.aclu.org/legal-document/north-carolina-v-tilmon-golphin-christina-walters-and-quintel-augustine-batson
The prosecutors' brief, Amicus Brief of Joseph diGenova, et al., submitted in *Foster v. Chatman*, 136 S. Ct. 1737 (2016), is available online at: https://www.scotusblog.com/case-files/cases/foster-v-humphrey/

Meanwhile, a survey of this Court's *Batson* jurisprudence, published in 2016, found that North Carolina appellate courts have never in the thirty years since *Batson* found a single instance of discrimination against a juror of color. "Statistics are not, of course, the whole answer, but nothing is as emphatic as zero." Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1959 (2016) (quoting *U.S. v. Hinds Cty. Sch. Bd.*, 417 F.2d 852, 858 (5th Cir. 1969)).[9]

This state of affairs in North Carolina is not inevitable. Other jurisdictions within the Fourth Circuit have found substantive *Batson* violations at least on occasion. As of 2016, the South Carolina courts had found 13 violations; there were six in Virginia, three in Maryland, and two in West Virginia. *See* Pollitt & Warren, *supra* at 1984.[10] Likewise, other southern states with histories of race discrimination akin to North Carolina's have been more diligent in policing racial bias in jury selection. A 2010 survey of *Batson* decisions across the South found that Alabama had over 80 appellate reversals because of racially-tainted jury selection, Florida had 33, Mississippi and Arkansas each had 10, Louisiana had 12, and

---

[9] In contrast, Pollitt & Warren note that the North Carolina Court of Appeals has remedied two instances of discrimination involving white jurors. *See id.* at 1962-63 (discussing *State v. Cofield*, 129 N.C. App. 268 (1998), and *State v. Hurd*, 246 N.C. App. 281 (2016)).

[10] The Pollitt & Warren study is actually a conservative count. In examining other states' *Batson* records, they considered only published decisions. *See id.* at 1993 Table 10.

Georgia had eight.[11] North Carolina stands alone in its intransigent refusal to enforce the minimal federal protections required by *Batson*.

II. Addressing racial bias in jury selection will further a number of compelling governmental interests.

First, and most fundamentally, the Court must turn its attention to race discrimination in jury selection because "[t]he duty to confront racial animus [and bias] in the justice system is not the legislature's alone . . . . [The judiciary is also] called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Pena-Rodriguez*, 137 S. Ct. at 867. This country, and this state, have a long history of excluding black citizens from jury service, which this Court is bound to address. *See Flowers v. Mississippi*, No. 17-9572, 2019 WL 2552489, at *7 (U.S. June 21, 2019) (tracing the history of statutes excluding citizens from juries based on race, to non-statutory "tactics" and "discriminatory tools to prevent black persons from being called for jury service," to the use of "peremptory strikes in individual cases to remove most or all black prospective jurors."); *see also* Kotch and Mosteller, *supra* at 2072-76 (detailing the history of legalized exclusion of black North Carolinians from jury service).

The Court must also act because equal access to jury service is one of our most important civil rights. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to

---

[11] *See* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, p. 19 (2010), available at: https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf

participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (citations omitted).

Moreover, enforcing *Batson* will safeguard the truth-finding function of juries. *Batson* itself was motivated by the principle that the "petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." 476 U.S. at 86. Researchers have found that juries with two or more members of color deliberate longer, discuss a wider range of evidence, and collectively are more accurate in their statements about cases, regardless of the race of the defendant. Put simply, diverse juries make better decisions overall. *See* Samuel R. Sommers, *On Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation*, 90 Personality & Soc. Psychol. 597 (2006). Requiring closer scrutiny of race-based exclusion of jurors is one way for the Court to ensure more reliable verdicts and reduce the risk of wrongful convictions in North Carolina. *See* The National Registry of Exonerations (documenting 61 instances of wrongful conviction in North Carolina).[12]

[12] This registry is a joint project of the University of California Irvine, Newkirk Center for Science & Society; University of Michigan Law School; and Michigan State University College of Law. It is available online at: http://www.law.umich.edu/special/exoneration/Pages/about.aspx

Next, by enforcing strong protections against racial bias in jury selection, the Court will ensure that this cornerstone of our democracy is fully protected, and that lower court actors are encouraged to be vigilant in combatting racial discrimination in jury selection. *See Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (O'Connor, J., concurring) (explaining the Court has "long held that upon proof of" a Fourteenth Amendment violation, the cost of reversing a conviction is necessary "to eradicate and deter such discrimination."). This Court's *Batson* record has plainly not provided the deterrence the U.S. Supreme Court envisioned.

Addressing racially-biased peremptory strikes will also improve North Carolina's government by ensuring public confidence in the fair and reliable administration of justice. The 2017 Final Report of Chief Justice Mark Martin's North Carolina Commission on the Administration of Law & Justice found that public confidence in the judiciary's fairness is a problem nationally, and in this state. *See* Commission Final Report, p. 18 (noting that an opinion poll sponsored by the Commission found that "whites were widely viewed as being treated better, while other racial groups were viewed as receiving less favorable treatment."). The Commission agreed on the need for "renewed system-wide attention to programs that seek to eliminate the possibility of bias and encourage procedural fairness in our courts." *Id.* at 18. And this Court has held, in a case forbidding discrimination in the selection of the grand jury foreperson, that the justice system "must operate evenhandedly," and "be perceived to operate evenhandedly," in order to "command the respect" of the populace. *State v. Cofield*, 320 N.C. 297, 302 (1987). The Court

should give *Batson* greater force because "racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt." *Powers*, 499 U.S. at 411 (internal citation and quotations omitted).

Increased public confidence in the legal system may also have practical effects on the administration of justice. Scholars have "found that people are more likely to comply with legal authority when they perceive it to be legitimate . . . . People are also more likely to cooperate with law enforcement when they perceive law enforcement's authority as legitimate." As a result, "prosecutors have not only normative reasons to strive for race-neutral jury selection, but also utilitarian interests." *See* Alafair S. Burke, *Prosecutors and Peremptories*, 97 Iowa L. Rev. 1467, 1475-76 (2012) (citations omitted).

Finally, the Court should act in this area to account for new information about *Batson*'s operation in North Carolina. The Court last addressed jury discrimination in 2010 when a *Batson* issue was raised in *State v. Waring*, 364 N.C. 443 (2010). At that time, the Court did not have the benefit of the MSU and Wake Forest jury studies exposing widespread racial disparities. The Court did not have evidence of formalized prosecutor training designed to circumvent *Batson*. The Court did not have the Pollitt & Warren study, showing that North Carolina appellate courts have never found discrimination against a juror of color. Nor did the Court have the 2017 Final Report of Chief Justice Martin's Commission, calling for "renewed system-wide attention to programs" to address racial bias in the

courts. The Court should take the opportunity these developments provide to revisit the issue of racial bias in the exercise of peremptory strikes, and finally give meaning to the promise of equal protection in North Carolina jury selection.

III. At a minimum, the Court must enforce existing federal law to ensure robust *Batson* protections against discrimination in North Carolina.

In *Waring*, the Court articulated the familiar three-part structure governing *Batson* objections:

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the "totality of the relevant facts" in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving "purposeful discrimination." The trial court's ruling will be sustained "unless it is clearly erroneous."

Waring, 364 N.C. at 474-75 (internal citations omitted).

The Court should now revisit and clarify the manner in which this framework must be applied under U.S. Supreme Court decisions. In order to make clear that the *Batson* threshold is no longer insurmountable, Amici urge the Court to recognize and adopt the following mandated aspects of U.S. Supreme Court precedent, which the state's judiciary has consistently disregarded. By enforcing existing federal law, this Court will take an important first step toward addressing jury discrimination.

A. The prima facie stage of *Batson* carries only a burden of production, does not involve a persuasiveness assessment, and must give the moving party the benefit of the doubt.

This Court has acknowledged the well-established rule that "a prima facie showing of racial discrimination is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *Waring*, 364 N.C. at 478 (citation and alterations omitted).

As applied by the North Carolina appellate courts, however, the hurdle has neither been low, nor consistent with the bar set by the U.S. Supreme Court. In the 34 *Batson* cases the Court has reviewed at the prima facie stage, it found the prima facie hurdle satisfied in only three. In the sixteen *Batson* cases raising the prima facie issue before the Court of Appeals, that court found that only two were sufficient. *See* Pollitt & Warren, *supra* at 1965. This Court and the Court of Appeals have repeatedly rejected prima facie *Batson* claims where the State struck between 50% and 100% of the jurors of color. *Id.* at 1966-67.

One likely explanation for this gulf between the letter of the law and its application is that North Carolina courts have never described the nature of the prima facie *Batson* showing in the terms articulated by the U.S. Supreme Court. In *Johnson v. California*, 545 U.S. 162 (2005), the Court explained that meeting *Batson*'s first step only requires "evidence *sufficient to permit* the trial judge to draw an inference that discrimination has occurred." *Id.* at 170 (emphasis added). The Court explained that the prima facie case involves only a burden of "production of

evidence" and does not involve an assessment of "persuasiveness." 545 U.S. at 171. The Court emphasized that the first step of *Batson* is not concerned with persuasion, by comparing it to the burden-shifting framework in employment discrimination claims:

> [D]eterminations at steps one and two of the *McDonnell Douglas* framework "can involve no credibility assessment" because "the burden-of-production determination necessarily *precedes* the credibility-assessment stage," and . . . the burden-shifting framework triggered by a defendant's prima facie case is essentially just "a means of 'arranging the presentation of evidence.' "

Johnson, 545 U.S. at 171 n.7 (citations omitted; emphasis in original).

Thus, at step one of *Batson*, there is no assessment of the persuasiveness of the evidence. This stage is merely a means of arranging and producing evidence so that persuasiveness can be evaluated at the final stage of analysis.

Johnson went on to explain that when there is an *arguable* basis for an inference of discrimination over which reasonable jurists could differ, those disputes should be resolved in the moving party's favor. *Id.* at 173 ("The disagreements among the state-court judges who reviewed the record in this case illustrate the imprecision of relying on judicial speculation to resolve plausible claims of discrimination . . . . [I]nferences that discrimination *may have occurred* were sufficient to establish a prima facie case under *Batson*.") (emphasis added).[13]

---

[13] Consistent with *Johnson*, lower courts have applied the rule that, when deciding whether a prima facie case exists, "it is preferable for the court to err on the side of [finding the prima facie case, to protect] . . . the defendant's rights to a fair and impartial jury." *U.S. v. Collins*, 551 F.3d 914, 921 (9th Cir. 2009) (quoting *U.S. v. Chinchilla*, 874 F.2d 695, 698 n.5 (9th Cir. 1989)); *see also U.S. v. Johnson*, 873 F.2d

No North Carolina case has ever recognized, adopted, or enforced *Johnson*'s essential principles of the prima facie case. This Court should do so now, and explicitly depart from its history of finding a prima facie case of discrimination in only the rarest of circumstances.

Proper enforcement of the prima facie standard as described in *Johnson* will improve North Carolina's *Batson* approach in several respects. First, it will protect a critical civil right while imposing only a minimal burden on the State to merely explain why it exercised a strike. *See Doe*, 834 F. Supp. at 249 ("This procedure . . . protects the public interest in ensuring that the jury selection is not tainted by racism . . . . [and] requiring a party to provide a race-neutral justification for a peremptory challenge causes no prejudice to that party."); *State v. Quick*, 341 N.C. 141, 147 (1995) (Frye, J., dissenting) (explaining that finding "a prima facie case . . . does not mean that jury selection cannot continue. The establishment of a prima facie case simply shifts the burden to the prosecutor to give a race-neutral explanation . . . . ").

1137, 1140 n.3 (8th Cir. 1989) ("where the district court considers the issue to be close, conservation of judicial resources might well justify inquiry of the government attorney as to the reasons for making a strike."); *Doe v. Village of Downers Grove*, 834 F. Supp. 244, 249 (N.D. Ill. 1992) ("a procedure requiring race-neutral explanations is permissible — even advisable — in situations where a prima facie *Batson* case is unclear but racial motivation *might* be a factor.") (emphasis in original; overruled on other grounds by *Doe v. Burnham*, 6 F.3d 476 (7th Cir. 1993)); *Little v. U.S.*, 613 A.2d 880, 887-88 (D.C. 1992) (adopting the Eighth Circuit's formulation of the rule in *U.S. v. Johnson*); *Com. v. Mathews*, 31 Mass. App. Ct. 564, 570 (1991) ("The case is close, but we think a reasonable basis existed for a prima facie inference of impropriety in the prosecutor's use of peremptory challenges.").

Second, by more frequently resolving prima facie issues in the moving party's favor, the Court would give appropriate effect to *Batson*'s recognition that peremptory strikes are inherently susceptible to racial bias. *See Batson*, 476 U.S. at 96 (explaining that, in establishing the prima facie case, a defendant "may . . . rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.") (citation omitted).

Third, at the prima facie stage, the available evidence may be limited to statistics describing the opposing party's peremptory strike pattern. *See Johnson*, 545 U.S. at 170 (commenting that, at the prima facie stage, it may be "impossible for the defendant to know with certainty" some of the facts supporting the *Batson* objection). And this Court has recognized the difficulty of formulating clear rules in the consideration of statistical evidence. *See State v. Barden*, 356 N.C. 316, 344 (2002) ("We are aware that we risk splitting hairs unduly if we attempt to distinguish between the 37.5% acceptance rate of prospective minority jurors in [one case] and the 28.6% rate here."). By erring on the side of finding a prima facie case and proceeding to the reasons for the strikes, the Court would alleviate the difficult line-drawing and small-sample-size problems presented by numerical analyses of individual cases.

Finally, the Supreme Court's directive in *Johnson* coheres with the overwhelming weight of the MSU and Wake Forest data showing that racial bias in jury selection is not an exceptional or rare occurrence, a practice consigned to the history books, or one confined to a small subset of explicitly racially-tinged cases.

Rather, discriminatory jury selection is endemic in this state and continues to undermine the fairness of criminal trials. At the very least, as *Johnson* requires, this Court must address the widespread nature of the problem by requiring the State to undertake the minimal burden of explaining its reasons for striking jurors when racial discrimination *might* be at work.

B. At *Batson's* third step, the burden of proof is a preponderance of the evidence.

An additional reason that may explain the North Carolina courts' failure to police jury discrimination adequately is that no appellate court in the state has ever articulated the burden of proof applicable to *Batson* claims. North Carolina courts frequently recite the familiar maxim that the moving party bears the burden of proving purposeful discrimination. No opinion, however, sets forth the quantum of evidence required to meet that burden. This Court should do so now, to ensure that all parties and courts adhere to the U.S. Supreme Court's longstanding precedent, and to dispel the tacit understanding that *Batson* imposes a nearly insuperable burden of proof.

Batson held that the ultimate burden of proof is a preponderance of the evidence. In explaining that the party contesting the peremptory strike "carries the ultimate burden of persuasion," *Batson* relied on and incorporated *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), which addressed the nature of the evidentiary burden in Title VII employment discrimination suits. *Batson*, 476 U.S. at 94 n.18. In *Burdine*, the Court held that the burden of proof placed on the party asserting discrimination is a "preponderance of the evidence." 450 U.S. at

252-53. The Court in *Burdine* elaborated that the preponderance standard involves a showing only that it was "more likely than not" that discrimination occurred. *Id.* at 254 (citation omitted).

In *Johnson*, the U.S. Supreme Court reinforced this standard, explaining again that the ultimate burden of proof is a showing that the strike "was more likely than not" motivated by race:

> [W]e assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, *before deciding whether it was more likely than not that the challenge was improperly motivated*.

Johnson, 545 U.S. at 170 (emphasis added).[14]

The preponderance standard is a particularly low burden of proof. *See Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721 (2009) ("The clear and convincing standard requires evidence that 'should fully convince.' This burden is more exacting than the 'preponderance of the evidence' standard generally applied in civil

[14] Lower courts have consistently recognized the U.S. Supreme Court requirement of applying the preponderance standard to *Batson* claims. *See, e.g., People v. Gutierrez*, 2 Cal. 5th 1150, 1158 (2017) ("In order to prevail, the movant must show it was more likely than not that the challenge was improperly motivated."); *Conner v. State*, 130 Nev. 457, 465 (2014) ("The district court should sustain the *Batson* objection and deny the peremptory challenge if it is more likely than not that the challenge was improperly motivated."); *Williams v. Beard*, 637 F.3d 195, 215 (3d Cir. 2011) ("At step three of the *Batson* analysis, the petitioner must show that it is more likely than not that the prosecutor struck at least one juror because of race."); *Crittenden v. Ayers*, 624 F.3d 943, 958 (9th Cir. 2010) ("In step three of the *Batson* inquiry, the court must decide whether the opponent of the peremptory challenge has carried his burden of proving purposeful discrimination by a preponderance of the evidence.").

cases, but less than the 'beyond a reasonable doubt' standard applied in criminal matters.") (citations omitted).

However, no appellate court in North Carolina has cited or applied the preponderance standard in a *Batson* case. This Court must now explicitly recognize it as the controlling standard of proof applicable to *Batson* objections.

Not only is this step required by U.S. Supreme Court precedent, it will also alleviate a significant hurdle to the proper enforcement of *Batson*. An acknowledged obstacle to prevailing on a *Batson* objection is judges' perception that doing so requires them to accuse an officer of the court of deceit or racism. *See State v. Saintcalle*, 178 Wash.2d 34, 53 (2013) ("A requirement of conscious discrimination is especially disconcerting because it seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a *Batson* challenge . . . . Imagine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism.") (citing Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 Stan. L. Rev. 9, 11 (1997) (noting that one judge "had the uncomfortable feeling that she had just rendered an official ruling that the attorney was lying to the court")).

Batson, however, does not require a definitive finding of deceit or racism. *See Flowers*, 2019 WL 2552489, at *14 (in finding *Batson* violation, asking, "Why did the State ask so many more questions . . . of black prospective jurors than it did of white prospective jurors? No one can know for certain."). Its preponderance standard is probabilistic, and merely holds that when there is a risk of bias, the

interest in protecting against race discrimination outweighs the competing interest in a party's right to exercise a peremptory strike:

> In most cases, courts cannot discern a prosecutor's subjective intent with anything approaching certainty. But the issue is not whether the evidence of improper discrimination approaches certainty or even amounts to clear and convincing proof. The ultimate issue is "whether it was *more likely than not* that the challenge was improperly motivated." This probabilistic standard is not designed to elicit a definitive finding of deceit or racism. Instead, it defines a level of risk that courts cannot tolerate in light of the serious harms that racial discrimination in jury selection causes to the defendant, to the excluded juror, and to "public confidence in the fairness of our system of justice."

People v. Gutierrez, 2 Cal. 5th 1150, 1182-83 (2017) (Lui, J., concurring) (emphasis in original; citations omitted).

Implementing the required preponderance burden in North Carolina will make clear that when objections are raised, courts are not called on to impugn the character of prosecutors. Giving force to the preponderance standard will apply only an "inferential analysis" that does not "brand the prosecutor a liar or bigot," and avoids "obscur[ing] the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve." *Gutierrez*, 2 Cal. 5th at 1183 (Lui, J. concurring).

C. At the third step of analysis, *Batson* is violated if a strike was motivated in substantial part by race, even if the defending party cannot disprove every given justification.

North Carolina courts also err in requiring *Batson* defendants to disprove every reason proffered by the prosecutor, even where other justifications are shown

to be improper or pretextual. In *State v. White*, 131 N.C. App. 734, 740 (1998), for example, the Court of Appeals rejected a *Batson* claim where the prosecutor admitted he struck two jurors because they were "[b]oth black females." But because the prosecutor had given other reasons for the strike that the defendant did not disprove, the Court of Appeals denied the claim. 131 N.C. App. at 740.

In *State v. Bell*, No. 01 CRS 2989-91 (Onslow County), one of the trial prosecutors submitted a post-trial affidavit admitting he struck a female juror because he "[w]as making a concerted effort to send male jurors to the Defense." Despite the prosecutor's admission that he relied impermissibly on gender, the superior court denied the claim based on another reason offered by the prosecutor. *See State v. Bell*, Superior Court Order, p. 45 (issued Dec. 13, 2012).[15]

Similarly, in *State v. Moore*, No. COA15-687, 2016 WL 1013330 (N.C. Ct. App. March. 15, 2016), the Court of Appeals panel found that "[t]he prosecutor mischaracterized [the juror's] answer . . . so that proffered reason could not support the trial court's findings." In reaching this conclusion, the Court of Appeals relied on *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005), where the Supreme Court "disregard[ed] . . . [and] disbeliev[ed] the prosecutor's" reason for striking a black juror, and found a *Batson* violation. *Moore*, 2016 WL 1013330, at *5.

---

[15] The prosecutor's affidavit and superior court order in *Bell* are on file with the authors of this brief. The Court has not yet received or reviewed the order in *Bell* because the case has been placed in abeyance pending resolution of other claims in superior court. *See State v. Bell*, No. 86A02-2 (order of Jan. 24, 2013, placing case in abeyance).

Despite the Court of Appeals' finding in *Moore* that the prosecutor offered a reason that was not credible, the court nonetheless affirmed the trial court's denial of the *Batson* objection because of two other "independent, non-racially motivated reasons" for the strike: the juror's body language and negative experience with law enforcement. *Moore*, 2016 WL 1013330, at *5; *see also State v. Clegg*, No. COA-17-76, 2017 WL 3863494, at *12 (N.C. Ct. App. Sept. 5 2017) (no error even though one purported reason applied as well to a white venire member who was accepted by the State because "[t]he State's race-neutral basis for striking Aubrey was not solely due to her lack of confidence in her ability to focus, but also based on her body language and failure to make eye contact.").[16]

These cases take the wrong approach. The *Batson* inquiry does not turn on whether a court can identify one race-neutral reason for the strike that withstands scrutiny. *See Miller-El*, 545 U.S. at 250-52 ("[A] *Batson* challenge does not call for a mere exercise in thinking up any rational basis" for a strike). Rather, "[t]he ultimate inquiry is whether the State 'was motivated in substantial part by discriminatory intent.'" *Flowers*, 2019 WL 2552489, at *11 (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016)); *see also Waring*, 364 N.C. at 480 ("As stated in *Miller-El*, the third step in a *Batson* analysis is . . . whether the defendant has shown 'race was *significant* in determining who was challenged and who was

[16] This Court subsequently remanded *Clegg* for further review in light of *Foster v. Chatman*, 136 S. Ct. 1737 (2016), which was not available at the time of trial. *See State v. Clegg*, No. 101P15-3 (order of Aug. 14, 2018).

not.'") (emphasis added in *Waring*). *Foster* illustrates the correct application of this standard.

In *Foster*, the prosecutor gave "laundry list[s] of reasons" for his strikes of two African American venire members. *Id.* at 1748. Yet the Supreme Court found purposeful discrimination without even addressing several of the prosecutor's reasons. *See* 136 S. Ct. at 1750 (analyzing four of eleven reasons given for striking Marilyn Garrett: "Moreover, *several* of Lanier's reasons for why he chose Garrett over Blackmon are similarly contradicted by the record.") (emphasis added); *id.* at 1751 (analyzing five of eight reasons given for striking Eddie Hood: "An examination of the record, however, convinces us that *many of* these justifications cannot be credited.") (emphasis added). Finding that the prosecutor's justifications generally lacked credibility, *Foster* found the strikes were motivated in substantial part by discriminatory intent, without forcing the defendant to disprove every reason.

Foster thus teaches what no North Carolina court has ever recognized. When a prosecutor gives a reason for striking a juror that is improper or a mischaracterization of the record, that is itself evidence of pretext, which casts doubt on the credibility of any other reasons the prosecutor may have offered. *See also Flowers*, 2019 WL 2552489, at *16 ("When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent."). The same is true when a prosecutor baldly, or perhaps inadvertently, admits that race was a factor in the strike decision.

Too often, North Carolina courts have approached *Batson* as if any reason the defendant fails to disprove must be accepted as the true reason for the strike, thereby defeating the claim. To correct this error, the Court must overrule prior decisions to the contrary, and clearly articulate that in order to prevail at *Batson*'s third step, the moving party need not disprove every proffered justification to show the strike was motivated in substantial part by discriminatory intent.

D. A finding of purposeful discrimination under *Batson* is not limited to cases that are particularly susceptible to race discrimination or those with direct evidence of race-consciousness.

This Court has said that relevant factors in the *Batson* analysis include susceptibility of the case to racial discrimination, including comments by the prosecutor that support or refute an inference of discrimination, and the race of the defendant, the victim, and witnesses. *See, e.g., State v. Hobbs*, 817 S.E.2d 779, 786 (N.C. Ct. App. 2018) (quoting *State v. Fair*, 354 N.C. 131 (2001)); *State v. Richardson*, 342 N.C. 772, 782 (1996). Amici do not dispute the relevance of such factors. For instance, the MSU study found that prosecutors struck black jurors at even more disparate rates in cases where the defendant was also black. *See* Grosso & O'Brien, *supra* at 1549 (finding that peremptory strike "disparities [based on race] were even greater in cases involving black defendants," by nearly ten percentage points).

However, no North Carolina appellate court has ever found these factors to *support* a finding of discrimination. Instead, the state courts have often applied the factors to deny relief, and have, in fact, suggested that a *Batson* violation *cannot* be

found unless there is explicit evidence the case is "especially susceptible" to racial considerations.

In *State v. Williams*, 343 N.C. 345, 359-60 (1996), for example, the Court held there was no prima facie case, despite the State striking the only two eligible black jurors in the venire. *Williams* reached this result, in part, because "[t]here is no evidence of this case being especially susceptible to racial discrimination since the defendant and the victim were both white and the excused jurors were black." *See also State v. White*, 349 N.C. 535, 550 (1998) (rejecting *Batson* claim, and noting "that this case is one that is not particularly susceptible to racial discrimination, as defendant, the victims, chief witness Patricia Green, and other witnesses are all African-American. We also note that at the time of this challenge, the prosecutor had accepted one African-American from the venire.") (citation omitted).

However, the empirical findings of the MSU and Wake Forest studies show that racial bias in jury selection is not an idiosyncratic event, but one that occurs frequently in scores of criminal trials across the state. In essence, the MSU and Wake Forest data demonstrate that there is virtually no case in North Carolina that is not susceptible to racial bias in jury selection. *See also* Phoebe C. Ellsworth & Samuel R. Sommers, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 Personality & Soc. Psychol. Bull. 1367 (2001) (finding a greater risk that racial bias could influence decision-making when issues of race are not obvious or discussed).

Moreover, the Supreme Court's decision in *Snyder v. Louisiana*, 552 U.S. 472 (2008), teaches that explicit racial susceptibility or direct evidence of race-consciousness is not required to sustain a *Batson* finding. In *Snyder*, the Court analyzed the prosecution's strike of a single black juror. The prosecutor said he struck the juror because he looked nervous, but the Court declined to consider this reason because the trial court did not make a finding about the juror's alleged nervous appearance. 552 U.S. at 479. Next, the Court analyzed the prosecutor's claim that he struck the juror due to the distraction of his student-teaching obligation. On several grounds, the Court held that reason could not be credited: the juror's hardship would not necessarily have favored the defense more than the prosecution, the hardship was not particularly burdensome given the brevity of the trial, the prosecutor accepted white jurors with hardships at least as serious as the black juror's situation, and the prosecutor elicited assurances from a white juror that he could serve despite his other pressing obligations, but the prosecutor made no such inquiry of the black juror. 552 U.S. at 479-84.

On these bases alone, and without relying on anything remotely approaching explicit evidence of racism or race-consciousness, the Court in *Snyder* found a *Batson* violation and "discriminatory intent." *Id.* at 485.[17] *See also Powers v. Ohio*,

[17] Notably, the defendant in *Snyder* argued that the prosecution explicitly injected race into the proceedings by comparing his case to the racially-divisive trial of O.J. Simpson, and that the comparison supplied the prosecutor with a motive to obtain an all-white jury. Nonetheless, the Supreme Court found a sufficient basis for a *Batson* violation without even mentioning any of the explicit race-based evidence. The defendant's brief in *Snyder* is available online at: https://www.scotusblog.com/case-files/cases/snyder-v-louisiana/

499 U.S. 400, 416 (1991) (holding that racial identity between the defendant and the excused prospective juror is not a necessary element of a *Batson* objection).

To resolve ambiguity in North Carolina law — as reflected by the disconnect between the MSU and Wake Forest studies, and *Snyder*, on the one hand; and on the other, state court decisions rejecting *Batson* claims based on a lack of racial susceptibility in the case — this Court should declare what is required under U.S. Supreme Court law: a court may find purposeful discrimination absent anything explicitly racial or race-based in the record.

E. Single-trait comparative juror analysis is probative of discrimination.

In *Miller-El*, 545 U.S. at 241, the Supreme Court described comparisons of struck black jurors and accepted white jurors, who were similar to one another, as "more powerful" evidence of discrimination than statistical disparities:

> More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step.

The Court made clear that such evidence, referred to as "comparative juror analysis," is probative of the ultimate issue of purposeful discrimination even if the compared jurors are not identical in every respect. The Court squarely rejected the dissent's contrary view that comparisons were not probative unless the jurors were identical. *Miller-El*, 545 U.S. at 247 n.6 ("None of our cases announces a rule that

no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one . . . . A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.").

Again in *Flowers*, the Court reiterated that "[a]lthough a defendant ordinarily will try to identify a similar white prospective juror whom the State did not strike, a defendant is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent." *Flowers*, 2019 WL 2552489, at *15 (emphasis in original; citing *Miller-El*, 545 U.S. at 247 n.6).

This Court's precedent is in direct conflict with *Miller-El* and *Flowers*. In *State v. Bell*, 359 N.C. 1, 14-16 (2004), the Court rejected juror comparisons proffered by the defense "because the *same combination of factors was not present* in the other two prospective jurors" and "no juror had experienced *all of the circumstances* that caused the State to dismiss" a black juror. (emphasis added). These statements cannot be squared with *Miller-El* and *Flowers*, and should now be overruled.

In other decisions, this Court has said that juror comparisons based on individual traits should be given only minimal, if any, probative value in the *Batson* analysis, because jury selection involves evaluation of potential jurors as a complex whole:

> Moreover, the alleged disparate treatment of prospective jurors would not be dispositive necessarily. Choosing

> jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process. Defendant's approach in this appeal involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State. We have previously rejected this approach.

State v. Porter, 326 N.C. 489, 501 (1990) (citations omitted).

> Because the ultimate decision to accept or reject a given juror depends on consideration of many relevant characteristics, one or two characteristics between jurors will rarely be directly comparable.

State v. Williams, 339 N.C. 1, 18 (1994).

The imposition of this impossible-to-meet burden is at odds with the U.S. Supreme Court's approach in recent decisions. *See Snyder*, 552 U.S. at 483-85 (finding *Batson* violation based on single-trait comparison of black juror struck because of an out-of-court obligation, with white jurors who had similar hardships); *Foster*, 136 S. Ct. at 1750-51 (finding evidence of discrimination where the prosecutor struck black jurors because they were divorced or young, but accepted white jurors who were also divorced or young); *Flowers*, 2019 WL 2552489, at *15 (again finding evidence of discrimination in single-trait comparisons). In these cases, the Court found evidence of discrimination in comparisons of single traits, without probing for any other characteristics that might separate the jurors.

The Court must therefore overturn its statement in *Bell* that comparative juror evidence is not probative unless "the same combination of factors" is present

in the equivalent jurors, because it has been conclusively rejected by controlling U.S. Supreme Court precedent. The Court must likewise overturn its reasoning in *Porter* and *Williams* that juror comparisons may only receive minimal probative weight, because *Porter* and *Williams* conflict directly with the analysis mandated by *Snyder*, *Foster*, and now *Flowers*.

The Court must now clarify that single-trait comparisons are, in the *Batson* analysis, "powerful" evidence of discrimination or "evidence of pretext," *Miller-El*, 545 U.S. at 241, 248; "particularly striking" or "significant" evidence of discrimination, *Snyder*, 552 U.S. at 483; or evidence that a prosecutor's race-neutral explanations are "difficult to credit," *Foster*, 136 S. Ct. at 1750.

This clarification is needed to guide the lower courts. Even after *Waring*, 364 N.C. at 475-91, where this Court did consider single-trait comparisons as potentially probative, the Court of Appeals has continued to rely on the outdated reasoning of *Bell*, *Porter*, and *Williams*. *See, e.g., State v. McQueen*, 790 S.E.2d 897, 905 (N.C. Ct. App. 2016) (citing *Porter*, and stating, "[w]hen there are additional factors that distinguish jurors who are excused from those who are not, and the defendant cannot make a showing of pretext, the defendant fails to meet his burden of proving purposeful discrimination.").

The cases before the Court exemplify the pressing need for clarification regarding single-trait juror comparisons. In *State v. Bennett*, in his brief to the Court of Appeals, Bennett argued that the prosecutor engaged in racially disparate treatment by justifying the strike of a black juror with the fact that he was the

victim of a crime, while the State accepted several white jurors who were also crime victims. *Bennett*, No. COA17-1027, Defendant's Brief, p. 15. Even though the U.S. Supreme Court has recognized this type of racially-disparate treatment as evidence of discrimination, the Court of Appeals' opinion failed to even mention the evidence in its opinion. *See State v. Bennett*, 821 S.E.2d 476, 480-83 (N.C. Ct. App. 2018).

The Court of Appeals engaged in a similar misapplication of *Batson* in *State v. Hobbs*, 817 S.E.2d 779 (N.C. Ct. App. 2018). The panel in *Hobbs* rejected comparative juror analysis, noting that "[w]hile some jurors had one factor in common with [black juror] Landry, none presented the range and multiplicity of issues the State stated for challenging Landry." The panel relied on *Bell*, 359 N.C. at 14, for the proposition that Hobbs had not shown disparate treatment because "the same combination of factors was not present in the white jurors whom the State passed." *Hobbs*, 817 S.E.2d at 788 (internal quotations omitted); *see also id.* at 789 (again relying on the *Bell* requirement of identical jurors as to juror McNeill). However, in light of *Miller-El*, the decision in *Bell* is no longer good law. The Court must take action to end this confusion in the lower courts.

IV. In addition to enforcing existing federal mandates, the Court should adopt safeguards against jury discrimination that are more rigorous than *Batson*.

The Court should view the preceding discussion of federal law as only the first, minimal steps needed to address jury discrimination in North Carolina. The MSU, Wake Forest, and Pollitt & Warren studies revealed — through examination of hundreds of cases, thousands of strike decisions, and three decades of experience

— that racial bias in North Carolina jury selection is a problem of significant magnitude that has gone unaddressed by the state courts. At the very least, the Court must respond by enforcing robust aspects of *Batson* that have previously been neglected in this state.

However, the evidence of persistent jury discrimination should move the Court — under the state constitution, or in the exercise of its own discretion — to go beyond the minimum protections offered by the *Batson* framework.

A. The U.S. Supreme Court's decision in *Batson* to reshape its own jurisprudence, after *Swain* was ineffective, provides a model for this Court to follow.

In *Batson*, the Court explained that in *Swain v. Alabama*, 380 U.S. 202 (1965), it had recognized that a "State's purposeful or deliberate denial to [black citizens] on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Batson*, 476 U.S. at 84 (quoting *Swain*, 380 U.S. at 203-04). *Swain* created "a presumption that [a prosecutor] properly exercised the State's challenges" in an individual case, but held that a defendant "could make out a prima facie case of purposeful discrimination" if, "in case after case," the State peremptorily removed qualified black jurors, "with the result that no [black citizens] ever serve on petit juries." *Batson*, 476 U.S. at 91-92 (quoting *Swain*, 380 U.S. at 221-23). Lower courts, "following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause." *Batson*, 476 U.S. at 92. The *Batson* Court observed that *Swain* "ha[d] placed on defendants a crippling burden of

proof" which rendered "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." 476 U.S. at 92-93.

To illustrate its point, the Court discussed a Second Circuit decision, *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984). *Batson*, 476 U.S. at 92 n.17. In *McCray*, the federal court described the legal standard as "mission impossible," and, surveying appellate case law, found that "almost no . . . defendants in nearly two decades since the *Swain* decision have met this standard of proof . . . ." *Id.* at 1120. The court in *McCray* pointed to a treatise that noted the "*Swain* standard [was] not found satisfied in any case from any jurisdiction." *Id.* at 1120 n.2. It was against this backdrop that the U.S. Supreme Court found it necessary in *Batson* to "reject this evidentiary formulation as inconsistent with [Equal Protection] standards . . . ." *Batson*, 476 U.S. at 93.

This Court faces the same challenge the U.S. Supreme Court addressed when it moved from *Swain* to *Batson*. The obstacles North Carolina courts have erected to *Batson* relief over the past three decades have resulted in the state appellate courts turning away every single litigant who has ever claimed discrimination against a juror of color. Now, as in *Batson*, the Court should take steps to correct the mission impossible it has created for discrimination claims, and do so by exercising its authority to go beyond the minimum protections afforded under federal law.

B. The Court should establish jury discrimination safeguards more robust than *Batson* under the state constitution or in its inherent discretion.

It is this Court's duty to effectuate state constitutional guarantees. Article I, section 26 of the North Carolina Constitution provides, in a unique provision not found in the federal constitution, that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." This Court has ruled that Article I, section 26 provides protection from jury discrimination that is independent of federal equal protection. In *State v. Cofield*, 320 N.C. 297 (1987), the Court found "that Article I, section 26 was adopted at the same time as the equal protection language found in Article I, section 19, yet was not considered redundant." 320 N.C. at 302 n.3. The Court also found that race discrimination in the selection of grand jury foreperson violated Article I, section 26 as a matter of state law, independent of the separate state and federal constitutional equal protection provisions. 320 N.C. at 301; *see also id.* at 311 (Mitchell, J., concurring) (explaining that Article I, section 26 is, by itself, an adequate and independent basis for precluding race discrimination in grand jury foreperson selection).[18]

Because Article I, section 26 is independent of equal protection doctrine, it does not include the equal protection requirement to prove purposeful or intentional

[18] Elsewhere, the Court has said Article I, section 26 is coextensive with *Batson*. *See Waring*, 364 N.C. at 474 ("Our review of race-based or gender-based discrimination during petit jury selection has been the same under both the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution."). But the Court only made this statement in passing, without any analysis of the separate provisions, or any indication that the parties raised and briefed the issue.

discrimination. Rather, the state provision is "an absolute guarantee" that the justice system "be free of both the reality and the appearance of racism, sexism and other forms of discrimination . . . ." *Cofield*, 320 N.C. at 310 (Mitchell, J. concurring). It protects against even a perception of bias, in addition to the actual bias at play in equal protection claims. *Cofield*, 320 N.C. at 302 ("the judicial system . . . . must also be *perceived* to operate evenhandedly.") (emphasis in original). *Compare Foster*, 136 S. Ct. at 1748 (noting that *Batson* claims require "evidence of intent") (citation omitted). As such, Article I, section 26 requires protection against peremptory strike discrimination that goes beyond the minimum set by *Batson*'s equal protection framework, and provides the Court with a ready mechanism for enforcing the ban on racial bias in jury selection.

But even if the Court declines, in its discretion, to reach the state constitutional issue, the Court should nevertheless consider and adopt protections beyond *Batson* under its commission or rulemaking authority. Just as former Chief Justice Martin convened a commission in 2015 to undertake a comprehensive review of North Carolina's judicial system, so too would it be appropriate for this Court to convene a commission to study new ways of addressing racial disparities in jury selection and other areas of the law. Other state supreme courts have done just that.[19] Similarly, pursuant to its authority under N.C. Gen. Stat. § 7A-34, "to

[19] *See* National Center for State Courts, listing state court commissions on racial bias from 23 states and the District of Columbia, available at: https://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/State-Links.aspx

prescribe rules of practice and procedure for the superior and district courts," the Court could study new rules to incorporate into the General Rules of Practice for the Superior and District Courts, just as the Washington Supreme Court did recently with its adoption of rules to be applied when parties argue a peremptory strike is race-based. *See* Washington General Rule 37.[20]

Whatever course the Court chooses — rooted in the state constitution, or its rulemaking or commission authority — the Court must take steps "to develop solutions" to address the fact "that race and racial bias affect outcomes in the criminal justice system and matter in ways that are not fair, that do not advance legitimate public safety objectives, and that undermine public confidence in our criminal justice system." Research Working Group & Task Force on Race, the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U. L. Rev. 623, 626 (2012).

C. The Court should look to Washington Rule 37 as a guide for new jury discrimination safeguards that forcefully ensure North Carolina juries are selected without regard to race.

In 2018, the Supreme Court of Washington adopted a framework for addressing claims of peremptory strike discrimination which includes a series of new approaches. The Court should implement these approaches in North Carolina to enforce Article I, section 26. Alternatively, the Court should study the Washington approach through a commission or rulemaking process.

---

[20] The Washington State Court General Rules, including Rule 37 governing peremptory strikes, are available online at: https://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=GR

The Washington rule is exhaustive and has several components. Amici believe the rule as a whole would most effectively enforce this state's Article I, section 26. However, the Court may also consider implementing one aspect of the Washington rule at a time, as the Court finds appropriate in a given case. Whichever route the Court chooses, Amici urge consideration of Washington's approach because it addresses specific problems in North Carolina, as revealed by the MSU, Wake Forest, and Pollitt & Warren studies.

1. "Objective observer" standard.

The Washington rule adopts an "objective observer" standard for adjudicating claims of peremptory strike discrimination, which provides in part: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. *The court need not find purposeful discrimination to deny the peremptory challenge*." Washington General Rule 37(e) (emphasis added).

Thus, one major distinction between the Washington rule and federal law is that *Batson* addresses only purposeful discrimination, while the Washington rule eschews that limitation by holding that "an objective observer is aware [of] implicit, institutional, and unconscious biases, in addition to purposeful discrimination . . . ." Rule 37(f); *see also* Grosso & O'Brien, *supra* at 1535 (explaining that "the [Supreme] Court designed the *Batson* regime to counter intentional discrimination. [But] [s]ignificant psychological research suggests that racial bias can operate below the

level of conscious awareness to affect people's perceptions and behaviors.") (citations omitted).[21]

The Court should thus adopt the "objective observer" standard because it confronts an aspect of peremptory strike discrimination that *Batson* does not. This approach is consonant with the command of Article I, section 26 that North Carolina courts must not only guard against actual bias, but also ensure the judicial system is "perceived to operate evenhandedly" in order "to command the respect and support of those subject to its jurisdiction." *Cofield*, 320 N.C. at 302. It is also consistent with the findings of Chief Justice Martin's Commission that the judiciary must do more to address widespread perceptions of unequal treatment based on race. *See* Commission Final Report, p. 18 ("Eliminating the possibility of bias in the decisions that courts make is an essential component of promoting fairness in any court system.").

The "objective observer" standard's acknowledgment of "institutional" racial bias, *see* Rule 37(f), is also consistent with conditions in North Carolina. The N.C. Conference of District Attorneys program training prosecutors to respond to *Batson* objections with vague and generic explanations demonstrates that resistance to

---

[21] The North Carolina Court of Appeals has recognized implicit bias by holding that it is a proper subject of voir dire in cases where it is related to a material issue. *See State v. Crump*, 815 S.E.2d 415, 422-25 (N.C. Ct. App. 2018) (citing, at n.2, Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. Irvine L. Rev. 843, 846 (2015) ("Calling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make.")). *Crump* is now before this Court for review in No. 151PA18.

Batson's mandate is institutionalized in this state. So too, the far-reaching findings of the MSU, Wake Forest, and Pollitt & Warren studies prove that racial bias in North Carolina is entrenched and pervasive.

The Washington Supreme Court deemed this change to an "objective observer" standard so fundamental for meaningful evaluation of juror discrimination that it applied the standard retroactively under its broader state power to implement the guarantee of equal protection. *State v. Jefferson*, 192 Wash.2d 225, 242, 249-50 (2018). This Court should do the same.

2. Abolition of the prima facie case.

The Washington rule does away with the prima facie stage of analysis under *Batson*, providing instead that "[u]pon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised." Rule 37(d).

This approach is warranted in North Carolina because statistical disparities uncovered by the MSU and Wake Forest studies show racial bias has permeated jury selection in vast swaths of cases across the state for at least two decades. Given the frequency with which racial bias affects North Carolina criminal trials, it only makes sense to ask parties to explain the reasons for their strikes so courts can address claims with all available information. *See also Johnson*, 545 U.S. at 172 ("counsel[ing] against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.") (citations omitted).

Moreover, the Pollitt & Warren study demonstrates that prima facie review of *Batson* claims in this state has too often terminated the inquiry prematurely at step one. Pollitt & Warren, *supra* at 1965 (finding that of fifty cases raising a prima facie *Batson* issue on appeal, the North Carolina appellate courts have only found the prima facie case met five times). This record should lead the Court, as in Washington, to do away with the prima facie requirement.

3. Disallow strikes if race is a factor to any degree.

Under the Washington rule, if "an objective observer *could view* race or ethnicity *as a factor* in the use of the peremptory challenge, then the peremptory challenge shall be denied." Rule 37(e) (emphasis added). This standard prevents race from tainting strike decisions to any degree, and offers more robust protection than U.S. Supreme Court law, which only asks whether a strike was motivated in "substantial part" by race. *See Snyder*, 552 U.S. at 485 (2008) (applying the "motivated in substantial part" standard); *Flowers*, 2019 WL 2552489, at *4 (same); *Waring*, 364 N.C. at 492 (same, and citing *Snyder*). Put another way, the Washington rule tolerates no racial bias in jury selection, while federal law tolerates some.

Absent this rule, North Carolina courts have permitted convictions to stand even when prosecutors admitted their discriminatory intent, or when trial courts found evidence of such intent. *See, e.g., White*, 131 N.C. App. at 740 (where prosecutor admitted he struck two jurors because they were "[b]oth black females," rejecting *Batson* claim because race was not the "sole factor"); *State v. Bell*, No. 01

CRS 2989-91 (Onslow County Dec. 13, 2012) (denying post-conviction *Batson* claim where the prosecutor submitted an affidavit admitting he struck a female juror on account of gender; the order is on file with the authors of this brief); *State v. Golphin*, 352 N.C. 364 (2000) (denying a *Batson* claim even though the trial court rejected the prosecutor's claim that a black juror had a poor demeanor, and even though the trial court found another reason the State gave was not "appropriate for . . . the exercise [of] a peremptory challenge."); *Moore*, 2016 WL 1013330, at *5 (denying a *Batson* claim even though the Court of Appeals found the prosecutor "mischaracterized" a juror's answer).

Contrary to these cases, the Washington rule recognizes race should play no part whatsoever in peremptory strikes. The Court should adopt this standard here.

4. Disallow "race-neutral" reasons for strikes that are historically associated with race-based strikes.

The Washington rule provides that certain explanations that are "historically . . . associated with improper discrimination . . . are presumptively invalid reasons for a peremptory challenge." These include "(i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker." Rule 37(h).

Rule 37(h) should be adopted in North Carolina because the MSU study reveals that these types of ostensibly "non-racial" explanations for strikes in fact do

not explain racial disparities. The MSU study removed from their data set all venire members who expressed reservations about the death penalty, were unemployed, had been accused of a crime or had a close relative accused of a crime, or knew any trial participant. Even after removing jurors with these traits, MSU found that "disparities identified through the unadjusted analysis persisted in each and every subset . . . ." Grosso & O'Brien, *supra* at 1551. When the researchers removed from the data all venire members with any one of the above characteristics, they still found that the remaining black venire members were twice as likely to be struck. *Id*. at 1552.

The Court can conclude from this data that these reasons — frequently cited by prosecutors and courts as proper, "race-neutral" justifications for strikes — are not the true reasons for striking jurors of color and have historically been associated with improper discrimination. The Court should therefore adopt Rule 37(h), including the additional "race-neutral" factors identified by the MSU data that are associated with discrimination.

5. Suspicion of demeanor-based reasons for strikes.

Finally, the Washington rule acknowledges that specific reasons for peremptory strikes "have historically been associated with improper discrimination," and therefore requires parties to provide "reasonable notice" if they intend to rely on these reasons, which include demeanor-based explanations: "the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided

unintelligent or confused answers." Rule 37(i). "A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge." *Id*.

The statewide North Carolina training program coaching prosecutors to rely on demeanor and "body language" supports the need for Rule 37(i) in this state. It is routine for courts to unquestioningly credit demeanor-based justifications. *See e.g.*, *White*, 349 N.C. at 549 (no error where prosecutors claimed to have struck jurors in part because they "sat with [their] arms crossed"); *State v. Robinson*, 336 N.C. 78, 95 (1994) (no error where jurors allegedly answered questions "with [their] arms folded"); *State v. Lyons*, 343 N.C. 1, 12 (1996) (jurors were allegedly "leaning away" from the prosecutor); *State v. Smith*, 328 N.C. 99, 125 (1991) (jurors were allegedly "nervous,"); *State v. Floyd*, 115 N.C. App. 412, 415 (1994) ("head-strong"); *State v. Gaines*, 345 N.C. 647, 668 (1997) ("softspoken"); *State v. Bonnett*, 348 N.C. 417, 434 (1998) ("belligerent"); *State v. Jackson*, 322 N.C. 251, 255 (1988) ("hostile"); *State v. Locklear*, 349 N.C. 118, 139 (1998) ("smiling").

When *Batson* was decided, Justice Marshall predicted the risk that "[a] prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported." *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

The Court should guard against this difficulty in North Carolina by adopting Washington's Rule 37(i), subjecting demeanor reasons to special scrutiny.

CONCLUSION

North Carolina's thirty-year failure to enforce *Batson* has nullified the ability of defendants to ensure their juries are selected without regard to race. North Carolina courts routinely misunderstand or misapply the law. They routinely scour the record for any possible reason to justify a finding of no discrimination. They routinely fail to acknowledge entire categories of evidence the U.S. Supreme Court has found probative. It is long past time for this Court to chart a new path forward.

The State may urge the Court to ignore patterns of race-based jury exclusion, and instead focus on "some pretextual reason — any reason — that the prosecutor can later articulate to justify" removing a juror of color. *Flowers*, 2019 WL 2552489, at *14. That approach is how North Carolina got here. The MSU study. The Wake Forest study. The Pollitt & Warren study. Thousands of jurors, across hundreds of cases, over thirty years. This evidence "cannot be considered in isolation in this case." *Flowers*, 2019 WL 2552489, at *16. "[T]he overall context here requires skepticism of the State's" record. The Court "cannot just look away." *Id.*

Amici ask the Court to issue opinions in *Bennett* and *Hobbs* that survey current *Batson* case law and enforce the required federal constitutional standards, as outlined above. Amici also ask the Court to adopt Washington Rule 37, in whole or in part, to provide safeguards against jury discrimination that are stronger than the *Batson* framework. Amici finally ask the Court to find race discrimination

violations in both cases, or in the alternative, find the Court of Appeals' reasoning in both cases wanting, and remand for further review under proper standards.

Respectfully submitted on June 28, 2019.

/s/ David Weiss
David Weiss
Center for Death Penalty Litigation
123 W. Main Street, Suite 700
Durham, NC 27701
(919) 956-9545
NC State Bar No. 35647
dcweiss@cdpl.org

Pursuant to N.C. R. App. P. 33(b), I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it:

/s/ James E. Coleman Jr.
James E. Coleman Jr.
John S. Bradway Professor of the Practice of Law
Duke University School of Law, Campus Box 90360
Durham, NC 27708
(919) 613-7057
NC State Bar No. 49600
jcoleman@law.duke.edu

/s/ Elizabeth Hambourger
Elizabeth Hambourger
Center for Death Penalty Litigation
123 W. Main Street, Suite 700
Durham, NC 27701
(919) 956-9545
NC State Bar No. 27868
elizabeth@cdpl.org

COUNSEL FOR AMICI CURIAE

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing amicus brief has been electronically filed pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, with the Clerk of the Supreme Court of North Carolina. I further certify that I served a copy of the brief by e-mail to:

Brent D. Kiziah
Assistant Attorney General
Brent@ncseaa.edu
Counsel for the State in *State v. Bennett*

Franklin E. Wells, Jr.
fwells.law@gmail.com
Counsel for Defendant in *State v. Bennett*

Amy Kunstling Irene
Special Deputy Attorney General
airene@ncdoj.gov
Counsel for the State in *State v. Hobbs*

Sterling Rozear
Assistant Appellate Defender
Sterling.P.Rozear@nccourts.org
Counsel for Defendant in *State v. Hobbs*

This the 28th day of June 2019.

/s/ David Weiss
David Weiss

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

North Carolina NAACP. Founded in 1909, the National Association for the Advancement of Colored People (NAACP) is the nation's oldest and largest civil rights organization. Its mission is to ensure the political, educational, social, and economic equality of all persons and to eliminate racial hatred and racial discrimination. Throughout its more than 100-year history, the NAACP has been at the forefront of the struggle to eliminate racial disparities and discrimination in the criminal justice system, including in jury selection and composition. It or its former affiliate, the NAACP Legal Defense and Education Fund, Inc., have filed amicus curiae briefs in many of the seminal jury discrimination cases. As a result of this history, the NAACP's experience has yielded lessons that may be useful to this Court in resolving the pending claims. The North Carolina State Conference of the NAACP is a non-partisan, non-profit organization with 101 active branches throughout the state.

North Carolina Association of Black Lawyers. The North Carolina Association of Black Lawyers (NCABL) consists largely, but not exclusively, of lawyers of color. It has long had a vital interest in matters which concern the intersection of race and criminal justice in North Carolina. NCABL engages in political advocacy, community partnership, and mentorship of attorneys, to advance justice for black people in North Carolina's legal system.

North Carolina Advocates for Justice. The North Carolina Advocates for Justice (NCAJ) is a nonprofit, nonpartisan, voluntary bar association whose approximately 2,500 members regularly represent defendants in criminal matters. NCAJ has established as one of its primary purposes ensuring that individuals charged with crimes are afforded all rights guaranteed by our state and federal constitutions. In furtherance of its mission, NCAJ regularly participates in the legislative process, prepares resource materials, conducts seminars, and appears as amicus curiae before the state and federal courts.

ACLU of North Carolina. The American Civil Liberties Union of North Carolina Legal Foundation (ACLU-NCLF) is a statewide, non-profit, non-partisan affiliate of the ACLU dedicated to defending the rights of all North Carolinians, with extensive experience litigating in state court under the North Carolina Constitution. In pursuit of this mission, the ACLU-NCLF engages in statewide criminal justice litigation and advocacy to end the mass incarceration of black and brown people.

ACLU Trone Center for Justice and Equality. The ACLU is a nationwide, nonprofit, nonpartisan organization with almost two million members dedicated to the principles of liberty and equality embodied in the Constitution. The Trone Center for Justice and Equality, one of three multi-disciplinary centers of the

national ACLU, focuses on the problems in the United States criminal justice system. The Trone Center includes the Racial Justice Program, the Criminal Law Reform Project, the National Prison Project, and the Capital Punishment Project. The ACLU has long been committed to the protections guaranteed by the U.S. and North Carolina constitutions, including the eradication of racial discrimination in jury selection.

Black Public Defender Association. The Black Public Defender Association (BPDA) is a part of the National Legal Aid & Defender Association. BPDA aims to improve the quality of defense provided to low-income communities across the United States by creating and maintaining a national network of skilled black public defenders that identify with and are committed to the populations they serve. BPDA is rooted in the recognition that creating and maintaining a national network of skilled black public defenders who identify with and come from the communities most disproportionately impacted by the criminal legal system is necessary to fight against racial bias in the justice system, and end mass incarceration.

Southern Center for Human Rights. The Southern Center for Human Rights (SCHR) is a non-profit, public interest law firm dedicated to protecting the civil rights and human rights of people in the criminal legal system in the southern United States. The Center represents individuals facing the death penalty, challenges institutional failures in the criminal courts, and engages in public advocacy with respect to criminal justice issues. More specifically, the Center has worked for decades to address the influence of racial bias in criminal trials. The Center represented the petitioners in *Snyder v. Louisiana*, 552 U.S. 472 (2008), and *Foster v. Chatman*, 136 S. Ct. 1737 (2016), both of which were capital cases in which the U.S. Supreme Court found race discrimination in jury selection and clarified the legal standards applicable to such claims.

Charles Hamilton Houston Institute for Race and Justice. The Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) at Harvard Law School was launched in 2005 by Charles J. Ogletree, Jr., Jesse Climenko Professor of Law. The Institute honors and continues the unfinished work of Charles Hamilton Houston, one of the twentieth century's most important legal scholars and litigators. Houston engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown v. Board of Education*. CHHIRJ's long-term goal is to ensure that every member of our society enjoys equal access to the opportunities, responsibilities, and privileges of membership in the United States. To further that goal and to advance racial justice, CHHIRJ seeks to eliminate practices or policies which compound the excessive policing, criminal sentencing, and punishment that created mass incarceration while simultaneously promoting investments in the communities that have been most deeply harmed by these policies. Given the racial disparities that characterize the entire criminal legal system, there are few issues as critical to our mission as reversing the persistent exclusion of African Americans from juries.

Center on Race, Inequality, and the Law at NYU. The Center on Race, Inequality, and the Law at New York University School of Law was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color. Accordingly, the Center uses public education, research, advocacy, and litigation to highlight and dismantle structures and institutions that have been infected by racial bias and plagued by inequality. The Center focuses, in part, on the intersection of race, bias, and the criminal legal system. In keeping with that focus, the Center supports efforts to eradicate racial discrimination in the selection of jurors as an essential part of the work needed to ensure the fair administration of criminal justice.

Promise of Justice Initiative. The Promise of Justice Initiative (PJI) is a non-profit organization founded in 2009 in New Orleans, Louisiana, to address issues of injustice. PJI, amongst other work, drafts policy papers and files amicus briefs in the state and federal courts, including the U.S. Supreme Court. This includes amicus briefs in death penalty cases: *Glossip v. Gross*, 135 S. Ct. 2726 (2015), *McCoy v. Louisiana*, 138 S. Ct. 1500 (2017), and *Brumfield v. Cain*, 135 S. Ct. 2269 (2015). PJI was a founding member of the Unanimous Jury Coalition, which engaged the broader community of Louisiana concerning the importance of full suffrage, especially given the history of discrimination against African Americans in jury service. At its core, PJI strives to educate citizens and courts about racial and religious discrimination in jury selection, and racial and geographic discrimination in first-degree murder charging decisions, and the connection between confidence in our justice system and safety in our communities.

National Association for Public Defense. This organization, NAPD, unites nearly 14,000 public defense practitioners across the fifty states. NAPD's mission is to ensure strong criminal justice systems, advocate for policies and practices that provide effective defense for indigent defendants, achieve system-wide reform that increases fairness for such defendants, and offer education and support for public defenders and public defender leaders. To that end, the NAPD plays a vital role in advocating for defense counsel and the clients they serve by addressing issues of fairness and justice facing indigent criminal defendants.

National Association of Criminal Defense Lawyers. The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, and files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts.

LatinoJustice, PRLDEF. LatinoJustice PRLDEF (LJP) is a national not-for-profit civil rights legal defense fund that has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. Since its founding in 1972 as the Puerto Rican Legal Defense & Education Fund, LJP's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate new Latino community leaders, and to engage in and support law reform cases around the country addressing basic civil rights in the areas of criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting and voting rights. LJP seeks to ensure that Latinos are not illegally or unfairly affected by discriminatory policies and practices, particularly by government actors.

Anti-Defamation League. The Anti-Defamation League (ADL) was founded in 1913 to combat anti-Semitism and all forms of bigotry, to defend democratic ideals, and to secure justice and fair treatment to all. ADL is vitally interested in protecting the civil rights of all persons and ensuring that each individual receives equal treatment under the law regardless of race, sex, sexual orientation, gender identity, ethnicity, or religion. Consistent with its mission, ADL is committed to working to eliminate racial bias in the criminal justice system.

Fair and Just Prosecution. Fair and Just Prosecution (FJP), brings together newly elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. These recently elected leaders — and the vision they share for safer and healthier communities — are supported by FJP's ongoing information sharing, research and resource materials, opportunities for on the ground learning, in-person convenings, technical assistance, and access to national experts. FJP is enabling a new generation of leaders to move beyond past incarceration-driven approaches and develop policies that promote a smarter and more equitable justice system.