No. 101PA15-3 DISTRICT 10

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake
	)	14 CRS 202101
	)	
CHRISTOPHER A. CLEGG	)	

****

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE COMMON CAUSE AND DEMOCRACY NORTH CAROLINA

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TO THE SUPREME COURT OF NORTH CAROLINA:

Pursuant to N.C. R. App. P. 28(i), Common Cause and Democracy North Carolina seek permission to file an amicus curiae brief in support of defendant Christopher A. Clegg. The proposed brief is attached to this motion, and has been filed within the time allowed for the filing of Mr. Clegg's principal brief. Through counsel, Mr. Clegg has consented to the filing of the amicus brief.

INTEREST OF AMICI CURIAE

Both Amici are interested in this case because it involves the issue of race discrimination in jury selection, which directly affects citizens who are summoned and seek to serve on juries throughout North Carolina. Exclusion of citizens from jury service on the basis of race also affects the fair administration of the criminal

legal system, an area of substantial concern to Amici as well as the public and this Court.

Common Cause is a nonpartisan, nonprofit organization with more than 1.2 million members and supporters nationwide, and more than 30,000 in North Carolina. Common Cause is dedicated to upholding the core values of American democracy. We work to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process. Common Cause fights to end mass incarceration as part of its longstanding commitment to fighting for a democracy that works for everyone. Common Cause also seeks to promote civic engagement among students of color at Historic Black Colleges and Universities across the country.

Democracy NC is a nonpartisan, nonprofit organization which conducts research, organizing, public education, and advocacy in order to increase voter participation — put simply, it aims to maximize the number of citizens at the polls and the number of eligible ballots counted. The organization has supporters throughout North Carolina who are registered voters and who vote in North Carolina elections. Democracy NC also works for pro-democracy reforms that improve government accountability and ethics and address the issue of money in politics. Through original research, policy advocacy, grassroots organizing, civic engagement, and leadership training, Democracy NC seeks to achieve a government that is truly of the people, for the people, and by the people.

REASONS WHY AN AMICUS CURIAE BRIEF IS DESIRABLE

State v. Clegg involves issues of race discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986). After nearly a decade without addressing the issue in North Carolina, *see State v. Waring*, 364 N.C. 443 (2010), this Court has recently begun to revisit this important area of law. *See State v. Bennett*, 843 S.E.2d 222 (N.C. 2020); *State v. Hobbs*, 841 S.E.2d 492 (N.C. 2020). The Court's decisions in *Bennett* and *Hobbs*, clarifying the law and remanding jury discrimination claims for further review, represent significant strides in reinvigorating *Batson* jurisprudence in this state.

But North Carolina remains an outlier. Its appellate courts still, in more than thirty years since *Batson* became law, have yet to recognize a single instance of discrimination against a juror of color. *See* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957 (2016). Meanwhile, state appellate courts around the country have reversed convictions where needed to remedy *Batson* violations. Several state high courts have also convened study commissions to examine ways to address the problem even more vigorously than the U.S. Supreme Court requires. *See* Brief of Amici Curiae Common Cause and Democracy NC, pp. 28-31, 35-38 (attached).

This case comes to the Court on a fully-developed record, following a *Batson* hearing at trial, appellate review in the Court of Appeals, and an additional *Batson* hearing in the trial court after this Court remanded summarily in light of *Foster v.*

Chatman, 137 S. Ct. 1737 (2016). As a result, this is an appropriate case for the Court to address important issues of law. In their brief, Amici call on the Court to continue bringing its *Batson* jurisprudence into compliance with the mandates of the U.S. Supreme Court, and to further consider, as other state appellate courts have, whether alternative approaches to jury discrimination should be implemented as a matter of state law.

ISSUES OF LAW TO BE ADDRESSED IN THE AMICUS CURIAE BRIEF

Amici address four subjects in their brief: the evidence of jury discrimination throughout North Carolina; the history demonstrating that the rights to vote and serve on juries are intertwined and complementary fronts in efforts to rid the legal system of racism; the aspects of U.S. Supreme Court precedent relating to jury discrimination which this Court can apply in this case to strengthen its oversight of the issue; and the reasons why this Court should begin a process to study and adopt protections against jury discrimination that are stronger than the minimum that federal law requires.

AMICI'S POSITION WITH RESPECT TO ISSUES OF LAW

With respect to the issues of law briefed by Mr. Clegg, Amici support his request for a new trial on the basis that the State's peremptory strikes against two Black jurors in his case were exercised in part on the basis of race.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant them permission to file an amicus curiae brief in support of Mr. Clegg.

Respectfully submitted on July 29, 2020.

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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:

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing motion 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 motion by e-mail to:

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Submitted on July 29, 2020.

/s/ David Weiss
David Weiss

No. 101PA15-3 DISTRICT 10

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BRIEF OF AMICI CURIAE
COMMON CAUSE AND DEMOCRACY NORTH CAROLINA

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BRIEF OF AMICI CURIAE
COMMON CAUSE AND DEMOCRACY NORTH CAROLINA[1]

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Pursuant to N.C. R. App. P. 28(i), Amici Curiae submit this brief in support of defendant Christopher A. Clegg, and adopt the statement of the case and facts as set forth by Mr. Clegg in his principal brief.

The Amici supporting Mr. Clegg are organizations working to safeguard our democracy through voter education, the protection of voting rights, removal of barriers to civic participation, and campaigns to ensure that all people have an equal voice in shaping our government. These organizations – one focused on North Carolina and one working throughout the nation[2] – seek to protect democracy and to ensure that ours is truly a government of, by, and for all the people.

INTRODUCTION

This Court is all too familiar with the historic and continuing exclusion of African Americans and other people of color from North Carolina juries. In 2020 alone, the North Carolina Supreme Court has already reviewed and remanded

[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: Emily Coward, Project Attorney for Public Defense Education, UNC School of Government; Lindsey Cohen, Duke Law J.D. candidate, 2022.

[2] Common Cause is a national organization with an active affiliate in this state, known as Common Cause North Carolina.

individual claims of jury discrimination, and revisited the state's groundbreaking legislative response to race discrimination in capital trials, the Racial Justice Act.[3]

The Court's decisions in those cases are important and much-needed first steps in the effort to address the continuing problem of prosecutors disproportionately removing Black North Carolinians from jury service. As is the case with voter suppression, the harm caused by jury discrimination is incalculable in scope. It undermines the legitimacy of our democracy, confers second-class citizenship on people of color, and denies defendants their right to a jury selected without regard to race.

But the Court's recent decisions should mark a beginning, not an end, to its work. North Carolina remains the only state in the South whose appellate courts have never found race discrimination against a juror of color. That record must end. As in other areas of law — such as recent federal court decisions striking down racially-discriminatory North Carolina election laws — the only way for this Court to ensure compliance with the ban on race discrimination in jury selection is to conduct robust appellate review, and reverse convictions where appropriate.

In this case, it is more than appropriate. It is necessary. When asked to explain his strike of a Black juror, Mr. Clegg's prosecutor gave only two reasons, neither of which, the trial court held, could be verified or supported by the record. In these circumstances, where a prosecutor is asked to provide verifiable, race-neutral

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[3] *See State v. Campbell*, 842 S.E.2d 601 (N.C. 2020); *State v. Bennett*, 843 S.E.2d 222 (N.C. 2020); *State v. Hobbs*, 841 S.E.2d 492 (N.C. 2020); *State v. Ramseur*, 843 S.E.2d 106 (N.C. 2020); *State v. Burke*, 843 S.E.2d 246 (N.C. 2020).

reasons for removing a Black juror, but is unable to identify even one, it should not be difficult for this Court to hold there is an impermissible risk of discrimination, and grant a new trial.

This brief proceeds in four parts. Section I outlines the evidence of jury discrimination throughout North Carolina. Section II, consistent with the central mission of Amici, explains how the long civil rights struggle to gain full access to the ballot box has been intertwined with efforts to gain equal access to the jury box. Thus, this section demonstrates that these rights are complementary fronts in the ongoing fight to rid the legal system of racism.

In Section III, Amici discuss three aspects of established U.S. Supreme Court precedent relating to jury discrimination, which previously have received too little attention in North Carolina jurisprudence, and which this Court can apply now, in this case, to strengthen our state's civil rights protections. First, the Court must clarify that the clear error standard of review does not involve such excessive deference that it precludes any chance of appellate relief. Second, the Court should make plain that a party need not identify explicit evidence of race-consciousness to prevail on a claim of jury discrimination. Third, the Court must hold that the preponderance burden of proof is a low threshold that only requires parties to show a significant risk of bias, and does not require definitive proof of racism. Correctly applied, these three principles will help end North Carolina's era of providing only an appearance of protection against racial bias in jury selection.

Finally, in Section IV, Amici call on the Court to join other state high courts around the nation that have recognized the need to study and adopt protections against jury discrimination that are even stronger and more vigorous than the baseline set by the U.S. Supreme Court.

ARGUMENT

I. North Carolina has a well-documented and widespread problem with race discrimination in jury selection.

Over the last three decades, despite the promise of *Batson v. Kentucky*, 476 U.S. 79 (1986), to end the discriminatory use of peremptory challenges, extensive research confirms that racial bias continues to infect North Carolina jury selection.

As of 2010, thirty of the 159 prisoners on death row in North Carolina had been sentenced by all-white juries, including four defendants from counties with Black populations of at least 20%, and another five from counties with Black populations ranging 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, 2041 n.33, 2110 n.356 (2010).

In 2012, researchers at Michigan State University examined more than 7,400 peremptory challenges used by prosecutors in 173 capital cases between 1990 and 2010. The study concluded that prosecutors struck 53% of the eligible Black jurors but only 26% of all other eligible jurors. When the defendant was Black the strike disparity widened, with eligible Black jurors struck at a rate of 60% and all other eligible jurors at a rate of only 23%. Even after controlling for 65 race-neutral factors that could account for the variation in the State's strike decisions, the

disparity remained statistically significant. *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, 1548–53 (2012).

In 2018, a research team at the Wake Forest School of Law, including two former federal prosecutors, replicated the MSU study's findings in their own analysis of nearly 30,000 potential jurors in North Carolina non-capital felony trials from 2011 to 2012. On average, the removal ratio of prosecutors striking Black jurors compared to white jurors was 2.0, with prosecutors striking 16% of Black jurors but only 8% of white jurors. Ronald F. Wright, Kami Chavis, and Gregory Scott Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue,* 2018 U. ILL. L. REV. 1407, 1425 Table 2 (2018).

Despite these statistical patterns, in over thirty years since *Batson* was decided, North Carolina appellate courts have never found an instance of discrimination against a juror of color. 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). By contrast, Pollitt and Warren found that every other state appellate court system within the Fourth Circuit has found instances of discrimination under *Batson*. *See* Pollitt & Warren, *supra* at 1983–84, and Table 10. Similarly, Bryan Stevenson's Equal Justice Initiative issued a report in 2010 that canvassed court opinions across the South and found scores of *Batson* reversals, including over 80 in Alabama, 33 in Florida, and about ten each in

Mississippi, Arkansas, Louisiana, and Georgia. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, 19 (2010).[4] It is long past time for this Court to end North Carolina's ignominious status as the only Southern state that has yet to grant even a single new trial due to race discrimination against a juror of color.

II. As in the area of voting rights, North Carolina courts must end discrimination in jury selection in order to protect the full citizenship rights of people of color.

Jury service, like the right to vote, is an essential aspect of citizenship. Voters express their political voice through the ballot box, and jurors express the voice of the people in matters of justice. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) ("The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."). "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). Voting enables the promise of democratic representation, and "[t]he jury is a tangible implementation of the principle that the law comes from the people." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017).

[4] https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf

A. Voting and jury service are parallel aspects of citizenship, which, historically, have been considered complementary civil rights.

The U.S. Supreme Court has stressed that, "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Throughout our history, these two avenues of civic participation have been inextricably entwined. "[T]he voting-jury service linkage was recognized by the Framers in the 1780s, by those responsible for drafting the reconstruction amendments and implementing legislation, and still later by authors of twentieth century amendments that protect various groups against discrimination in voting." Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 206 (1995); *see also* Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105 (2014) ("At the founding, jury service and voting were twin political rights, equal in stature and importance.").

Notably, the jury was a central concern of abolitionists. While the jury loomed large in the "political philosophy of the colonial era, juries became even more important during the abolitionist movement." James Forman, *Juries and Race in the Nineteenth Century*, 113 YALE L. J. 895, 897 (2004) (observing that "the abolitionists' struggle against fugitive slave laws deepened their commitment to jury trial"). Frederick Douglass wrote in 1881 that in order for freed Black people to become full citizens, they would need to obtain "the liberties of the American people," including "the Ballot-box [and] the Jury-box . . . ." FREDERICK DOUGLASS,

LIFE AND TIMES OF FREDERICK DOUGLASS, HIS EARLY LIFE AS A SLAVE, HIS ESCAPE FROM BONDAGE, AND HIS COMPLETE HISTORY TO THE PRESENT TIME 386 (DeWolfe & Fiske Co., New Revised Ed., 1892).

Following abolition, the ballot box became a central focus of the movement to achieve full citizenship rights for Black people, as reflected in the passage of the Fifteenth Amendment. *See* WILLIAMS GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 59 (The Johns Hopkins Press 1965). Concurrently, the right to serve on a jury was also viewed as a cornerstone civil right during the Reconstruction era:

> After the Civil War, all-white Southern juries refused to indict or convict white defendants accused of crimes against blacks. In response, Reconstruction Republicans did not abandon the jury trial. Instead, they worked to eliminate barriers to black participation in the legal system, with a view toward ultimately securing the right of blacks to serve as jurors. They had come to recognize that the exclusion of blacks from juries made it impossible to achieve justice in Southern courts.

Forman, *supra* at 897.

During the Civil Rights Movement as well, as lawyers and activists fought to free the ballot box from racist barriers, they recognized the central role that jury service played in Black citizens attaining full citizenship:

> Jury service became one of the central battlegrounds in the legal campaign to challenge desegregation laws. The National Association of Colored People, Legal Defense Fund (NAACP-LDF) chose discriminatory jury practices to lead its litigation strategy in the South. Charles Hamilton Houston, the architect of the civil rights moment won his first Supreme Court case on a jury discrimination challenge. The civil rights leaders

> succeeded in getting the Federal Jury Selection Act of 1968 passed, which reaffirmed the policy of the United States that "all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

Ferguson, *supra* at 1126.

Thus, barriers to voting and jury service have both imposed second class status, and the protection of both rights is critical to attaining full and empowered citizenship for people of color.

B. Historically, both voting and jury service have been targeted by efforts to suppress Black civic and political participation.

For most of United States history, both voting and jury service were restricted to discrete groups of white men. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 2 (Basic Books 2000). Abraham Lincoln himself, during the fourth Lincoln-Douglas Debate in 1858, declared he was never "in favor of bringing about in any way the social and political equality of the white and black races," which Lincoln recognized would include "making voters [and] jurors of negroes . . . ."[5]

As explicitly-discriminatory laws began to change, these dual pillars of citizenship became primary targets of campaigns to suppress Black civic participation. *See* Thomas Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1593 (2019) (describing the struggle against jury discrimination as the "counterpart

[5] https://www.nps.gov/liho/learn/historyculture/debate4.htm

to the legal struggles against disenfranchisement and de jure segregation" and observing the "centrality of the jury to politics and power in the post-Reconstruction era").

These interconnected struggles are evident throughout the history of our state. The ratification of the Thirteenth Amendment in 1865 was countered by North Carolina's "Black Code," which aimed to replicate the controls of slavery by preventing freed African Americans from serving on juries, voting, bearing arms, and exercising other rights. Historian Laura F. Edwards describes the Black Code's purpose as ensuring that Black people would not "be confused with citizens . . . acquir[ing] only the duties and obligations, not the rights of freedom." Laura F. Edwards, *"The Marriage Covenant is at the Foundation of all Our Rights": The Politics of Slave Marriages in North Carolina after Emancipation*, 14 L. & HIST. REV. 81, 96 n.30 (1996).

Reconstruction ushered in a brief, hard-fought period of expanded access to both the ballot box and the jury box for African Americans. The Civil Rights Act of 1875 ostensibly outlawed racial discrimination in jury service and, in 1880, the U.S. Supreme Court overturned a West Virginia statute restricting jury service to white people. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (holding that racial discrimination in jury selection compromises the right of trial by jury and violates the Equal Protection Clause). However, throughout the South, constitutional, statutory, and judicial efforts to secure the rights of Black people to serve on juries were met with fierce resistance and were rarely enforced. "At precisely the same

moment that Southern white politicians labored to curtail democratic opportunities for Black voters at the ballot box, they invoked the rhetoric of democratic self-governance to justify the disempowerment of Black Southerners in the criminal law." Frampton, *supra* at 1614.

In North Carolina, the white supremacist backlash to Black civic participation during Reconstruction was vicious and swift. Around the turn of the century, "white supremacists . . . alter[ed] state law so as to disenfranchise black people[;]" while there were "more than a hundred and twenty-five thousand registered black voters in North Carolina in 1896 . . . only six thousand or so were still on the books by 1902." Caleb Crain, *City Limits: What a white-supremacist coup looks like,* THE NEW YORKER (April 27, 2020).[6] By the turn of the century, Black people in North Carolina had suffered brutal setbacks at the hands of white supremacists on many fronts, including the right to vote, run for office, and serve as jurors. Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 309, 371–75 (1998).

In the twentieth and twenty-first centuries, the connection between jury service and voting has only deepened. When Congress passed the Jury Selection and Service Act of 1968 requiring the use of voter registration rolls in populating jury lists, states including North Carolina followed suit. From that point on, voter rolls have been used as a primary source for North Carolina jury lists. *See State v.*

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[6] https://www.newyorker.com/magazine/2020/04/27/what-a-white-supremacist-coup-looks-like

Cornell, 281 N.C. 20, 35 (1972) (explaining the rewrite of Chapter 9 of the general statutes "creat[ed] a jury commission to act in lieu of the county commissioners [and] designat[ed] the voter registration records as a source for preparing jury lists."). The reliance on voter rolls in assembling master jury lists in North Carolina means that any racial disparities in voter registration are necessarily reproduced in the formation of North Carolina juries. *See* Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238, 245–47 (1994) (traditional source lists including voter rolls disproportionately exclude African Americans and Latinos).

This history should call on the Court to ensure that North Carolina's contemporary protections against jury discrimination are enforced to the fullest extent of the law.

C. The harm caused by jury and voter discrimination is diffuse and pervasive.

Discrimination in both the jury and voting contexts harms not only the individual discriminated against, but also undermines the rule of law and threatens core democratic principles:

> Exclusion of any person from [the jury] by reason of race does violence to centrally important constitutional ideals of equal access to government, quite apart from any particular effect on verdicts. In this respect, exclusion of jurors is like exclusion of voters: the exclusion of voters by reason of race does violence to constitutional ideals, whether or not the exclusion affects the outcome of any particular election.

Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 727 (1992); *see also* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection*, at 38 ("Excluding racial minorities from juries causes serious collateral consequences: the credibility, reliability, and integrity of the criminal justice system is compromised when there is even an appearance of bias and discrimination.").

This is not to understate the particularized harm suffered by individuals on the receiving end of juror or voter discrimination. When people are denied the right to vote or serve on a jury, they are relegated to a second-class citizenship echoing shameful and longstanding historical practices. *See* Sam Levine, *A Black Woman Faces Prison because of a Jim-Crow Era Plan to Protect White Voters*, THE GUARDIAN (Dec 16, 2019)[7] (Black North Carolinian Lanisha Bratcher was charged with "voter fraud" for voting while on probation under "a Jim Crow-era law that was intended to disenfranchise African Americans"; she did not know she was ineligible when she attempted to vote, but even when her rights are restored she doubts she will vote again as it "seems really dangerous"); *see also* Abbie Vansickle, *You Can Get Kicked Out of a Jury Pool for Supporting Black Lives Matter*, THE MARSHALL PROJECT (July 7, 2020)[8] (describing how potential juror Crishala Reed, in California, "felt targeted" when, as the only Black person in the jury box, she was

[7] https://www.theguardian.com/us-news/2019/dec/16/north-carolina-felony-vote-law-black-woman

[8] https://www.themarshallproject.org/2020/07/07/you-can-get-kicked-out-of-a-jury-pool-for-supporting-black-lives-matter

struck by a prosecutor: "It was a life-changing experience for me, personally."); *Miller-El v. Dretk*e, 545 U.S. 231, 237–38 (2005) (internal quotations omitted) ("prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.") (internal quotations omitted).

Just as anti-discrimination law in voting aims to ensure elected bodies represent and are accountable to communities of color, so too will preventing discrimination in jury selection help ensure that the criminal legal system becomes more accountable and responsive to these same communities. Indeed, North Carolinians are painfully familiar with the consequences of racial discrimination in both voting and jury service. The white supremacist voter suppression campaign of the early twentieth century succeeded in nearly eliminating Black voter registration and ushering in a 92-year period, from 1900-1992, in which no Black people were elected to the U.S. Congress from North Carolina. A Leon Higginbotham, Jr., Gregory A. Clarick, and Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1598 (1994). Similarly, efforts to block Black people from serving on North Carolina juries have been devastatingly successful. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 172–79 (First Vintage Books 1997). These campaigns are not historical relics but living legacies that haunt the elusive promise of equal access to juror and voting rights. *See* Wright, Chavis & Parks, *supra* at 1425 Table 2 (documenting that prosecutors, on average, strike Black jurors at twice the rate of qualified white

jurors); *NAACP v. McCrory*, 831 F.3d 204, 225 (4th Cir. 2016) (the "important takeaway" from the history of discriminatory voter suppression in North Carolina is "that state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day.").

Another way is possible. This Court already has taken notable steps toward strengthening the *Batson* standard in North Carolina. This case provides an opportunity for the Court to continue down this important road, by declaring unconstitutional the strikes of Viola Jeffreys and Gwendolyn Aubrey from Mr. Clegg's jury. Providing relief to Mr. Clegg will send a clear message to lower North Carolina courts and to the public that jury discrimination in North Carolina is incompatible with principles of democratic governance.

III. This Court should expand on the progress made in *Hobbs* and *Bennett* by, for the first time, ruling that the defendant has proven intentional discrimination against a juror of color, in violation of *Batson*.

The Court's recent rulings in *State v. Hobbs*, 841 S.E.2d 492 (N.C. 2020) and *State v. Bennett*, 843 S.E.2d 222 (N.C. 2020), took important and sorely needed first steps in infusing North Carolina's *Batson* jurisprudence with the vigor the U.S. Supreme Court demands. The Court clarified, for example, that at the prima facie stage of inquiry, the objecting party bears only a burden of production, not of persuasion; that when a party presents evidence of a historical pattern of discrimination, the trial court must explain how that evidence was considered; and that the State may not avoid scrutiny of its own conduct by raising irrelevant questions about the defendant's strike pattern.

In this case, the Court should expand on the progress made in *Hobbs* and *Bennett*. The Court has still never held that race discrimination against a citizen of color occurred in the *Batson* context, nor vacated a conviction on *Batson* grounds. Vactur here will send a strong message that North Carolina truly rejects jury discrimination.

In this section, Amici discuss three legal concepts which, if applied correctly, should lead the Court to end its three-decade record of never recognizing race discrimination in jury selection. First, under the clear error standard of review, the Court must cease affording excessive deference to trial court *Batson* rulings and demonstrate that deference does not by definition preclude relief.

Second, when evaluating Mr. Clegg's evidence to determine whether he met his burden of proof, the Court must make clear, as the U.S. Supreme Court requires, that a *Batson* claimant need not present explicit evidence of race-consciousness to prevail.

Third, under the preponderance of the evidence standard, prevailing on a *Batson* objection does not require definitive proof of discrimination. The party raising the objection need only show it is more probable than not that the strike was motivated in part by race. The Court should make plain to lower courts that this showing does not brand the party exercising the strike a bigot, but merely "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) (Liu, J., concurring) (citations omitted).

A. The clear error standard of appellate review, applicable to *Batson* claims, should not result in this Court giving excessive deference to trial court determinations.

As the Court recently explained in *Bennett*, *Batson* claims are reviewed on appeal for clear error, meaning the Court must determine whether, "on the entire evidence . . . [it is] left with the definite and firm conviction that a mistake has been committed." When applying this standard, "a reviewing court is not entitled to choose between two permissible views of the evidence . . . [but] deference does not by definition preclude relief under the clearly erroneous standard." *Bennett*, 843 S.E.2d at 231 (internal citations and quotations omitted).

Thus, there are two components to this mode of review. In the first, the appellate court affords a measure of deference to the trial court's first-hand observations of jury selection. But in the second — "deference does not by definition preclude relief" — there remains room for an appellate court to exercise its own judgment contrary to the trial court's decision.

North Carolina's history of appellate *Batson* review reveals that there has been far too much emphasis placed on the first component of the clear error standard, and far too little attention paid to the second. In *Thirty Years of Disappointment*, Pollitt and Warren carefully detail our state's *Batson* case law to show that, "in review of almost every *Batson* claim within the jurisdiction, the appellate courts rely on the proposition that . . . [trial court rulings should be given

great deference] and hold no violation without considered analysis of the claim." Pollitt & Warren, *supra* at 1978–83 (emphasis added).

The tendency of North Carolina appellate courts to over-emphasize deference to trial courts is at odds with U.S. Supreme Court precedent. In *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003), the Court chided the lower court for failing to "give full consideration to the substantial evidence" in support of the *Batson* claim. In *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005), the Court cautioned that "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*," which the Court explained in *Batson* was an ineffective approach to reducing jury discrimination.

The correct measure of deference to be applied to *Batson* claims is also illustrated by the U.S. Supreme Court's practical application of that standard to such claims. In *Miller-El v. Dretke*, the Court found a *Batson* violation even though it was a federal habeas case governed by federal statutory standards which the Court itself has described as "difficult to meet," "highly deferential," and "demand[ing] that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal citations omitted).

In *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019), when reviewing a *Batson* claim on direct appeal, the Court acknowledged the clear error standard and the deference it requires. But when engaging in its detailed factual analysis, not once did the Court even use the word "deference" in reaching its decision contrary to that of the lower state court, and granting a new trial.

Perhaps most relevant here, in *Snyder v. Louisiana*, 552 U.S. 472 (2008), the U.S. Supreme Court reviewed a *Batson* claim on review of the state direct appeal, under the clear error standard. Even though the Court applied what it described as a "highly deferential standard of review," it nonetheless found a *Batson* violation based exclusively on the fact that the prosecutor's explanation for striking a Black juror — that the juror's student-teaching would pose a hardship — was not persuasive given the circumstances of the case, and that the prosecutor passed two white jurors with similar hardships. *Id.* at 479.

There can be no debate that, had Mr. Snyder's fairly unremarkable claim — which did not include any explicit evidence of racism — been examined under North Carolina's *Batson* law of the past thirty years, it would have lost. And yet the U.S. Supreme Court granted relief by applying the very same standard of review that North Carolina courts have apparently believed, for three decades, precludes relief in every single case. In view of this U.S. Supreme Court law, North Carolina appellate courts must end their excessive deference to trial courts in the *Batson* context.

Indeed, courts and legal scholars who have studied the issue explain why appellate courts can and should have a robust role in reviewing whether peremptory strikes are based on race. For example, while it is true that trial courts are able to evaluate demeanor in person, it is equally relevant that face-to-face interaction with the litigants can actually pose an obstacle to accurate assessment of a *Batson* objection, owing to the social barriers associated with accusing another

person of 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")).

Moreover, when the question is race discrimination, courts should take special care not to over-rely on assessments of demeanor. Quite frequently, people who believe they are being accused of racism respond indignantly. For instance, here, the prosecutor responded to Mr. Clegg's *Batson* objection with: "I would tell you, first of all, I want to note that I think it's very offensive that there's an allegation being made that I'm excusing jurors for racial reasons." (T p 109).

But a vehement response does not necessarily correlate with innocent intent. To the contrary, passionate denials often accompany substantial evidence of discrimination. *See, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) ("Throughout all stages of this litigation, the State has strenuously objected that 'race [was] not a factor' in its jury selection strategy . . . . Indeed, at times the State has been downright indignant . . . [arguing the *Batson* claim was] 'an attempt to discredit the prosecutor [and] [t]he State and this community demand an apology.' . . . The contents of the prosecution's file, however, plainly belie the State's claim that

it exercised its strikes in a 'color-blind' manner.") (cleaned up); *see also Hobbs*, 841 S.E.2d 492 (although not noted in the Court's opinion, the defendant's brief explains how the prosecutor responded to the *Batson* objection by protesting that defense counsel's argument "was somehow we're just racists in this county").

Thus, when it comes to discriminatory intent, demeanor might be especially misleading. In a 2007 study of gender bias in jury selection, researchers found that "individuals may actively decide to consider gender and then intentionally mask evidence of bias" "by offering compelling — and perfectly plausible — gender-neutral explanations for those decisions." Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, J. BEHAV. DEC. MAKING, 20: 467–479 (2007). The researchers summarized their conclusions:

> [P]articipants who acted as prosecutors in a jury selection paradigm eliminated female jurors more often than male jurors, but then justified these biased choices by citing gender neutral information. Troublingly . . . explicit instructions against the use of gender failed to eliminate selection bias, and in fact resulted in even more elaborate justifications.

Id.

Fortunately, demeanor is not the only, or even the best evidence available to courts. As this Court recognized in *Hobbs*, evidence supporting purposeful discrimination may include:

- Statistical evidence about the prosecutor's use of peremptory strikes against Black prospective jurors as compared to white prospective jurors in the case;

- evidence of a prosecutor's disparate questioning and investigation of Black and white prospective jurors in the case;

- side-by-side comparisons of Black prospective jurors who were struck and white prospective jurors who were not struck in the case;

- a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing; and

- relevant history of the State's peremptory strikes in past cases, [and other relevant circumstances].

Hobbs, 841 S.E.2d at 501. When it comes to this type of complicated record analysis, appellate courts are at least as well-positioned as trial courts. *See Foster*, 136 S. Ct. at 1749 (conducting an "independent examination of the record.").

Furthermore, the magnitude of North Carolina's unremedied jury discrimination has come to light largely through statistical analysis. *See, e.g., State v. Burke*, 843 S.E.2d 246, 248 (N.C. 2020) (remanding for evidentiary hearing on Racial Justice Act claim based in part on "several statistical studies, including an extensive statistical study of capital charging, sentencing, and jury selection in North Carolina which was conducted by professors at Michigan State University College of Law."). Appellate courts may well have particular competency when it comes to assessing broad patterns across cases.[9] *See* David L. Faigman, *Appellate*

[9] This Court recently recognized "the difficulty of proving covert racial discrimination" and the resulting need for careful examination of statistical patterns of racial bias. *See Ramseur*, 843 S.E.2d at 116–17 n.8 (citing with approval the remarks of former N.C. legislators that "[r]ace discrimination is very hard to prove. Rarely, particularly in today's time, do people just outright say, 'I am doing this because of the color of your skin.' . . . . [U]nstated motivation is extraordinarily difficult to ferret out.").

Review of Scientific Evidence Under Daubert and Joiner, 48 HASTINGS L.J. 969, 979 (1997) ("Contrary to the arguments against appellate courts' competency, arguably appellate judges are better positioned than trial judges (and trial judges better than juries) to decide scientific disputes that transcend particular cases."); *see also* Randolph N. Jonakait, *The Standard of Appellate Review for Scientific Evidence: Beyond Joiner and Scheffer*, 32 U.C. DAVIS L. REV. 289, 317–18 (1999) (arguing that "[t]he trial court does not have a privileged position over the appellate court in [assessing scientific evidence] because appellate judges can have direct access to the scientific material").

Finally, this Court should pause and take stock of its historical practice of affording trial courts extreme deference on *Batson* claims, in light of the troubling heritage of the concept of appellate deference. In the era when *Strauder v. West Virginia*, 100 U.S. 303 (1880), was still the law — under which discriminatory jury practices were only unconstitutional if they were explicitly imposed by statute or a deliberate administrative decision — southern courts frequently rejected claims of discrimination on the ground that "very strong and convincing testimony" was lacking. The U.S. Supreme Court would then defer to these state court findings unless clearly erroneous, thus making it "virtually impossible" for a defendant to prevail. *See* Klarman, *supra* at 304, 376-77 (collecting state court cases).

Accordingly, not only is this Court required by U.S. Supreme Court precedent to leave behind the practice of deferring excessively to trial court *Batson* determinations, there are strong reasons for doing so. Under the clear error

standard of review, this Court is fully empowered to rule on the ultimate question of purposeful discrimination in this case, as opposed to remanding for further assessment by the trial court, as in *Hobbs*. Appellate *Batson* enforcement is not intended to be restricted to remands, as is evident from the U.S. Supreme Court's grant of new trials in *Miller-El v. Dretke*, *Snyder*, *Foster*, and *Flowers*.

B. This Court must make clear that prevailing on a *Batson* claim does not require the moving party to produce explicit or "smoking gun" evidence of discrimination.

In *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, Pollitt and Warren showed that "[t]hirty years after *Batson*, North Carolina defendants challenging racially discriminatory peremptory strikes still face a crippling burden of proof and prosecutors' peremptory challenges are still effectively immune from constitutional scrutiny." Pollitt & Warren, *supra* at 1984–85.

Clegg exemplifies this problem. On remand to the trial court, Mr. Clegg argued that neither of the prosecutor's purported reasons for the strike of Juror Aubrey could withstand scrutiny. The trial court agreed: "Here, Defendant has shown that the race-neutral justifications offered by the prosecutor cannot be supported by the record." (RS p 201).[10]

Yet, despite this lack of support, the trial court found no *Batson* violation: "the Court cannot conclude from this record that in this case, the State has engaged

[10] This citation is to Mr. Clegg's Rule 9(B)(5) Record on Appeal Supplement, filed March 24, 2020.

in 'purposeful discrimination.'" (RS p 202). The trial court reasoned "that essential evidence of purposeful discrimination — which is the defendant's burden to prove — is lacking" and that "the cases in which the Supreme Court has found that the state exercised peremptory challenges in a purposefully discriminatory fashion are strikingly different from the case at hand." *Id.* The court went on to recount select facts from *Miller-El* and *Foster* which revealed those prosecutors' explicitly race-conscious intent to strike Black jurors. (RS pp 202-03). Absent such glaring proof of racism in Mr. Clegg's case, the trial court declined to deem the strike discriminatory.[11]

The trial court required too much of the defendant. By reversing Mr. Clegg's conviction, this Court should make clear that *Batson* does not require definitive proof of racial animus. It does not require a smoking gun. And where, as in this case, all reasons proffered for striking a juror of color are discredited, the Court should not find it difficult to hold that, more likely than not, race was a significant factor in the strike decision.[12]

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[11] In addition, the trial court stated there was "no evidence . . . of a systemic policy of the prosecutor's office to exclude black jurors . . . ." (RS p 204). However, even though no such evidence is required to prevail on a *Batson* claim, Amici note that the trial court's recitation of the record was inaccurate. In his remand brief to the trial court, Mr. Clegg specifically relied on the Wake Forest study showing that from 2011 to 2012, Wake County prosecutors struck Black jurors at 1.7 times the rate of white jurors. (RS p 70). The trial court on remand failed to discuss or even acknowledge this evidence. This omission is error pursuant to *Hobbs*, 841 S.E.2d at 503.

[12] Although Amici focus here on the State's strike of Juror Aubrey, they agree with Mr. Clegg that the Court should also find a *Batson* violation with respect to Juror Viola Jeffreys. In particular, the prosecutor asserted he struck Ms. Jeffreys because

There is growing recognition in the law and in all sectors of our society that racially inequitable outcomes are not primarily the product of individual bigotry. Rather, these enduring disparities are, first and foremost, caused by institutional and systemic forces, as well as individual implicit biases, that are the ongoing legacy of our nation's history of white supremacy. Courts have recognized this in both the voting rights and *Batson* contexts. In *NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), the Fourth Circuit found the election law in question was motivated by discriminatory racial intent, while noting:

> Our conclusion does not mean, and we do not suggest, that any member of the General Assembly harbored racial hatred or animosity toward any minority group. But the totality of the circumstances — North Carolina's history of voting discrimination; the surge in African American voting; the legislature's knowledge that African Americans voting translated into support for one party; and the swift elimination of the tools African Americans had used to vote and imposition of a new barrier at the first opportunity to do so — cumulatively and unmistakably reveal that the General Assembly used SL 2013–381 to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party. Even if done for partisan ends, that constituted racial discrimination.

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she worked as a nurses' aid at a mental health hospital. However, Mr. Clegg's trial did not present any mental health issues for the jury to consider, and the prosecutor did not ask any other juror if they had experience with mental health. *See* (RS pp 78-80) (Mr. Clegg's brief on remand discussing Juror Jeffreys). These and other circumstances briefed by Mr. Clegg are sufficient to prove a *Batson* violation. Yet, on remand, the trial court summarily rejected Mr. Clegg's objection to the strike of Ms. Jeffreys in single paragraph, without mentioning even one of his arguments. (RS p 195).

Id. at 233; *see also Saintcalle*, 178 Wash.2d at 46 (denying *Batson* relief but recognizing that "[r]acism now lives not in the open but beneath the surface — in our institutions and our subconscious thought processes — because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus."). Thus, focusing exclusively on racist actors, individual intent, and explicit declarations of personal bias not only fails to address most harm, but also obscures the massive dimensions of the problem.

Fortunately, *Batson* does not require a claimant to produce proof of explicit bigotry or malice. Under *Batson*, a constitutional violation may be proven through "the totality of the relevant facts." *See State v. Waring*, 364 N.C. 443, 474 (2010) (quoting *Batson*, 476 U.S. at 94). In other words, *Batson* does not require an explicit admission of racist intent by the prosecutor; a court may look beneath the prosecutor's words. *See Snyder v. Louisiana*, 552 U.S. 472 (2008) (finding purposeful discrimination on the basis of comparative juror analysis alone, without direct evidence of race consciousness); Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1862 n.371, 1866, 1876 n.447 (2012) (citing *Batson* and *Miller-El*'s "contextual intent" approach as a rare exception to the Supreme Court's use of the "malice test" to deny equal protection challenges.).

Under *Batson*, not only can purposeful discrimination be inferred, but discriminatory intent need not amount to hatred or bigotry. *See Flowers*, 139 S. Ct. at 2241–42 ("Justice Thurgood Marshall drove the point home: 'Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks

are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the intelligence, experience, or moral integrity to be entrusted with that role.'"); *In re A.S.*, 76 N.E.3d 786, 793 (Ill. App. Ct. 2017) ("under *Batson*, the issue is not racial animus but the respondent's right to a fair trial, including a jury selection process untainted by improper exclusion of prospective jurors based on race . . . . *Batson* focuses on the *reason* the State believes a particular juror should not be seated, and if the juror's race is the reason, a violation exists despite the fact that the prosecutor does not otherwise discriminate against or harbor any animus toward that race.") (emphasis in original).

Further, if one examines recent *Batson* decisions from around the country granting relief, it quickly becomes clear that courts have not, as in North Carolina, waited for blatant, smoking gun evidence of discrimination to find violations. Rather, as *Batson* permits, these state courts have addressed the problem by inferring that discrimination occurred under sufficiently suspicious (but superficially race-neutral) circumstances, such as claiming to strike a Black juror due to a trait shared by accepted white jurors, mischaracterizing a Black juror's answers when attempting to justify the strike, or claiming to strike a Black juror for a reason that the prosecutor did not even question the juror about. *See, e.g., Williams v. State*, 134 Nev. 687, 691–96 (2018); *In re A.S.*, 76 N.E.3d 786, 791–93 (Ill. App. Ct. 2017); *Landis v. State*, 143 So.3d 974, 978–81 (Fla. Dist. Ct. App. 2014); *Conner v. State*, 130 Nev. 457, 466 (2014); *Addison v. State*, 962 N.E.2d 1202,

1214–17 (Ind. 2012); *Rice v. State*, 84 So. 3d 144, 149–51 (Ala. Crim. App. 2010); *Hopkins v. Commonwealth*, 53 Va. App. 394, 400–01 (2009); *Greer v. State*, 310 S.W.3d 11, 15–19 (Tex. App. 2009); *People v. Wilmot*, 34 A.D.3d 1225 (N.Y. App. Div. 2006); *Burnett v. State*, 71 Ark. App. 142, 147–51 (2000).

Most relevant is the fact that other states have granted relief in cases like Mr. Clegg's, where the prosecutor's reasons were unsupported by the record. In *State ex rel. Ballard v. Painter*, 213 W. Va. 290, 295 (2003), the prosecutor initially justified the strike on grounds that the juror worked for the same company as the defendant's father. However, additional voir dire revealed that the juror did not work for the same company or know any member of the defendant's family, leaving the reason for the strike meritless. The state then gave another reason for the strike: because the juror worked the night shift he may be unable to stay awake during the trial. But during voir dire the juror had stated that staying awake would not be an issue. "By simply re-asserting the nightshift issue, the State failed to prove that the juror would have difficulty staying awake during the trial. The State was only able to show that the juror worked the nightshift. This showing, without more, was simply not a facially credible basis for striking the juror in the face of a racial discrimination challenge." *Id.* at 296.

In *McCarter v. State*, 791 So.2d 557 (Fla. Dist. Ct. App. 2001), the prosecutor allegedly struck the juror because she believed a real trial in the courtroom would not be different from trials she had observed on television. After reviewing the record, the appellate court determined that the juror stated that she did know a

trial would be different from television. "As a result, the trial court erred in sustaining the peremptory strike of this juror without a race-neutral explanation, supported by the record." *Id.* at 558.

In *State v. Patterson*, 307 S.C 180, 182 (1992), the prosecutor claimed the juror expressed hesitation about applying the death penalty. The South Carolina Supreme Court reviewed the record and determined that while the juror said she would "wait and hear the facts and all the evidence of the case" before imposing the death penalty, when asked if she could vote for a defendant to receive the death penalty, she gave an unequivocal yes. *Id.* at 183. "Because the record does not support the solicitor's evaluation of Juror Leaphart's responses, we find the trial judge erred in ruling that the solicitor offered a race-neutral reason for exercising the strike." *Id.* at 184; *see also State v. Davis*, 306 S.C. 246, 250 (1991) ("Because the record does not support the solicitor's stated reason for striking Juror Burch, we find the trial judge erred in ruling that the solicitor offered a race-neutral reason for exercising the strike.").

These state courts did not require the defendant to offer explicit evidence of prosecutorial race consciousness or animus. To these courts, the fact that the prosecutor had no legitimate race-neutral reason for the strike was, by itself, enough to prove purposeful discrimination. This inferential approach is consistent with the U.S. Supreme Court's grant of relief in *Snyder*. By contrast, the trial court considering Mr. Clegg's *Batson* objection wanted something more. This was error.

But indeed, the trial court's error is understandable. North Carolina's dismal appellate *Batson* record begs the conclusion that discriminatory intent in jury selection is essentially impossible to prove. This Court should now join other states and the Supreme Court by applying *Batson*'s inferential approach.

C. This Court must make clear that the preponderance of the evidence standard requires *Batson* relief whenever the facts present an unacceptable risk that purposeful discrimination has taken place.

As shown above, *Batson* claimants need not present evidence of explicit racial animus. Nor does *Batson* require definitive proof of discrimination, proof beyond a reasonable doubt, or even proof by clear and convincing evidence. As this Court recently noted in *Hobbs*, the burden of persuasion required to prove a *Batson* violation is "whether it was more likely than not that the challenge was improperly motivated." *See Hobbs*, 841 S.E.2d at 498 (quoting *Johnson v. California*, 545 U.S. 162, 170 (2005)); *see also State v. Garner*, 331 N.C. 491, 513–14 (1992) (Frye, J., concurring) (recognizing that "preponderance of the evidence," "greater weight of the evidence," and "more likely than not" are synonymous formulations of the same standard). In this case, the Court should provide further guidance to lower courts on how to apply this preponderance standard to objections under *Batson*.

According to Black's Law Dictionary (11th ed. 2019), "preponderance of the evidence" should be understood as "[t]he greater weight of the evidence . . . [or] superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."

This is consistent with North Carolina law. In the civil context, this Court has made clear that, to meet the preponderance burden, a claimant need only present evidence that "tip[s] the scales in his favor . . . ." *Lewis v. Barnhill*, 267 N.C. 457, 468 (1966). This Court has also explained that the "preponderance of the evidence" standard is even less than "[t]he clear and convincing standard [which] requires evidence that 'should fully convince.'" *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721 (2009).

In *State v. Adcock*, 310 N.C. 1, 39–40 (1984), Justice Exum explained how the preponderance standard does not call for a definitive determination, and leaves room for doubt: "Essentially the jury is dealing in probabilities, not certainties. The jury could believe [a certain fact is] more probable, or more likely, than not . . . and yet still have a doubt about it." Indeed, the U.S. Supreme Court has recognized that the preponderance standard involves a "risk of error." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983); *see also In re Winship*, 397 U.S. 358, 369–70 (1970) (Harlan, J., concurring) (explaining all standards of proof involve only a "degree of confidence").

This Court, in *Clegg*, should make clear that these principles concerning the preponderance of the evidence standard must be meaningfully applied when *Batson* objections are raised. Justice Goodwin Liu of the California Supreme Court has already explained how the preponderance standard should operate in the *Batson* context. The Court should adopt Justice Liu's reasoning, as it is fully consistent with both U.S. Supreme Court and North Carolina law:

> 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." In the case before us, as in *Snyder*, the inferential analysis supports the conclusion that it is more likely than not that one or more strikes were improperly motivated. But I do not think the finding of a violation should brand the prosecutor a liar or a bigot. Such loaded terms obscure the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve.

Gutierrez, 2 Cal. 5th at 1182–83 (Liu, J., concurring) (emphasis in original; citations omitted); *see also Winship*, 397 U.S. at 369–70 (Harlan, J., concurring) (observing that no court can "acquire unassailably accurate knowledge of what happened. Instead, all the fact-finder can acquire is a belief of what probably happened.").

It is important that courts apply the preponderance standard with integrity because the standard itself takes into account the myriad harms caused by jury discrimination. "[A] standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Winship*, 397 U.S. at 369–70 (1970) (Harlan, J., concurring). The relatively light burden placed on *Batson* claimants appropriately reflects the severity of the societal harm at issue, which "extends beyond that inflicted on the defendant and the excluded

juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87.

By contrast, the risk of harm in the other direction is minimal when a court grants a *Batson* objection that involves a close call. "The Constitution does not confer a right to peremptory challenges." *Id.* at 91. And truly inappropriate jurors will be removed for cause. *See* N.C.G.S. 15A-1212(8) and (9) (providing that jurors may be removed for cause if they "would be unable to render a verdict . . . in accordance with the law" or are otherwise "unable to render a fair and impartial verdict.").

Until now, North Carolina courts have seemed far more concerned with affording prosecutors every benefit of the doubt, than with the harm caused by unaddressed race discrimination. As a result, our courts have demanded from *Batson* claimants nearly impossible levels of persuasion. But given the impossibility of discerning subjective motivations with complete certainty, plus the individual and societal harm caused by prosecutorial jury discrimination, this Court should instruct lower North Carolina courts to apply a true preponderance standard and grant *Batson* relief whenever there is an unacceptable risk that discrimination has occurred.

In *Clegg*, the trial court paid lip service to the preponderance standard, but still denied relief. (RS p 202). However, where, as in this case, a prosecutor is asked to provide the race-neutral reasons for striking a Black juror, and musters only

reasons that are unsupported by and inconsistent with the factual record, there is an intolerable risk that the strike was, at least in significant part, based on race. The trial court should therefore have granted the *Batson* objection.

North Carolina trial courts will never take *Batson* seriously until this Court does. Lower courts have surely noticed that this Court has never granted a new trial on *Batson* grounds.[13] Proper application of the legal standards, and reversal of Mr. Clegg's conviction, is necessary to finally begin making the promise of *Batson* real.

IV. Amici urge the Court to begin a rulemaking or commission process to consider new approaches to jury discrimination that reach beyond the minimum protections that *Batson* requires.

The judiciary — alongside the legislative and executive branches of government — has an indispensable role to play in ameliorating racial bias in our legal system. In the wake of the recent police killings of African Americans and the resulting mass protests, on June 2, 2020, Chief Justice Beasley gave a public address on the "Intersection of Justice and Protests around the State." On June 9, 2020, Governor Cooper announced the creation of the Governor's Task Force for

[13] It appears perhaps attorneys have noticed as well. During the remand hearing, the prosecutor noted this case was "the first and only time myself as a prosecutor I've had to address this type of challenge." (Remand T p 17). This statement is remarkable. Upon information and belief, at the time of Mr. Clegg's trial, the State's attorney had been a prosecutor in Wake County for nearly eight years. It is concerning to say the least that in one of North Carolina's largest and most diverse counties, a prosecutor had never, in almost a decade of practice, seen a *Batson* challenge raised. This suggests the extent to which this Court's precedent of never granting *Batson* relief has discouraged lawyers from raising the issue in the trial courts.

Racial Equity in Criminal Justice, co-chaired by Associate Justice Earls. These actions reflect a renewed commitment, by those in the highest levels of power, to the recognition and remediation of longstanding injustices.

That is why this Court must act, as other state courts have, to restore integrity to the jury system. As this Court well knows, in 2018, the Washington Supreme Court used its rulemaking authority to create Washington General Rule 37, which, among other innovations, adopted the "objective observer standard."[14] Since then, the Washington Supreme Court deemed the implementation of the "objective observer" standard so fundamental that it applied the standard retroactively under its general state power to implement the guarantee of equal protection. *State v. Jefferson*, 192 Wash.2d 225, 242 (2018). Jury discrimination in Washington will now be met with a robust response that was lacking for decades. *See e.g., State v. Omar*, 12 Wash. App. 2d 747, 749 (2020) (affirming the prosecutor's reasons of "just didn't like some of the responses" and "felt uncomfortable about the way that she was responding and [was] uncomfortable having her on his jury in this case" were suspicious under Rule 37's criteria for demeanor-based justifications) (alteration in original); *State v. Pierce*, 195 Wash. 2d 230, 243 (2020) (finding it presumptively invalid to strike based on juror's response that "the system, or at least parts of the system did not treat her brother fairly").[15]

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[14] http://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_37_00_00.pdf

[15] Judges around the country have voiced approval for Rule 37. *See e.g., State v. Porter*, 460 P.3d 1276, 1289 (Ariz. Ct. App. 2020) (McMurdie, J., dissenting) (asserting a rule change modeled after Washington's is necessary); *People v. Bryant*,

Within the past year, California and Connecticut courts have appointed commissions to consider approaches to strengthening *Batson*. Connecticut formed its commission in December 2019, with the charge to "(1) propos[e] changes to statutes governing the confirmation form and questionnaire provided to prospective jurors, (2) improv[e] the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross section of the community that is representative of its diversity, (3) draft[ ] model jury instructions about implicit bias, and (4) promulgat[e] new substantive standards that would eliminate *Batson*'s requirement of purposeful discrimination." *Holmes*, 334 Conn. at 251–52.

In January 2020, the Chief Justice of California formed a similar commission,[16] tasked with addressing topics such as the appropriateness of the purposeful discrimination standard, the impact of implicit or unconscious bias in

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40 Cal. App. 5th 525, 548 (2019) (Humes, P.J., concurring) (endorsing application of the objective observer test in California); *State v. Holmes*, 334 Conn. 202, 246 (2019) (calling for modifications to the *Batson* inquiry through the formation of a commission, like that in Washington); *State v. Veal*, 930 N.W.2d 319, 361–62 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) (arguing that Iowa's "approach to achieving a fair cross section of the community in the jury pool and in ensuring African-Americans receive a fair trial is in need of an overhaul"); *State v. Curry*, 298 Or. App. 377, 389 (2019) (recommending the Council on Court Procedures and the legislature consider the efforts in Washington to address jury discrimination); *Tennyson v. State*, No. PD-0304-18, 2018 WL 6332331, at *6, n.6, *7 (Tex. Crim. App. Dec. 5, 2018) (Alcala, J., dissenting from denial of discretionary review) ("[i]f any implausible or outlandish reason that was never even discussed with a prospective juror can be accepted as a genuine race-neutral strike. . . *Batson* is rendered meaningless, and it is time for courts to enact alternatives to the current *Batson* scheme to better effectuate its underlying purpose").

[16] The California Chief Justice's charge for forming a commission is available online: https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group

jury selection, whether a juror's negative feelings towards law enforcement are permissibly "race neutral" grounds to exercise a peremptory strike, whether training would assist judges in enforcing fairness, and whether standard jury instructions should be modified.

This Court should likewise embrace the responsibility to provide new and more robust approaches that go beyond *Batson*'s minimum protections, seizing this moment to create the new structures necessary for North Carolina jury selection to become truly racially equitable.

CONCLUSION

This Court has taken considerable strides in recent months to rectify North Carolina's years of neglect of *Batson*'s mandate. Yet, ours remains the only state appellate court system in the South that has never found discrimination against a juror of color. In the absence of more vigorous enforcement – both through consistent application of federal law and development of systemic reform as in Washington – citizens of color will continue to be blocked from juries at staggering and unacceptable rates, with consequences that reverberate beyond the walls of any single courtroom. This is the time. This is the case. Amici ask the Court to continue its leadership in addressing jury discrimination by reversing Mr. Clegg's conviction and granting him a new opportunity to present his defense to a jury not tainted by the persistent stain of race discrimination. Amici also ask the Court to initiate a process to adopt Washington Rule 37, in whole or in part, to provide safeguards against jury discrimination that are stronger than *Batson*'s minimum protections.

Respectfully submitted on July 29, 2020.

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I certify that the foregoing 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:

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