No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2023

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CEDRIC THEODIS HOBBS, Jr.,

Petitioner,

-v-

STATE OF NORTH CAROLINA,

Respondent.

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA**

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## QUESTION PRESENTED FOR REVIEW

During voir dire in this case, the defendant objected several times to the State's strikes of Black jurors, citing *Batson v. Kentucky*, 476 U.S. 79 (1986). A *Batson* hearing was held during voir dire, during which the State offered several justifications for its strikes. The *Batson* challenges were denied, and Mr. Hobbs was ultimately convicted. During Mr. Hobbs' appeal, the Supreme Court of North Carolina ordered a remand hearing to fully address the *Batson* challenges. At the remand hearing, conducted six years after voir dire, the State offered new explanations for its strikes by highlighting "favorable characteristics" about the jurors it had accepted, which were not related to the original explanations it had given during voir dire. Contrary to this Court's precedent, the trial court accepted the State's post-hoc justifications, and concluded that Mr. Hobbs' comparative juror analysis was not persuasive when considering these previously-unmentioned "favorable characteristics." On appeal, the Supreme Court of North Carolina found no error.

This case thus presents the following recurring and important question, on which lower courts are split:

Whether it is proper for a court conducting a comparative juror analysis to consider "favorable characteristics" in otherwise comparable jurors when those characteristics were unrelated to the original justifications offered by the striking party.

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Petitioner, Cedric Theodis Hobbs, Jr., respectfully petitions this Court pursuant to Supreme Court Rules 10, 12, 13, and 14, to issue a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina, entered in the above case on April 26, 2023.

## INTRODUCTION

Although this Court has previously answered the question presented in this case, lower courts persist in ignoring the answer. However, without this Court's direct and clear intervention, the lower courts show no sign of bringing their practices in line with this Court's precedent.

In the 37 years since *Batson v. Kentucky*, 476 U.S. 79 (1986) was decided, this Court has repeatedly reversed convictions where lower courts failed to enforce *Batson*. But in North Carolina, *Batson* has changed almost nothing. Over the past 37 years, North Carolina's appellate courts have found that a prosecutor intentionally discriminated against a juror only once. *See State v. Clegg*, 380 N.C. 127, 867 S.E.2d 885 (2022); *see also State v. Robinson*, 375 N.C. 173, 178, 846 S.E.2d 711, 716 (2020) ("Although the Supreme Court's ruling in *Batson* and subsequent decisions sought to eliminate discrimination through the use of peremptory challenges, this Court has *never* held that a prosecutor intentionally discriminated against a juror of color."); *and* Daniel R. Pollitt and Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1959 (2016) ("Briefly, that record is remarkable and disappointing: North Carolina's highest court has never once in those thirty years found a substantive *Batson* violation"). Since that singular decision, the Supreme Court of North Carolina has regressed, issuing four decisions this year which fail to properly apply *Batson* and its progeny. *See State v. Hobbs*, 384 N.C. 144, 884 S.E.2d 639 (2023), *State v. Richardson*, No. 272A14, 2023 N.C. LEXIS 586 (N.C. Sep. 1, 2023); *State v. Campbell*, 384 N.C. 126, 884 S.E.2d 674 (2023); and *State v. Ruth*, 384 N.C. 185, 884 S.E.2d 747 (2023).

In the present case, the Supreme Court of North Carolina largely ignored the numerous arguments raised in Mr. Hobbs' 111-page brief and effectively rubber-stamped a 70-page trial court order in 15 pages of cursory, legally improper analysis. While the order below contains a constellation of errors, both legal and factual, a

single mistake burns brightest: The lower courts allowed the State, at a hearing held six years after the original voir dire, to offer new explanations for its strikes by highlighting supposedly favorable characteristics in the jurors it had accepted. In doing so, the lower courts not only engaged in a fundamentally flawed comparative juror analysis, they also allowed the State to offer post-hoc rationalizations. Both are in direct contradiction to this Court's precedent.

Worse, because the purported differences between stricken and accepted jurors were actually similarities, the lower courts committed factual error. And, by failing to find that the State's new explanations were both legally and factually incorrect, the lower courts failed to recognize them for what they were: evidence of pretext.

Despite glaring mistakes in the decision below, the mistakes should come as no surprise. North Carolina courts have a long history of circumventing *Batson*. Indeed, the best way to nullify this Court's precedent is simply to ignore it. While scholars and even justices in North Carolina have long considered *Batson* a dead letter here, the renewed disregard for *Batson* in North Carolina renders it something worse: a false promise. *See* Pollitt et al., 94 N.C. L. Rev. at 1979-80; *see also Clegg*, 380 N.C. at 170, 867 S.E.2d at 916 ("We must acknowledge that this Court's *Batson* jurisprudence has not been effective.") (Earls, J., concurring). North Carolina is, in effect, a *Batson*-free zone.

In North Carolina, as well as other states and circuits, *Batson* has become an empty formality. Courts routinely caution counsel that racial discrimination in jury selection is forbidden, while bending over backwards to conclude that such

discrimination is not present in any actual case before them. In the present case, the lower courts plainly and casually ignored this Court's precedent. Unless and until this Court directly instructs North Carolina courts to properly apply *Batson* and its progeny, prosecutors will win verdicts with improperly-selected juries, and the appellate courts will not deprive them of their unlawful victories.

While the order below is replete with errors, this case is particularly well-suited to present the question of whether it is appropriate for courts to consider purportedly favorable characteristics of otherwise comparable jurors who were accepted, when those explanations were not the justifications offered for a peremptory strike during an original *Batson* hearing occurring in voir dire.

## OPINION BELOW

The trial court's order on Mr. Hobbs' 2020 remand hearing is attached as Appendix A. The opinion of the Supreme Court of North Carolina issued on April 6, 2023, denying Mr. Hobbs' direct appeal is attached as Appendix B and is also available at *State v. Hobbs*, 384 N.C. 144, 884 S.E.2d 639 (2023). The Supreme Court of North Carolina's judgment entered April 26, 2023, is attached as Appendix C.

## JURISDICTION

The judgment of the Supreme Court of North Carolina denying Mr. Hobbs' direct appeal was entered on April 26, 2023. *See* Appendix C. On June 21, 2023, Chief Justice Roberts granted Mr. Hobbs' timely-filed motion for extension of time within which to file this Petition until September 23, 2023. *See* Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, as Mr. Hobbs is asserting a

deprivation of his rights secured by the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fourteenth Amendment to the United States Constitution. "No State shall . . . deprive any person of life, liberty or property without the due process of law . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

## STATEMENT OF THE CASE

On August 4, 2014, the Cumberland County Grand Jury indicted Cedric Theodis Hobbs, Jr., for the following nine offenses: 1) first-degree murder; 2) two counts of armed robbery; 3) two counts of attempted armed robbery; 4) conspiracy to commit armed robbery; 5) two counts of second-degree kidnapping; and 6) one count of first-degree kidnapping. (Rpp 79-81). These counts were tried together and the murder case tried capitally at the October 13, 2014 Criminal Session of Cumberland County Superior Court. (Rp 1). The trial court dismissed the three kidnapping charges at the close of the State's evidence. (Rp 1). On December 12, 2014, the jury found Mr. Hobbs guilty of the six remaining offenses. (Rp 1). After a capital sentencing hearing, the jury could not reach a unanimous verdict. (Rp 1). On December 18, 2014, the trial court entered a consolidated judgment imposing life imprisonment without parole for the first-degree murder conviction and one of the attempted armed robbery convictions. The court also entered consecutive sentences of 73 to 97 months each for the two armed robbery convictions and the other attempted armed robbery conviction, and 29 to 44 months for the conspiracy to commit armed

robbery conviction. (Rpp 154-163).

Mr. Hobbs is Black, and the victims of the crimes he was charged with were non-Black. (Rpp 15-16, 17, 79-81; Tpp 1575, 1623). This petition arises from the State's purposefully discriminatory use of peremptory strikes. During voir dire, Mr. Hobbs objected to the State's strikes of four Black jurors under *Batson*. At the time of the final *Batson* challenge, the State had used eleven peremptory strikes, eight of them against Black prospective jurors. (3rd RSpp 148, 190). The State struck 8 of 16 Black prospective jurors and passed 8, for a Black juror "rejection rate" of 50%. (3rd RSpp 148, 190-91). In contrast, the State struck only 2 of the 22 non-Black jurors and passed 20, for a non-Black juror "rejection rate" of 9%. (3rd RSpp 148, 190-91). Thus, the State was approximately five times more likely to strike a Black juror than a non-Black juror.

During voir dire, the trial court ruled on each of these objections and concluded the strikes were not racially motivated. (Tpp 1629-30, 2437-38). Throughout the state-court appellate process, Mr. Hobbs challenged the State's peremptory strikes as violations of the right to equal protection under *Batson*.

I. <u>The *Batson* objections and the State's initial justifications:</u>

During voir dire, the State exercised peremptory strikes against Black prospective jurors Layden, Humphrey, and McNeill. (Tpp 1557-58, 2421). In multiple *Batson* hearings, the trial court asked the State to offer justifications for the strikes. For prospective juror Layden, the State's justifications included: (1) his sister had a significant mental health issue; (2) he allegedly had reservations about imposing the death penalty; (3) he wanted to give second chances to soldiers under his command

"who had made alcohol related or dumb mistakes;" and (4) he had a prior arrest he said he did not want to answer detailed questions about. (Tpp 1596-98).

For prospective juror Humphrey, the State's justifications included: (1) he allegedly had reservations about imposing the death penalty; (2) he had connections to the mental health field and "thought [mental health professionals] did a good job"; and (3) the State allegedly feared he would identify with Mr. Hobbs because he served as a mentor at a halfway house for people with mental health issues and pending criminal charges. (Tpp 1598-99).

For prospective juror McNeill, the State's justifications included: (1) his "significant" reservations about imposing the death penalty; (2) he had "a sister with some anxiety issues;" (3) he had family members with substance abuse problems; and (4) as a pastor, he had "outreached to folks that are going through drugs and other difficult issues." (Tpp 2424-26).

In each instance, the trial court denied the *Batson* challenges, concluding that the State's strikes were not motivated by racial discrimination. (Tpp 1629-30, 2437-38).

During the voir dire *Batson* hearings, Mr. Hobbs argued that the State's justifications for the strikes were pretextual. In support of this argument, Mr. Hobbs cited a history of racial discrimination in jury selection in Cumberland County, argued that the case was particularly susceptible to racial bias, and offered a comparative juror analysis showing that the State's justifications applied equally well to non-Black jurors the State had accepted. (Tpp 1573-1630, 2423-38).

II. The Appellate Process:

During his appeal, Mr. Hobbs raised arguments concerning the errors in the lower court's *Batson* rulings. On May 1, 2020, the Supreme Court of North Carolina issued an opinion remanding the matter to Superior Court "for a new *Batson* hearing," holding "the Court of Appeals erred in its analysis of [the] *Batson* claims" and "neither the trial court nor the Court of Appeals appropriately considered all of the evidence necessary to determine whether Mr. Hobbs proved purposeful discrimination with respect to the State's peremptory challenges of jurors Humphrey, Layden, and McNeill." *State v. Hobbs (Hobbs I)*, 374 N.C. 345, 347, 356, 841 S.E.2d 492, 495, 501 (2020).

III. The Remand Hearing:

On July 22, 2020 the Superior Court held a remand hearing. (HTp. 3). The precise issue before the trial court was "whether the defendant ha[d] shown 'race was *significant* in determining who was challenged and who was not.'" *Hobbs I*, 374 N.C. at 352 n.2, 841 S.E.2d at 498 (quoting *State v. Waring*, 364 N.C. 433, 480, 701 S.E.2d 615, 639 (2010) (quoting *Miller-El v. Dretke,* 545 U.S. 231, 252 (2005) (emphasis in *Hobbs I*)). At the trial court's request, both parties submitted proposed orders to the Court *before* the hearing date, in part to allow the judge to familiarize himself with the arguments. (HTpp. 4-7, 14-15, 3rd RSpp 1, 64).

Neither party presented new evidence at the hearing. Both parties argued based on the evidence in the record from the 2014 jury selection. (HTpp. 12-85). Mr. Hobbs argued, just as he had done throughout this litigation, that the State's pattern of strikes, disparate questioning, misrepresentations of the record, racially-charged

statements, and many other factors proved purposeful racial discrimination under *Batson*. (HTpp. 12-67). The State presented new reasons for its strikes and acceptance of jurors. (HTpp. 8, 68-85). It also argued its pattern of strikes against Black jurors at this trial was justified, notwithstanding the prior death-qualification, because "members of the black population" at "an aggregate rate" have "judicial political opinions" opposing the death penalty. (HTpp. 85-89). Just as it did in 2014 (Tpp. 1584-86), the State also argued the trial court should consider Mr. Hobbs' strikes against Black jurors. (HTpp. 91-93).

The State also rejected Mr. Hobbs' comparative juror analysis, arguing instead that the trial court should consider a "whole juror" analysis in the form of a lengthy discussion of non-Black jurors who had been accepted by the State, repeatedly identifying "significant differences" between the accepted jurors and the stricken jurors. (3rd RSpp 195-208). The State recited numerous supposedly "favorable" characteristics about accepted jurors and claimed that Mr. Hobbs' comparative analysis "ignore[d]" these favorable characteristics. (3rd RSpp 195-208).

Mr. Hobbs offered a comparative juror analysis showing that the State's original justifications for the strikes applied to 21 non-Black jurors it had accepted. Mr. Hobbs also argued that the State's "whole juror" analysis was improper under this Court's precedent and that the State was attempting to offer new justifications for its strikes of Layden, Humphrey, and McNeill. Mr. Hobbs argued the trial court should not credit the State's post-hoc justifications and that it should instead consider them evidence of the pretextual nature of the State's original justifications for the

strikes. (HTpp 40-67).

IV. The August 13, 2020 Order:

On August 13, 2020, the trial court filed a 74-page order again denying Mr. Hobbs' *Batson* objections. (3rd RSpp 138-211). The trial court adopted a proposed order submitted by the State with few alterations. (Compare 3rd RSpp 64-137 *and* 138-211). The trial court's order includes a "finding of fact number 46" containing a juror analysis that recites reasons why the State struck and did not strike jurors the State had never before offered in this litigation. (3rd RSpp 195-208). This section also approves what the order terms the State's "whole juror approach" to comparative juror analysis, which views comparative juror analysis as not probative unless the whole of all of the traits of one juror are identical to the whole of all of the traits of another juror, and which focuses on differences between the jurors and allegedly favorable characteristics of the jurors not stricken. (3rd RSp 196). The order was certified back to the Supreme Court of North Carolina for final review.

V. The Supreme Court of North Carolina's final decision:

On April 6, 2023, the Supreme Court of North Carolina issued an opinion holding there was no error in the trial court's order on Mr. Hobbs' *Batson* claims. The Supreme Court of North Carolina noted that "the trial court conducted side-by-side juror comparisons of the three excused prospective jurors at issue with similarly situated prospective white jurors whom the State did not strike." *Hobbs*, 384 N.C. at 150, 884 S.E.2d at 644. The Supreme Court of North Carolina further noted that "[t]he trial court declined to adopt defendant's suggested 'single factor approach' to compare the prospective jurors because that approach fails to consider each juror's

characteristics 'as a totality.' Instead, the trial court adopted the State's 'whole juror' approach in its comparisons." *Id*. The Supreme Court of North Carolina then recited some of the facts found by the trial court and concluded that, as to each of the three jurors at issue, "the trial court's decision" was "not clearly erroneous." *Id.* at 150-157, 884 S.E.2d at 644-49.

A dissenting justice observed that the trial court "failed again to adequately consider all the evidence Mr. Hobbs presented." *Id*. at 159 (Earls, J., dissenting). The dissent took issue with the trial court's handling of several factors, including the comparative juror analysis. *Id*. at 159-170. (Earls, J., dissenting). In particular, the dissent noted that, "[b]y focusing on the differences between the jurors, the trial court foreclosed the possibility of any meaningful comparative juror analysis." *Id.* at 170 (Earls, J., dissenting). The dissenting Justice noted that "[i]t will always be possible to find something different between two people, even identical twins[,]" and concluded that the "trial court's 'whole juror' analysis was not consistent with well-established legal principles." *Id.* (Earls, J., dissenting).

## REASONS WRIT OF CERTIORARI SHOULD ISSUE

This Court has consistently rejected the sort of post-hoc, "whole juror" analysis applied by the trial court and approved by the Supreme Court of North Carolina in this case. Despite the clear precedent, only some state courts of last resort and lower federal courts follow this Court's directives. Given the divergence, this Court should grant certiorari to reaffirm its already clear precedent and demonstrate to misguided lower courts that *Batson* and its progeny must be applied faithfully, including

rejecting the so-called "whole juror" approach to comparative juror analysis.

I. This Court has, in every case involving a comparative juror analysis, rejected a striking party's attempt to offer post-hoc explanations for accepting comparable jurors based on their unrelated "favorable characteristics." North Carolina has joined several circuits and states in ignoring this Court's precedent.

This Court has repeatedly held that, during *Batson's* third step, "side-by-side comparisons of" stricken jurors and accepted jurors may provide "powerful" evidence of discrimination. *Miller-El*, 545 U.S. at 235. Judges undertaking such an analysis should determine whether "a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve[.]" *Id.*

II. A comparative juror analysis must focus on whether a striking party's justifications for a strike also apply to jurors who were accepted by that party.

This Court conducted its first comparative juror analysis in *Miller-El*. When conducting this review, this Court simply identified the State's justifications for a strike and then assessed whether that justification applied to jurors who were accepted. *Id*. at 248 ("The fact that [the prosecutor's] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext.").

This Court explicitly rejected an invitation to look for other factors to use when comparing the jurors. *See id.* at 245, n.4. In fact, this Court mentioned nothing about the white jurors accepted by the State other than their similarity to the stricken jurors in the area identified by the State. *See id.* Notably, the dissenting justice in *Miller-El did* engage in a "whole juror" analysis. *See id.* at 294 (Thomas, J., dissenting) ("This is likely why the State accepted Hearn and Miller-El challenged

her for cause."). However, as described above, the majority opinion engaged in no such analysis and in fact expressly rejected the dissent's focus on differences between jurors. *Id.* at 245, n.4 ("The dissent offers other reasons why these nonblack panel members who expressed views on rehabilitation similar to Fields's were otherwise more acceptable to the prosecution than he was. . . . In doing so, the dissent focuses on reasons the prosecution itself did not offer.").

Next, in *Snyder v. Louisiana*, 552 U.S. 472 (2008), this Court repeated its cause-by-cause, single-factor comparative juror analysis. There, the prosecutor gave two reasons for striking a Black juror: his alleged demeanor and possible scheduling concerns arising from his student teaching job. *Snyder*, 552 U.S. at 478-79. This Court discounted the first excuse because the trial court failed to make a finding of fact concerning the juror's demeanor. *Id.* at 479. This Court then addressed the second excuse and stated, "The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as [the Black juror's]." *Id.* at 483. This Court's analysis compared the Black juror to two white jurors, focusing solely on whether the two white jurors would have scheduling problems. *Id.* at 483-84. This Court never mentioned any other characteristic about these white jurors, nor did it engage in any discussion of why these white jurors might have been more favorable to the State. *Id.*

Next, this Court conducted a comparative juror analysis in *Foster v. Chatman*, 578 U.S. 488 (2016). This Court again found the prosecutor's excuses "difficult to credit because the State willingly accepted white jurors with the same traits that

supposedly rendered [a Black juror] an unattractive juror." *Foster*, 578 U.S. at 490. The Supreme Court identified several such reasons, proceeding trait-by-trait, and again never mentioned additional, supposedly favorable, characteristics in the white jurors accepted. *Id.* For example, one of the State's excuses was that a Black juror had a son the same age as the defendant. This Court found this excuse pretextual, observing: "If Darrell Hood's age was the issue, why did the State accept (white) juror Billy Graves, who had a 17-year-old son? . . . And why did the State accept (white) juror Martha Duncan, even though she had a 20-year-old son?" *Id.* at 508. This Court never mentioned any characteristic of Billy Graves or Martha Duncan outside of their sons and their similarity to the son of the Black juror stricken. *Id*.

The most recent comparative juror analysis conducted by this Court came in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). As it has done in every comparative juror analysis preceding it, this Court limited its review to a trait-by-trait comparison to see whether the State's "proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve[.]" *Flowers,* 139 S. Ct. at 2248-2249. This Court discussed the applicability of several proffered reasons to non-Black jurors accepted by the State, without ever discussing supposed "favorable characteristics." *Id*.

Thus, in the eighteen years since this Court first conducted a comparative juror analysis, it has always focused solely on the question of whether the striking party's justifications for a strike applied to jurors that had been accepted. This Court has never conducted a comparative analysis by seeking out favorable characteristics of

accepted jurors to further justify the strike. Likewise, this Court has never required a defendant to show that comparable jurors who were accepted by the State had no "favorable" characteristics which motivated the State to accept them despite their sharing "flaws" used to justify the strikes of other jurors. As stated originally in *Miller-El*, "[a] per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El*, 545 U.S. at 247, n.6.

III. It is inappropriate to consider post-hoc justifications for a strike.

This Court has also made clear that, once a *Batson* objection has been raised and a prima facie case has been established, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." *Id.* at 252. A prosecutor must not be afforded multiple chances to articulate new justifications for a strike after the fact. *Id.* Attempts to do so "reek[] of afterthought" and are themselves evidence of pretext. *Id.* at 246 (rejecting prosecutor's new justification for a strike offered at a *Batson* hearing held two years after voir dire); *accord Foster*, 578 U.S. at 514 (rejecting prosecutor's new explanations "having never been made in the nearly 30-year history of this litigation[.]).

IV. The Supreme Court of North Carolina has violated both of these rules.

During the original *Batson* hearing in 2014, the State never identified any "favorable characteristics" of non-Black jurors to explain why those jurors were accepted despite their sharing "flaws" the State had offered as justifications for striking Black jurors McNeill, Layden, and Humphrey. (Tpp 1573-1630; 2422-2438).

By offering these new explanations six years later at the remand hearing in 2020, the State was simply providing new excuses for striking Black jurors: If only the stricken jurors had shared the purportedly favorable characteristics newly identified in the non-Black jurors it accepted, the State appears to say, it would have accepted them as well.

The trial court adopted the State's "whole juror" analysis, and the Supreme Court of North Carolina approved of it. In doing so, the lower courts failed to recognize the State's arguments for what they were: evidence of pretext. Instead, the lower courts allowed the State to subvert the purposes of a comparative juror analysis by hiding behind supposed differences between the jurors it accepted and those it struck on characteristics other than those which it had previously claimed justified its strikes. The lower courts' decisions in this case violate this Court's clearly-established precedent both that a comparative juror analysis should focus only on whether a prosecutor's justification for a strike applies to a juror it had accepted and that a prosecutor's post-hoc attempts to drum up new justifications should be viewed as evidence of pretext and held against the prosecutor. *See Miller-El*, 545 U.S. at 245, n.4.

The error is particularly striking in the present case, where the trial court rubber-stamped the State's new justifications despite them being demonstrably untrue. Here, the State claimed that four non-Black jurors were preferable because they had military experience or a connection to someone with military experience. The State claimed that seven non-Black jurors were preferable because they had a

law enforcement background, or a connection to someone with a law enforcement background. And the State claimed that it preferred nine non-Black jurors who had been the victims of a crime. The trial court found that these factors were all "significant differences" between the stricken and accepted jurors, which all overcame any similarity the jurors bore on the characteristics originally relied upon by the State to justify the strikes. (3rd RSpp 195-208). The Supreme Court of North Carolina approved of this reasoning. *Hobbs*, 384 N.C. at 150-57, 884 S.E.2d at 644-49.

However, as pointed out to both lower courts, all three of the stricken jurors in this case had been victims of a crime. (McNeill - Tp 2381; Layden – Tp 1455-56; Humphrey – Tp 1485). Both Layden and McNeill had military experience, serving in the marines for eight years and the army for three, respectively. (McNeill - Tp 2368-70; Layden - Tpp 1417, 1442-43, 1452, 1454). McNeill himself had worked as a correctional officer. (Tp 2368-70). The trial court here found "differences" where there simply were none, and, in doing so, failed to recognize the State's post-hoc, demonstrably false justifications as evidence of discrimination. The Supreme Court of North Carolina endorsed this factually inaccurate order.

Thus, not only are the decisions of the lower courts in conflict with this Court's precedent, they are in conflict with reality.

V. Some lower courts have dutifully followed this Court's guidance in the *Batson* line of cases. North Carolina and other state and federal courts, however, continue to defy this Court's *Batson* mandate.

Notwithstanding this Court's clearly articulated practice, there is a split in jurisdictions concerning the appropriate factors for consideration when conducting a comparative juror analysis. For example, the Seventh, Ninth and Eleventh Circuits

have clearly rejected prosecutors' attempts to offer post-hoc justifications for a strike by articulating favorable characteristics about jurors who were accepted. *See United States v. Taylor*, 636 F.3d 901, 905-06 (7th Cir. 2011) (Noting that because *Miller-El* "instructs that when ruling on a *Batson* challenge, the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons offered after the fact" and rejecting prosecutors' attempt to further explain a strike at a remand hearing by identifying new, unrelated characteristics about an accepted juror that justified their acceptance.); *Love v. Cate*, 449 F. App'x 570, 572 (9th Cir. 2011) (unpublished) (holding it was proper for district court to reject the government's reasoning where, "[d]uring the proceedings on remand, Respondent pointed out to the district court that these jurors had non-racial characteristics that distinguished them from the black venire-member. However, the prosecutor never stated to the state trial court that he relied on these characteristics, even though *Batson* required him to articulate his reasons.");[1] *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1269-70 (11th Cir. 2009) (rejecting new justifications not offered by the State at trial). Likewise, the

[1] Further demonstrating the need for this Court's intervention, the Ninth Circuit appears to apply this Court's precedent inconsistently. Compare *Love* with *United States v. Mikhel*, 889 F.3d 1003, 1030-31 (9th Cir. 2018) (concluding that because the seated juror had served on several jury trials that went to verdict, the government had a "powerful reason" not to strike him as the government could assume that "the juror is unlikely to be a defense-friendly holdout during deliberations.").

Fourth Circuit has appeared to comply with this Court's holding, though it was not discussed explicitly. *See United States v. Barnette*, 644 F.3d 192, 217 (4th Cir. 2011) (conducting a comparative juror analysis by reviewing solely the justifications offered by the prosecutor and their applicability to various jurors).

However, the courts of several states and federal circuits have improperly adopted a rule allowing prosecutors on remand to offer new justifications for a strike under the guise of identifying new, supposedly favorable, characteristics of accepted jurors. For example, the Fifth Circuit Court of Appeals expressly adopted such a view in *Chamberlin v. Fisher*, 885 F.3d 832, 841 (5th Cir. 2018), *cert. denied Chamberlin v. Hall*, 139 S. Ct. 2773 (2019) (holding that *Miller-El's* "rationale, however, does not extend to preventing the prosecution from later supporting its originally proffered reasons with additional record evidence, especially if a defendant is allowed to raise objections to juror selection years after a conviction and to allege newly discovered comparisons to other prospective jurors."). The Fifth Circuit followed *Chamberlin* in *Harper v. Lumpkin*, 64 F.4th 684, 698 (5th Cir. 2023), *petition filed*, No. 23-5089 (U.S. July 5, 2023) (citing *Chamberlin* and observing, "[i]f the prosecution was not able to explain why it did *not* strike certain jurors after the fact, it would have to foresee future *Batson* claims and explain why it was *not* striking each prospective juror during jury selection."). As of the time of this filing, Mr. Harper has petitioned this court for a writ of certiorari to review this very issue. *See id.*

Likewise, the courts of California, Illinois, and North Carolina have adopted similar rules. *See People v. O'Malley*, 365 P.3d 790, 818 (Cal. 2016), *cert. denied*, 137

S. Ct. 122 (2016) (appellate court rejecting a comparative juror analysis based on appellate court's speculation that there were certain responses of accepted jurors which "would have made them more attractive in the eyes of a prosecutor"); *People v. Mack*, 538 NE.2d 1107, 1111 (Ill. 1989) ("A characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other, favorable characteristics"); and *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 153 (1990) (following *Mack*).

By approving of the so called "whole juror" approach offered by the State in this case, the Supreme Court of North Carolina has demonstrated its continued commitment to ignoring this Court's precedent and has reaffirmed its place among the states and circuits that continue to insist on misapplying *Batson*.

## VI. This Court's intervention is required to ensure lower courts act properly to eradicate racial discrimination from jury selection.

North Carolina courts have, for almost forty years, displayed an obstinate reluctance to grapple with *Batson* in good faith. *See*, *e.g.*, Pollitt *et al.*, 94 N.C. L. Rev. at 1979-80. The sole case in which a North Carolina appellate court concluded a prosecutor had violated *Batson* and removed a juror because of his race occurred in 2022. However, in 2023, the Supreme Court of North Carolina heard oral argument in four cases involving *Batson* claims. In three of those cases, the Court issued decisions finding no *Batson* violation. The fourth has yet to be decided. These decisions, particularly the decision in this case, make clear that the Supreme Court of North Carolina has no interest in properly applying *Batson*. After more than thirty years, it is clear that nothing short of this Court's intervention will fix the situation

persisting in North Carolina.

If this Court truly wishes to remove racial discrimination from the criminal justice system at large, and jury selection in particular, it should grant review to reaffirm its already established rules and bring delinquent jurisdictions like North Carolina in line with its precedent.

VII. Mr. Hobbs' case provides the ideal vehicle for deciding this issue.

Mr. Hobbs made timely *Batson* objections during voir dire, and over the course of the next decade, the record was fully developed. At the original *Batson* hearing during voir dire and at the remand hearing held in 2020, all three steps of the *Batson* analysis were addressed. The State's "whole juror analysis" was fully litigated both at the remand hearing and before the Supreme Court of North Carolina. Thus, Mr. Hobbs' case provides the ideal vehicle for this Court to correct the misapplication of *Batson* and its progeny. Without this Court's intervention, North Carolina courts will continue to flout *Batson* and do nothing to prevent racial discrimination in jury selection.

## CONCLUSION

For the foregoing reasons, Mr. Hobbs respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina on the question presented.

Respectfully submitted, this the 22nd day of September, 2023.

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