No. 113A96-4 DISTRICT 21

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
v.	)	From Forsyth County
RUSSELL WILLIAM TUCKER	)	

****

BRIEF OF *AMICUS CURIAE*
NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS
AND
NORTH CAROLINA STATE CONFERENCE OF THE NAACP
IN SUPPORT OF RUSSELL WILLIAM TUCKER

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STATEMENT OF INTEREST[1]

Amicus North Carolina Association of Black Lawyers ("NCABL") is a professional association organized to protect the interests of Black attorneys, their clients, and to promote justice for all people. Known as the NCABL since 1971, the organization traces its roots to a 1954 meeting in Durham of the North Carolina Lawyers Association and was organized from 1957 to 1971 as the Southeastern Lawyers Association. The NCABL files *amicus curiae* briefs in cases that raise important issues of public policy affecting Black people, including racial discrimination in jury selection. As an association of Black lawyers practicing in North Carolina's courts and often representing Black clients, the NCABL has a

[1] Pursuant to Rule 28(i)(2), counsel for Amicus states that no person or entity other than Amicus, its members, or its counsel directly or indirectly authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief.

specific interest in and perspective on the important issues raised by Mr. Tucker's petition.

Amicus NCABL is joined on brief by the North Carolina State Conference of the NAACP ("NC NAACP"), a grassroots-based civil rights organization with the mission of ensuring the rights of all persons to political, educational, social, and economic equality, and eliminating racial discrimination. Tracing its roots in the state to 1917, the NC NAACP is the oldest and largest civil rights organization in North Carolina, and it is one of the largest NAACP branches in the country. The NC NAACP dedicates significant organizational resources to protecting the constitutional rights of Black people, people of color, and other groups who have historically been denied their constitutional rights in North Carolina. Like the NCABL, the NC NAACP regularly files *amicus* briefs in cases that raise important public policy questions regarding racial discrimination in the criminal process.

ARGUMENT

Amici write principally to respond to the State's assertion that the discovery of a document entitled Batson *Justifications: Articulating Juror Negatives* (known colloquially and referred to hereinafter as the "cheat sheet"[2]) does "not constitute newly discovered evidence sufficient to overcome the procedural bar,"[3] as well as to encourage the Court to reject the State's benign characterization of this troubling

[2] *E.g.*, State v. Augustine, 375 N.C. 376, 382 (2020) (discussing "use of a prosecutorial 'cheat sheet' to respond to *Batson* objections" (quoting trial court order)); Jacob Biba, *Did Prosecutors Use a 'Cheat Sheet' to Strike Black Jurors in North Carolina Death Penalty Case?*, THE APPEAL (Sept. 4, 2018), https://theappeal.org/did-prosecutors-use-a-cheat-sheet-to-strike-black-jurors-in-north-carolina-death-penalty-case/.

[3] State's Response in Opp. to Pet. for Writ of Cert. at 15, State v. Tucker, 849 S.E.2d 103 (Dec. 9, 2020) (No. 113A96-4).

document. *Amici* are concerned that if the Court fails to address the State's use of a device intended to subvert judicial safeguards against race discrimination, particularly in a capital case, it would send a troubling message to the state's trial courts and to litigants.[4]

In its previous briefs in the case, the State has had conspicuously little to say in defense of this document, instead devoting more attention to an argument that consideration of the matter is procedurally barred. That the State would rely principally on procedural objections is not surprising, as the facts have put it in the position of defending a practice that was plainly designed to circumvent Mr. Tucker's constitutional right to be free of racial discrimination.[5]

Amici regards the trial prosecutors' reliance on the cheat sheet as evidence of racial discrimination in Mr. Tucker's jury selection process.[6] The transcripts from *voir dire* and the fact the document was in the prosecutors' case file indicate that the justifications offered to the trial court for striking the Black jurors from the

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[4] *Cf.* Donald E. Lively and Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1309–10 (1991) (describing equal protection law's "two hundred year legacy of subordinating the aims and agenda of racial justice to competing interests," and stating that courts' "ultimate choice of values and their impact, more than associated rhetoric, disclose the reality of societal priorities").

[5] *See* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. (AM. BAR ASS'N 2021) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice[.]"). Some prosecutorial officials have determined that a commitment to equal justice under law requires that they stipulate to the existence of jury discrimination where it is obvious from the record that it occurred. *See, e.g.*, State's Stipulations in Response to Def.'s Presentation of Evidence of Discrimination in Jury Selection on Remand from the La. Sup. Ct. at 2, State v. Williams, 229 So.3d 455 (La. 2017) (stipulating that "the State agrees that the Defendant is entitled to a new trial due to the State's use of peremptory strikes against African-American prospective jurors" and that the District Attorney's Office recognizes "the need to redress instances of racial discrimination in the criminal legal system," including the necessity of "correct[ing] past harms and injustices the office has caused").

[6] *Cf.* Miller-El v. Dretke, 545 U.S. 231, 240, 253 (2005) (concluding that prosecutors violated *Batson* where, *inter alia*, training materials advocated racially based strikes).

venire were pretextual, something the U.S. Supreme Court has said "naturally gives rise to an inference of discriminatory intent."[7]

As attorney Bryan Stevenson, Executive Director of the Equal Justice Institute, explained in an affidavit affixed to Mr. Tucker's M.A.R.:

> On its face, the *Batson* Justifications handout is not a document that is intended to help prosecutors pick a jury in a race-neutral way. The title says it all. Prosecutors must provide "*Batson* justifications" and "articulate juror negatives," not when making strike decisions, but only at *Batson*'s second step, once an objection has been lodged and typically, once the judge has found a *prima facie* case of discrimination. Thus, the document is a list of reasons to be used once an inference of discrimination has been raised to prevent the judge from making a finding of purposeful discrimination. This purpose is at odds with the proper function of *Batson*'s second step, which is for the prosecutor to provide her true subjective reasons for striking the juror. If a prosecutor chooses instead to give reasons suggested by the handout, this is the very definition of pretext and strong evidence that her unspoken, subjective reasons were impermissibly race-conscious.[8]

Moreover, as Dr. Ibram X. Kendi explained in a separate affidavit, the document, though written to sound race-neutral, echoes racist historic stereotypes of Blacks as unintelligent, defiant or hostile, unwilling to make eye contact, and physically unattractive.[9] Mr. Stevenson, too, has said that "phrases like those in the North Carolina handout are rooted in historically derogatory labels applied to African Americans who did not show adequate deference to the prevailing racial order," and that "[a]s such, these justifications are not truly race-neutral, in that they have a much different and more insidious meaning when applied to African Americans."[10]

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[7] Snyder v. Louisiana, 552 U.S. 472, 485 (2008).
[8] Stevenson Aff. ¶ 11, Feb. 22, 2019.
[9] Kendi Aff. ¶¶ 6–22, Apr. 30, 2019.
[10] Stevenson Aff., *supra* note 8, at ¶ 13.

The nature of what the document implies about the trial prosecutors' intentions, the fact that it corresponds with the explanations that were offered for executing the strikes, in addition to the racial stereotypes it recalls in the context in which it was used, causes *amici* to conclude that Mr. Tucker was denied his right to a constitutionally-drawn jury. In the pages that follow, *amici* describe why, as matter of law, this Court should grant Mr. Tucker the relief he is requesting, and why, as a matter of public policy and institutional integrity, that is the right thing to do.[11]

I. This Court should not permit the State's assertion of a procedural bar to prevent it from reaching the issue of the *Batson* "cheat sheet," a document that is evidence of state-sanctioned racial discrimination in jury selection.

As a general matter, this Court should reject the invocation of procedural bars in any case that raises credible evidence of state-based racial discrimination. Historically, courts have too often employed them to avoid addressing issues of critical importance to racial justice, including racial discrimination in jury selection.[12] In recent years, however, the U.S. Supreme Court has made a number of notable departures from this trend, concluding that the necessity of addressing claims of racial bias outweighs the import of procedural rules that would have otherwise barred

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[11] In 2012, faced with evidence of similar misconduct, Gov. Beverly Perdue pardoned the defendants in the infamous Wilmington Ten case, stating it was necessary "to right [a] longstanding wrong." OFFICE OF GOV. BEV PERDUE, STATE OF NORTH CAROLINA, *Gov. Perdue Issues Pardon of Innocence for Wilmington 10* (Dec. 31, 2012). The pardons cited "the dominant role that racism played in jury selection," something they described as "utterly incompatible with basic notions of fairness" and a threat to the "legitimacy of our criminal justice system." *Id.*

[12] *See, e.g.*, Carrie Leonetti, *Smoking Guns: The Supreme Court's Willingness to Lower Procedural Barriers to Merits Review in Cases Involving Egregious Racial Bias in the Criminal Justice System*, 101 MARQ. L. REV. 205, 210–11 (2017) (discussing the Court's past "use of 'analytic and regulatory techniques' to segregate racial-bias challenges to criminal procedure from the rest of its equal protection jurisprudence" (quoting Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2023 (1998)); *cf.* Donald E. Lively and Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307 (1991).

their consideration.[13] As the Court's decision in *Pena-Rodriguez v. Colorado* noted, many state appellate courts have also adopted race exceptions to rules that would otherwise bar consideration of the issue on the merits.[14] Notably, *Pena-Rodriguez* created an exception to the no impeachment rule, which had previously been regarded as unassailable and of far greater public policy import[15] than any of procedural bars that the State has asserted against Mr. Tucker, each of which are rooted in a general statute that itself recognizes exceptions.[16]

These cases have come as welcome developments. The U.S. Supreme Court's recent decisions implicitly recognize that the promise of equal justice under law rings hollow when courts are presented with evidence of racial discrimination against a criminal defendant, an opportunity to address it, and they fail to take remedial action because of a procedural issue. More than that, they reflect the operation of a "constitutional rule that racial bias in the justice system must be addressed . . . to prevent a systemic loss of confidence in jury verdicts[.]"[17] This rule is a recognition

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[13] *E.g.*, Pena-Rodriguez v. Colorado, 580 U.S. __ (2017); Buck v. Davis, 580 U.S. __ (2017); Foster v. Chatman, 578 U.S. __ (2016); *see generally* Leonetti, *Smoking Guns*, *supra* note 12.

[14] *Pena-Rodriguez*, 580 U.S. at __, 137 S. Ct. at 865. Examples include State v. Brown, 62 A.3d 1099, 1110 (R.I. 2013); Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 87–90 (Mo. 2010); State v. Hidanovic, 747 N.W.2d 463, 472–74 (N.D. 2008); State v. Santiago, 715 A.2d 1, 14–22 (Conn. 1998); Fisher v. State, 690 A.2d 917, 919–21 & n.4 (Del. 1996) (Appendix to opinion); State v. Jackson, 912 P.2d 71, 80–81 (Haw. 1996); State v. Hunter, 463 S.E.2d 314, 316 (S.C. 1995); Powell v. Allstate Ins. Co., 652 So.2d 354, 357–58 (Fla. 1995); Commonwealth v. Laguer, 571 N.E.2d 371, 376 (Mass. 1991); Spencer v. State, 398 S.E.2d 179, 184–85 (Ga. 1990); People v. Rukaj, 506 N.Y.S.2d 677, 679–80 (1986); State v. Callender, 297 N.W.2d 744, 746 (Minn. 1980); Seattle v. Jackson, 425 P.2d 385, 389 (Wash. 1967); and State v. Levitt, 176 A.2d 465, 467–68 (N.J. 1961).

[15] *See* Cummings v. Ortega, 365 N.C. 262, 268 (2011) (discussing the "[p]olicy considerations [that] were critical to the [U.S. Supreme] Court's decision in *Tanner* [*v. United States*, 483 U.S. 107 (1987)]," in which the Court rejected the admissibility of evidence that jurors' consumed cocaine and alcohol during the trial to impeach their verdict).

[16] *See* N.C. Gen. Stat. § 15A-1419(b)(1)–(2) (providing that a defendant may overcome a procedural bar by showing either "good cause" and "actual prejudice" or if procedurally barring the claim would result in a "fundamental miscarriage of justice").

[17] State v. Crump, 376 N.C. 375, 381 (2020) (quoting *Pena-Rodriguez*, __ U.S. at __, 137 S. Ct. at 869).

that jury service represents most people's closest connection to the criminal process,[18] that it informs their understanding of it, and that the failure of courts to intervene when racial discrimination infects the proceedings risks undermining the legitimacy of the court as an institution.

Applying this rule to the facts of this case leads to the conclusion that the Court should not permit any procedural bar—if one exists at all[19]—to keep it from reaching the issue of the *Batson* cheat sheet. Here, the prosecutors' intention of securing a death-qualified all-white jury[20] to try Mr. Tucker is apparent from the record. The possibility that they succeeded in this endeavor because of their deceit and use of the sheet is all the more reason for this Court to address the issue head on.[21] As the U.S. Supreme Court has observed, when courts fail to act when presented with evidence of race-based challenges to jury service, they risk "undermin[ing] public confidence"[22] in the system and cast doubt on their own commitment "to adhere to the law."[23]

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[18] *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 407 (1991) ("[F]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

[19] *See* N.C. Gen. Stat. § 15A-1419(b)(1)–(2) (detailing exceptions to procedural bar).

[20] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 134 (1994) (stating that the imperative of maintaining the "diverse and representative character of the jury" serves, among other things, the critical purpose of providing "'assurance of [the jury's] diffused impartiality'" (quoting Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975)).

[21] *See* Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 397 (2019) ("At a time when the Black Lives Matter movement has raised increasing concerns about the fairness of law enforcement and criminal justice decision making, courts should not tolerate practices that compound distrust and undermine the legitimacy of legal processes.").

[22] Georgia v. McCollum, 505 U.S. 42, 49 (1992).

[23] *Powers*, 499 U.S. at 412; *see also* James E. Coleman, Jr., *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond*, THE CHAMPION, 28, 33 (June 2018) ("Reviving the promise of *Batson* in North Carolina and beyond is a critical component of the appellate courts' role in safeguarding the integrity of the criminal justice system.").

II. Equal Protection does not permit prosecutors to employ devices designed to undermine the operation of legal mechanisms imposed by courts to guard against racial discrimination.

Recognizing that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice,"[24] the U.S. Supreme Court in 1986 decided *Batson v. Kentucky*, which "sought to protect the rights of defendants and jurors, and to enhance public confidence in the criminal justice system."[25] Crucially, *Batson* and its progeny obligate prosecutors to be *subjectively honest* about their reasons for striking prospective jurors.[26] When responding to a *Batson* challenge during *voir dire*, prosecutors are expected to give a truthful answer as to why they moved to strike a prospective juror.[27]

As Professor Pamela Karlan has explained, "the *Batson* rule is to a great extent hortatory in the same way that the ban on selective enforcement is: much of its effectiveness in the real world depends . . . on its internalization by the relevant actors."[28] In Mr. Tucker's case, there is no real question about what prosecutors thought of their responsibilities vis-à-vis *Batson*. The record shows they relied on written materials to circumvent them.[29] The real question, at least for *amici*, is

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[24] Batson v. Kentucky, 476 U.S. 79, 87 (1986).
[25] State v. Ramseur, 374 N.C. 658, 675 (2020) (quoting Flowers v. Mississippi, __ U.S. __, __, 139 S. Ct. 2228, 2242 (2019)).
[26] *See* Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9, 36 (1997) (observing that the U.S. Supreme Court has "concentrated its determination of discriminatory intent on the prosecutor's subjective state of mind," and that "the ultimate question is one of subjective honesty, not objective sensibility").
[27] *See* State v. Hobbs, 374 N.C. 345, 360 (2020) (remanding for further consideration of prosecutor's motive for striking prospective juror where the "Court of Appeals . . . bas[ed] its conclusion on the fact that the reasons articulated by the State have, in other case, been accepted as race-neutral").
[28] Karlan, *Race, Rights, and Remedies*, *supra* note 12, at 2023.
[29] *Cf.* State v. Robinson, 375 N.C. 173, 180 (2020) ("The trial court noted that . . . 'North Carolina prosecutors received training in 1995 and 2011 about how to circumvent *Batson*.").

whether this Court will reject or adopt the fiction proffered by the State that, rather than "establishing any sort of intent to discriminate on the basis of race, this document establishes that the prosecutors in Tucker's case were aware . . . that all peremptory challenges should appropriately be based on non-racial reasons."[30]

As advocates who work in North Carolina's courts and who understand the role of *Batson* in guarding against racial discrimination in jury selection, *amici* are discouraged that the State's most senior attorneys would choose to characterize such a plainly bad act in such benign terms.[31] *Amici* believe that attorneys empowered by the State to pursue the death penalty must always act with unflinching honesty and candor when communicating about the case.[32] That has not happened in Mr. Tucker's case.

Prosecutors do not need the assistance of written aids to communicate with the court about their own subjective motivations regarding a decision made moments before. It defies common sense to believe that the *Justifications* document was

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[30] Answer to Successive M.A.R. and State's Motion for Summary Denial at 13, State v. Tucker, No. 94 CRS 40465 (May 25, 2018).

[31] "[G]ood faith requires honesty in fact, which would presumably preclude someone from arguing that an action was intended to advance the goal of racial equality when it was actually intended to undermine that goal." Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 617 (2015).

[32] *See* Caldwell v. Mississippi, 472 U.S. 320, 336–37 & 341 (1985) (vacating death sentence where prosecutor argued that ultimate responsibility for determination of appropriateness of a death sentence rested with appellate courts, concluding "argument was inaccurate [and] . . . misleading" and "simply had nothing to do with" the facts); *cf.* Giglio v. United States, 405 U.S. 150, 153 (1972) (stating that the Court has long held "that deliberate deception of a court . . . is incompatible with 'rudimentary demands of justice'" (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)); Napue v. Illinois, 360 U.S. 264, 269 (1959) (stating that "implicit in any concept of ordered liberty" is the "principle that a State may not knowingly use false evidence, including false testimony").

created to aid prosecutors in effecting the promise of *Batson*, when the obvious explanation is that the document was created to undermine it.[33]

This Court should thus reject the State's characterization. When courts accept specious explanations regarding the actions of trial prosecutors and their exercise of racially correlated strikes, they risk sending "a message . . . that the exclusion of minority jurors is generally not going to be taken very seriously or scrutinized very carefully."[34] That would be a terrible message for the state's lawyers and litigants to receive.

Until a pair of recent opinions from this Court,[35] however, that was the general lesson most people took from the case law in North Carolina. In contrast to the other southern states, each of whose appellate courts have long made some effort to police

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[33] Brief of Joseph DiGenova, et al. as Amici Curiae Supporting Timothy Tyrone Foster at 8, Foster v. Chatman, 578 U.S. __ (2016) (No. 14-8349) (stating N.C. Conference of D.A.s' 1995 "Top Gun II" course, where the cheat sheet was distributed, "train[ed] . . . prosecutors to deceive judges as to their true motivations"). The State advanced a similarly dubious argument in Mr. Tucker's case when it asserted that "the reference to [people who like] 'rap music' . . . in a short list which appears to be an outline of characteristics the prosecution was seeking to avoid" in jurors somehow "refutes an allegation that indicates a motivation to racially discriminate." Answer to Successive M.A.R. and State's Motion for Summary Denial at 14, State v. Tucker, No. 94 CRS 40465 (May 25, 2018). The facts of the case, of course, have nothing to do with rap music, suggesting that prosecutors may have intended to ask questions about rap music as a proxy for assessing prospective jurors' attitudes about Black people, to prime jurors' minds with stereotypical imagery of Black people, or both. *See generally* Christine Reyna et al., *Blame it on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice*, 12(3) G.P.I.R. 361–80 (2009); *see also* Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 632 (2009) (discussing the "implicit association between the death penalty and race that becomes activated during the supposedly race-neutral death qualification process," as well as studies that show rap music can operate as a "racial stereotype prime[r]" and that "activating racial stereotypes at trial will likely affect juror decision making").

[34] Karlan, *Race, Rights, and Remedies*, *supra* note 12, at 2023; *see also* Jackson v. Commonwealth, 380 S.E.2d 1, 6 (Va. Ct. App. 1989) ("Rubber stamp approval of all nonracial explanations will not satisfy the command of *Batson*. . . . If this were sufficient, the *Batson* inquiry would amount to little more than a charade."); Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 318–19 (2007) ("Toleration of intentional misconduct is inconsistent with *Batson*'s basic premises[.]").

[35] State v. Bennett, 374 N.C. 579 (2020); State v. Hobbs, 374 N.C. 345 (2020).

the issue, "this Court has *never* held that a prosecutor intentionally discriminated against a juror of color."[36] The remands in *Bennett* and *Hobbs* signaled the Court's attentiveness to the inadequacy of *Batson* enforcement in North Carolina. However, prior to those decisions, there was very little a trial attorney could direct a judge to as evidence that appellate courts would apply scrutiny to suspicious juror challenges.

In capital cases, the consequences for many defendants were dramatic, as exemplified by Mr. Tucker's case. For at least 20 years, and likely many more, prosecutors in capital trials statewide struck "eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black"—disparities which remained consistent and endured well into the 2000s and the passage of the state's now-repealed Racial Justice Act.[37] While this Court has since begun to grapple with "*Batson*'s ineffectiveness in this state,"[38] the North Carolina Conference of District Attorneys has not. Their position continues to be that "Black people being unfairly excluded from juries in North Carolina" is not a problem and that they have never encouraged prosecutors to circumvent *Batson*.[39]

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[36] State v. Robinson, 375 N.C. 173, 178 (2020) (emphasis in original); *see also* Daniel R. Pollitt and Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957 (2016).

[37] 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, 1533–34 (2012).

[38] *Robinson*, 375 N.C. at 178–79.

[39] *See* Elizabeth Weill-Greenberg, *The Persistent History of Excluding Black Jurors in North Carolina*, THE APPEAL (Aug. 26, 2019), https://theappeal.org/north-carolina-black-jury-selection/ ("When asked if she thought there was an issue of Black people being unfairly excluded from juries in North Carolina, [the organization's director] replied, 'No, I don't. We teach the law and we teach appropriate application of the law,' she said. 'We always have[.]'").

Even in jurisdictions where *Batson* has been given real effect, large scale surveys of its application demonstrate "that in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race."[40] In other words, *Batson* is already a somewhat poor match for remedying the discrimination that occurs.[41] However, it stands *no* chance of doing the work it is intended to do if prosecutors understand there will be no penalty for conspiring to circumvent the constitutional process it prescribes.[42]

In Mr. Tucker's case, this act of circumvention—the decision to employ the handout to read to the trial court when asked for a non-racial explanation for the exercise of a peremptory challenge against Black prospective jurors—was itself a racially discriminatory act that distorted the court's ability to identify the

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[40] Michael J. Raphael and Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J. L. REFORM 229, 236 (1993); *see also* Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 213 (2003) ("[N]otwithstanding its necessity and propriety, the Court's ban on the discriminatory use of peremptory challenges has, in practice, been decidedly ineffective in achieving its original goals."); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 459 (1996) ("The number of prosecutors who have been determined to have acted in violation of the law as set down in *Batson* is a dismal report card on this particular aspect of this obligation.").

[41] People v. Bolling, 591 N.E.2d 1136, 1145 (N.Y. 1992) (Bellacossa, J., concurring) ("Unfortunately, the *Batson* procedural hurdles have become 'less obstacles to racial discrimination than they are road maps' to disguised discrimination." (citation omitted)).

[42] *See, e.g.*, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER, June 5, 2015 ("[Justice] Marshall's skepticism was quickly vindicated. As soon as *Batson* was decided, prosecutors started coming up with tactics to evade it. . . . A consensus soon formed that the *Batson* remedy was toothless. In a 1996 opinion, an Illinois appellate judge, exasperated by 'the charade that has become the *Batson* process,' catalogued some of the flimsy reasons for striking jurors that judges had accepted as 'race-neutral' . . . . The judge joked, 'New prosecutors are given a manual, probably entitled, *Handy Race-Neutral Explanations* or *20 Time-Tested Race-Neutral Explanations*.' As it turns out, that really happens.").

discrimination that was otherwise occurring.[43] That was the point. Weeks later, an all-white jury sentenced Mr. Tucker, a Black man, to death.

This Court should find this practice violated both Mr. Tucker's and the excluded Black jurors' rights under the Fourteenth Amendment and Article I, § 19 of the N.C. Constitution.[44] It should make clear that equal protection will not abide the State's use of devices designed to undermine the operation of legal mechanisms that have been imposed to guard against racial discrimination.[45] The fact that this is a

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[43] The attorneys who employed the document at Mr. Tucker's trial, who work as public officials, have repeatedly declined opportunities to dispute this characterization and to offer an alternative explanation. *See, e.g.*, Michael Hewitt, *Motion: Prosecutors Used Race in Jury Selection in Winston-Salem Murder Trial Involving Killing of Kmart Security Guard*, WINSTON-SALEM JOURNAL, July 30, 2018, at A1. Other prosecutors known to have employed it have been similarly evasive. One N.C. court concluded that a prosecutor who testified she had not attended the "Top Gun II" training, where the document was distributed, had in fact attended. The court described the prosecutor as "insolent" when questioned about her attendance. It also determined that the transcripts from her *voir dire* in the defendants' cases amounted to "very convincing evidence that [she] used the . . . handout when addressing the trial judge" in "a calculated—and largely successful—effort to circumvent *Batson*." Ord. Granting Motions for Appropriate Relief, State v. Golphin, 97 CRS 47314-15, State v. Walters, 98 CRS 24832, 35044, State v. Augustine, 01 CRS 65079, at 73–77 (N.C. Super. Ct. Dec. 13, 2012).

[44] Racially based strikes of jurors cause constitutional injury to both the defendant and the excluded jurors. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994); Carter v. Jury Comm'n of Greene County, 392 U.S. 320, 329 (1970).

[45] Courts have regularly rejected, as violative of equal protection, attempts by state officials to undermine the effect of court decisions, rules, regulations, or consent decrees that affirm the right to be free of discrimination. *See, e.g.*, Hibbs v. Winn, 542 U.S. 88, 93 (2004) (observing that "[i]t is hardly ancient history that States, once bent on maintaining racial segregation in public schools, . . . fastened on tuition grants and tax credits as a promising means to circumvent *Brown v. Board of Education*," but noting that "[t]he federal courts, this Court among them, . . . upheld the Constitution's equal protection requirement"); City of Pleasant Grove v. United States, 479 U.S. 462, 468 (1987) (recognizing that "[a]llowing a State to circumvent the preclearance requirement for annexations by annexing vacant land intended for white developments would . . . 'have the effect of denying citizens their right to vote because of their race'" (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969)); Alexander v. Chattahoochee Valley Cmty. Coll., 325 F. Supp. 2d 1274, 1281–83 (M.D. Ala. 2004) (holding that Black community college clerk stated a prima facie case of race discrimination where the school followed a procedure that appeared designed to circumvent hiring practices mandated by an earlier consent decree); *see also* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 429 (2014) (discussing a series of decisions from 1927 to 1953, collectively known as the White Primary Cases, in which the U.S. Supreme Court found that an "anti-circumvention norm justified abrogating the First Amendment rights" of a private association because the state was using it as a mechanism "to circumvent the protections of the Fourteenth . . . Amendment[ ]"); Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 100 n.60 (1966) (observing that the practice of eliminating the use of

capital case makes it all the more important that the Court closely scrutinize the actions of the trial prosecutors.[46]

The remedy for state action that has undermined a defendant's right to a jury selection process free of racial discrimination is the vacation of conviction. The U.S. Supreme Court accords such weight to the constitutional prohibition against race-based peremptory challenges that it has on three occasions since 2005 reversed murder convictions because of trial courts' failure to abide by *Batson*'s dictates.[47] This Court should do the same here. It should award Mr. Tucker a new trial, one free of racial discrimination, and make clear that any attempt to game the use of peremptory challenges and undermine the operation of *Batson* by North Carolina prosecutors will compromise any ensuing conviction.

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literary tests and other "devices [that] had been . . . used as a means of circumventing the fifteenth amendment by discriminatory application" today would "be defended under the fourteenth amendment").

[46] The use of the death penalty in North Carolina has come under increased scrutiny in recent years in part because of the DNA exoneration of two brothers whose convictions were previously upheld by this Court, *see* State v. McCollum, 334 N.C. 208 (1993), and who spent 31 years as innocent men on death row. The men were once "held out, to the collective members of the Supreme Court, as the very worst of the worst." Michael L. Perlin, *"Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1513–16 (2016). Even after they were proven innocent and the actual killer was identified, the trial prosecutor refused to acknowledge his error and criticized the state's failure to execute them. *See generally* Richard A. Oppel, Jr., *As Two Men Go Free, a Dogged Ex-Prosecutor Digs In*, N.Y. TIMES, Sept. 8, 2014, at A1. As the McCollum case illustrates, the risk of executing an innocent person is very real. In 2015, former U.S. Supreme Court Justice John Paul Stevens said one of his former clerks had convinced him "beyond a shadow of doubt" that Texas had executed an innocent man. *See generally* COLUMBIA LAW SCHOOL, *Professor James Liebman Proves Innocent Man Executed, Retired Supreme Court Justice Says* (Jan. 26, 2015). It has become clear in some instances that prosecutors' zeal to win in death cases has eclipsed their sense of responsibility to do justice. The Supreme Court of Arizona, for example, was made to disbar a capital prosecutor for using false testimony to obtain multiple convictions and death sentences, a decision that came only after the prosecutor had "conducted approximately sixty death penalty trials," "won national awards and twice won the Arizona prosecutor-of-the-year award while being 'personally responsible for a tenth of the prisoners on Arizona's death row.'" Jeffrey L. Kirchmeier et. al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1363–64 (2009).

[47] Flowers v. Mississippi, 588 U.S. __ (2019); Foster v. Chatman, 578 U.S. __ (2016); Miller-El v. Dretke, 545 U.S. 231 (2005).

III. Unique considerations regarding the adjudication of homicide cases involving Black defendants militate in favor of this Court's close scrutiny where defendants advance credible evidence of racial discrimination in the jury selection process.

Although post-conviction relief in a capital case comes at the expense of considerable prosecutorial resources, there is a strong public interest in having instances of racial discrimination in jury selection, including the kind of practices that were employed in Mr. Tucker's case, declared as unacceptable.[48] Recognizing this, officials in other jurisdictions, rather than fighting to preserve a conviction, have agreed in some cases to stipulate "that [a] Defendant is entitled to a new trial due to the State's use of peremptory strikes against African-American prospective jurors,"[49] or because a prosecutor made false or misleading statements during their trial.[50]

This has not happened in North Carolina, and there is no indication that it would, given the state's fraught political climate.[51] Yet courts' and prosecutors' fidelity to *Batson* during the period of time in which Mr. Tucker was convicted are

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[48] *See, e.g.*, State v. Ramseur, 374 N.C. 658, 675 (2020) (observing that "the harm from racial discrimination in criminal cases is not limited to an individual defendant, but rather it undermines the integrity of our judicial system"); Kirchmeier, *Vigilante Justice*, *supra* note 46, at 1353 (stating that "studies . . . indicate[that] the potential for an unethical prosecutor to commit misconduct by striking jurors for prohibited reasons while concealing that intent with neutral reasons is significant"); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 501 (1996) ("[T]he exclusion from jury service because of group stereotyping . . . makes underrepresented groups less accepting of the court system and its results[ ] and injures society as a whole by frustrating the ideal of equal citizen participation in the jury process.").

[49] *See, e.g.*, State's Stipulations, State v. Williams, discussed *supra* note 5.

[50] *See, e.g.*, Philadelphia District Attorney's Office, OVERTURNING CONVICTIONS—AND AN ERA, CONVICTION INTEGRITY UNIT REPORT, JAN. 2018–JUNE 2021, at 10 (2021) (reporting that the Philadelphia D.A.'s office recently worked to exonerate and secure the release of four prisoners who were convicted in cases where it was determined prosecutors made false statements in court).

[51] *Cf.* Jason Zengerle, *Is North Carolina the Future of American Politics?*, N.Y. TIMES, June 25, 2017, at MM36 ("Welcome to North Carolina . . . where all the passions and pathologies of American politics writ large are played out writ small—and with even more intensity.").

known to have been particularly poor,[52] heightening the need for this Court to apply close scrutiny to capital cases that advance credible claims of racial discrimination. In this case, the State may have chosen to take trial prosecutors at their word that race was not in play, but the circumstances strongly suggest that it was.

Amicus are acutely aware of the salient but inappropriate influence of race in the disposition of many criminal cases. For many of *amicus* NCABL's earliest defense attorneys, often the only other person of color in the courtroom, if there was one, was the criminal defendant they were representing. The district attorneys they practiced against, as well as the judges they practiced before, were uniformly white. Today, Black judges and District Attorneys hold office and preside over criminal proceedings in courtrooms across the state.[53] While the larger work of diversifying the legal profession remains halting and unfinished,[54] the state has almost twice the proportion of Black attorneys as the nation as a whole.[55] Older members of *amicus* have thus seen the legal profession in North Carolina change in important respects

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[52] *See generally* State v. Robinson, 375 N.C. 173, 178–79 (2020); Pollitt & Warren, *Thirty Years of Disappointment*, *supra* note 36; Weill-Greenberg, *Persistent History*, *supra* note 39.

[53] In 1975, during oral argument about North Carolina's death penalty before the U.S. Supreme Court, the assistant attorney general used a racial slur to refer to the state's first Black judge, the Hon. Elreta Alexander, while arguing that her election was evidence that there was "not one aspect of racial overtones in the system of justice in the State of North Carolina." *See* EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 326–28 (2013) (reprinting transcript from *Fowler v. North Carolina*, 428 U.S. 280 (1976)).

[54] *See, e.g.*, Greg Goelzhauser, *Diversifying State Supreme Courts*, 45 LAW & SOC'Y REV. 761 (2011) (examining trends in racial diversity on state supreme courts); *see also* Judge Ashleigh Parker Dunston, *"Justice Isn't Always Blind*," N.C. STATE BAR JOURNAL, 6, 7–8 (Fall 2020) (collecting accounts from Black attorneys and judges in North Carolina of being "held to different standards, scrutinized at higher levels, [or] seen as illegitimate," as well as discussing difficulties that come with being the only Black practitioner in some places).

[55] *Compare* N.C. STATE BAR, VOLUNTARY DEMOGRAPHIC SURVEY OF ACTIVE STATE BAR MEMBERS (ongoing) (reporting that 9.03% of 11,675 respondents identified as Black) *with* AM. BAR ASS'N, NAT'L LAWYER POPULATION SURVEY (2021) (reporting that in each year from 2011 to 2021, 5% of active attorneys nationwide were Black).

during their lifetimes. Yet one thing that has stayed stubbornly and distressingly constant has been the systematic exclusion of Black jurors from capital juries, a phenomenon that endures and continues to undermine the promise of equal justice under law.[56]

Regrettably, some trial prosecutors have recognized that, as an empirical matter, race-based peremptory challenges "are strategically rational,"[57] and they have pursued them for that reason—another factor that militates in favor of the Court's vigilance. North Carolina data sets indicate that, "for every peremptory challenge that [a] prosecutor used, the conviction rate for black male defendants increased by 2–4%."[58] The state's demographics happen to be such that, "when the defendant is black, challenges by State prosecutors have an especially large positive impact on the conviction rate."[59]

Not long ago, the State appealed to this Court to permit the execution of Black and minority criminal defendants who a lower court concluded were subjected to racial discrimination in their jury selection process.[60] In doing so, the State accused the Black superior court judge in Fayetteville who entered the order of being "biased"

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[56] 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, 1533–34 (2012).

[57] Ronald F. Wright et. al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1431 (2018); *cf.* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1621–22 (1985) (observing that when Baltimore switched "from a juror selection method that yielded at least 70% white jurors to one that yielded between 34% and 47% black jurors, the jury trial conviction rate dropped from almost 84% to less than 70%," and that a similar phenomenon occurred in Los Angeles).

[58] *Id.* (citing Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J.L. & ECON. 189 (2018)).

[59] Flanagan, *Evidence from North Carolina*, *supra* note 58, at 212.

[60] Paul Woolverton, *N.C. Supreme Court Justices Hear Arguments About Racial Justice Act Used in Fayetteville Cases*, FAYETTEVILLE OBSERVER, April 14, 2014.

in favor of the defendants, whose death sentences he had commuted to life "primarily based on the words and deeds of the [trial] prosecutors themselves."[61]

Here, the State has argued that a procedural bar precludes the Court from reaching the issue of a cheat sheet that was employed by trial prosecutors to subvert *Batson* and obtain the all-white jury that sentenced Mr. Tucker to death. This argument comes in the wake of the Attorney General's recent condemnation of "covert . . . practices of discriminatory exclusion" in jury selection,[62] which *amici* contends is an apt description for the trial prosecutors' use of the document at issue. While the State is not wrong to regard the preservation of a homicide conviction among its highest executive priorities, the preservation of defendants' constitutional right to trials and sentences untainted by racial discrimination should always take precedence.

CONCLUSION

North Carolina is still coming to terms with how to honor this responsibility, particularly for those who have been convicted and whose lives hang in the balance. This Court ultimately determined that the defendants granted relief by the superior court in Fayetteville were entitled to maintain their life sentences. Some advocates have read those cases to suggest that North Carolina courts are prepared to take

[61] *Id.* (second quotation quoting defense attorney Jay Ferguson, characterizing the court's order); *see also* Dax-Devlon Ross, *Bias in the Box: For Capital Juries Across America, Race Still Plays a Role in Who Gets to Serve*, 90 VIRGINIA QUARTERLY, 178, 197 (2014) (observing that the judge endured heated "criticism from legislators, law enforcement, prosecutors, and victims' rights groups, some of whom detested . . . [him] for giving [the evidence] credence").

[62] N.C. TASK FORCE FOR RACIAL EQUITY IN CRIMINAL JUSTICE, REPORT 2020, at 100 (2020).

Batson more seriously than they traditionally have, although those cases were resolved on double jeopardy grounds and not *Batson*.[63]

This case, however, presents the Court with an opportunity to do something it has never done: to find that the State engaged in improper race-based strikes of Black jurors.[64] Given the strong evidence of pretext and the resulting jury, *amici* contend that such a finding would be appropriate on the facts. However, if the Court believes additional factfinding is necessary, it should, consistent with *Bennett* and *Hobbs*, remand the matter to the trial court with specific instructions to award Mr. Tucker a new trial if the State fails to meet its burden of production.[65] Either outcome would communicate to trial courts and attorneys across North Carolina that the Court is prepared to take action where evidence indicates that the State has sought to evade its obligations under *Batson*.

Amici North Carolina Association of Black Lawyers and North Carolina State Conference of the NAACP believe this is an important message for litigants and trial courts to receive. *Amici* respectfully urges the Court to consider the harm it would do to the credibility of our judicial system, and to the promise of equal justice under law, if the State is permitted to execute Mr. Tucker when the evidence indicates

[63] State v. Robinson, 375 N.C. 173, 178 (2020); State v. Walters, 375 N.C. 484 (2020); State v. Golphin, 375 N.C. 432 (2020); State v. Augustine, 375 N.C. 376 (2020).
[64] *See Robinson*, 375 N.C. at 180 n.6 ("Although this Court ultimately remanded [*Hobbs* and *Bennett*] for a new *Batson* hearing, we did not find that the State intentionally discriminated against a juror in violation of *Batson*.").
[65] State v. Bennett, 374 N.C. 579, 602–03 (2020); State v. Hobbs, 374 N.C. 345, 360 (2020).

prosecutors employed dishonest tactics to secure the all-white jury that convicted and sentenced him to death.[66]

Respectfully submitted, this the 13th day of July 2021.

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N.C. R. App. P. 33(b) certification: I certify that 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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[66] State v. Ramseur, 374 N.C. 658, 676 (2020) ("Discrimination in the jury selection process undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice." (quoting Davis v. Ayala, 576 U.S. 257, 285 (2015)).

CERTIFICATE OF SERVICE

The undersigned counsel of *amicus curiae* certifies that a copy of *amici curiae*'s Motion and Brief was sent via email, addressed as follows:

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