No. _____

IN THE

Supreme Court of the United States

JONATHAN DOUGLAS RICHARDSON,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTION PRESENTED

Thanks to a well-known study of twenty years of capital jury selection in North Carolina, the defense knew going into trial that Mr. Richardson's prosecutor had a personal history of striking Black jurors at a rate nearly quadruple that of other jurors. When that pattern once again emerged during jury selection in this case, the defense objected under *Batson v. Kentucky*, 476 U.S. 79 (1986). But when the defense attempted use its data to support its *prima facie* case, the trial court categorically refused to consider the data on the grounds it was "hearsay."

On direct appeal, Mr. Richardson argued that this Court's precedent obligated the trial court to at least *consider* the "relevant history of the State's peremptory strikes in past cases" at step one of the *Batson* inquiry. *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019). The Supreme Court of North Carolina rejected that argument. But not on the grounds that the rules of evidence apply to *Batson* hearings in North Carolina and were properly applied. Rather, consistent with its long record of misapplying *Batson*, it held that "[i]n light of the broad discretion given to trial courts" at the first stage of the inquiry, it did "not perceive clear error in the trial court's decision to sustain the State's hearsay objection[.]" *State v. Richardson*, 891 S.E.2d 132, 205 (N.C. 2023). The question presented for review is:

> Whether the Supreme Court of North Carolina violated this Court's clear precedent when it held that trial judges have "broad discretion" to refuse to consider a prosecutor's personal history of racially disparate strikes at the *prima facie* stage of the *Batson* inquiry?

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Jonathan Douglas Richardson respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina.

OPINION BELOW

The opinion of the Supreme Court of North Carolina issued on September 1, 2023 affirming the trial court in Mr. Richardson's direct appeal is available at *State v. Richardson*, 891 S.E.2d 132 (N.C. 2023). A copy is attached as Appendix A.

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming Mr. Richardson's convictions and sentences was entered on September 21, 2023. *See* Appendix B. On December 7, 2023, Chief Justice Roberts granted Petitioner's timely-filed motion for an extension of time within which to file this Petition until

February 18, 2024. *See* Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, as Mr. Richardson is asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

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

PROCEEDINGS BELOW

A. Trial

On August 2, 2010, a Johnston County, North Carolina Grand Jury indicted Mr. Richardson for first-degree murder and other related non-capital offenses. (R pp 8-14) The case was tried at the January 6, 2014 Criminal Session of Johnston County Superior Court before the Honorable Thomas Lock. (T1 p 1)

Jury selection lasted from January 6 to February 18. The first two Black jurors the State questioned were removed from the panel on the State's motions for cause. (T1 pp 159-60; T5 pp 1060-61) The State peremptorily struck the next Black juror, and the defense indicated it would begin to object under *Batson v. Kentucky*, 476 U.S. 79 (1986), if a pattern developed. (T7 pp 1462-66) The State passed the next Black juror it questioned. (T9 p 1991)

The fifth Black juror questioned by the State was Cubia Massey. The State moved to peremptorily strike her. The defense objected under *Batson* and argued

race was a factor in the strike because, to that point, the State had peremptorily struck 2 of 3 Black jurors who were not challenged for cause, or 67%. Meanwhile, the State had only struck 3 of 16 white jurors for a strike rate of 19%. Thus, the State had struck Black jurors at about 3.5 times the rate of white jurors. (T10 pp 2334-35)

In addition, the defense supported its *Batson* objection with an affidavit from two researchers at Michigan State University College of Law who studied jury selection in 173 North Carolina capital cases between 1990 and 2010. The affidavit showed that based on data from that study, the same prosecutor who questioned and struck Ms. Massey had disproportionately removed Black jurors in four prior capital cases. Over those four cases, the prosecutor struck 29 of 39 qualified[1] Black jurors, for a rate of 74%, but struck only 33 of 154 qualified non-Black jurors, for a rate of 21%. (T10 pp 2335-36; MSU Affidavit)

The affidavit also showed that the prosecutor's strike rate was consistently racially-disparate in all four of the prior cases that were examined:

- In *State v. Hassan Bacote*, tried in 2009, the prosecutor struck 75% (6/8) of Black jurors but only 23% (8/35) of non-Black jurors.

- In *State v. Brian Bell*, tried in 2001, the prosecutor struck 81.8% (9/11) of Black jurors but only 26.3% (15/57) of non-Black jurors.

- In *State v. Iziah Barden*, tried in 1999, the prosecutor struck 80% (8/10) of Black jurors but only 13.8% (4/29) of non-Black jurors.

[1] The researchers defined "qualified" jurors as those who were not removed for cause at the request of either the State or defense.

- In *State v. Johnny Parker*, tried in 1997, the prosecutor struck 60% (6/10) of Black jurors but only 18.2% (6/33) of non-Black jurors.

The affidavit proffered to the trial court also included, as an attachment, the law review article in which the researchers published their capital jury study and its methodology. *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, 1543 (2012) ("the MSU study").[2] According to the article, the source documents collected for the study included jury selection transcripts, juror seating charts, individual juror questionnaires, and attorneys' or clerks' notes from the cases examined. The task of recording information about the race of jurors the State struck or passed was completed by staff attorneys working under the direct supervision of the study's primary investigators. These staff attorneys received detailed training on each step of the data collection process. *Id.* Where the race of jurors was not evident from court documents, the researchers implemented a protocol for documenting juror race that included cross-checking public database information with juror summons lists, blinding the staff attorneys who were researching the race of jurors to whether the State struck or passed the jurors, coding a juror's race as unknown if there was any

[2] The MSU study has been described as "comprehensive" and supportive of "meticulously detailed findings" of race discrimination. *See State v. Robinson*, 846 S.E.2d 711, 717–18 (N.C. 2020).

doubt about their identity, and saving copies of all documents used to make race determinations. *Id.* at 1544–46.

The prosecutor objected to the trial court considering the evidence of his personal history of striking Black jurors at over 3.5 times the rate of non-Black jurors, characterizing the MSU study as "one of the most ridiculous studies [he had] seen in [his] entire life," as well as challenging its relevance. In response, defense counsel argued that historical information about the prosecutor's jury selection conduct was relevant under this Court's precedent. The trial court, after re-framing the prosecutor's objection as one based on hearsay grounds, sustained the objection. (T10 pp 2336-43)[3]

Unburdened by the statistical evidence of his prior pattern of strikes, the prosecutor argued the *Batson* objection lacked merit because the number of Black jurors in Mr. Richardson's case was too small to draw any conclusions from the percentage of jurors struck. The prosecutor argued there was no discrimination against Black jurors because Mr. Richardson is white, the victim was white and had a Salvadoran family background, and most key witnesses were either white or Salvadoran. The prosecutor also observed that he had asked Ms. Massey race-neutral questions about her job and the death penalty. (T10 pp 2347-50)

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[3] The State raised an additional objection to the defense even placing the affidavit in the record for appellate review. (T10 pp 2343-46) In response, the trial court asked the defense to prepare a new affidavit that included only information specific to the prosecutor and excluded information about peremptory strikes in capital cases in the county, prosecutorial district, and statewide. The defense complied with that request without objection, and with respect to the narrower affidavit, the trial court overruled the State's objection to its placement in the record. The trial court did order, however, that the affidavit be placed under seal. (T20 pp 4727-41; T28 pp 6316-20)

After hearing argument, and declining to consider the affidavit and jury study, the trial court found that the defense had not established a *prima facie* case of discrimination and overruled the *Batson* objection. The trial court explained that while numerical analyses of the strikes that had occurred earlier in jury selection in the case "could be helpful to the Court in ruling on a prima facie decision," the prosecutor's *voir dire* had, in the court's opinion, been "consistent and evenhanded throughout." The trial court offered the State an opportunity to articulate its reasons for striking Ms. Massey for the record, but the State declined. Ms. Massey, a high school special education teacher, was removed from the jury box without explanation. (T10 pp 2350-51) At the close of jury selection, the State had struck 3 of 6 Black jurors, or 50%, but only 12 of 44 white jurors, or 27%.

On March 25, 2014, the jury returned verdicts convicting Mr. Richardson of all charged offenses, including first-degree murder. (R pp 292-96) The jury later returned a death verdict. (R p 395) Mr. Richardson appealed directly to the state Supreme Court as provided by law. *See* N.C. Gen. Stat. § 7A-27(a)(1).

B. Appeal

On direct appeal, Mr. Richardson argued*, inter alia*, that the trial court erred under this Court's precedent when it categorically refused to consider his statistical evidence of the prosecutor's strike history in prior capital trials. Mr. Richardson noted that neither this Court nor North Carolina's appellate courts had ever suggested the rules of evidence applied to *Batson* hearings, citing several examples where information that could similarly be characterized as "hearsay" had been

considered. And he explained to the Court how imposing rigid rules of admissibility would eliminate the capability of parties to present the very sort of statistical evidence this Court has deemed highly relevant to a *Batson* determination. (Defendant's Br. pp 158-79)

On September 1, 2023, the Supreme Court of North Carolina issued an opinion affirming Mr. Richardson's convictions and sentences on all grounds. *State v. Richardson*, 891 S.E.2d 132, 205 (N.C. 2023). In evaluating the trial court's failure to consider the prosecutor's history of strikes, the Court opined that none of the precedent cited by Mr. Richardson "bar[s] a trial court's use of the rules of evidence and evidentiary concepts such as hearsay from serving as guidance in *Batson* hearings" and held that *Batson* and its progeny "employ[] a deference to the decisions of the trial court rather than providing this Court with a precedential basis to reverse a trial court's discretionary evidentiary determination." *Id.* at 205. It further summarized its holding as follows, explicitly tying the decision to this Court's precedent:

> We acknowledge the lack of any precedent which categorically provides that the rules of evidence may not be employed *in the discretion of a trial court during the prima facie stage of a Batson challenge* during jury selection and therefore decline to create such an exception to the general applicability of the evidentiary rules during trial proceedings based on the facts presented here with regard to the MSU affidavit. . . . *In light of the broad discretion given to trial courts at the first stage of a* Batson *inquiry and the great deference that we must give such determinations on appellate review, we do not perceive clear error in the trial court's decision to sustain the State's hearsay objection* to the MSU affidavit.

Id. (emphasis added).

This Petition followed.

REASONS FOR GRANTING THE PETITION

North Carolina has a well-documented history of disproportionately excluding its Black citizens from jury service. *See, e.g., State v. Robinson*, 846 S.E.2d 711, 718 (N.C. 2020) (recognizing a trial court's "meticulously detailed findings," based on the very same study at issue in this case, that "race was a significant factor in the decisions of prosecutors to exercise peremptory challenges to strike African-American jurors . . . [across] the State of North Carolina" in capital trials over a long-term sample). At the same time, North Carolina possesses a shameful record of failing to faithfully apply this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. *See* 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) (detailing that record, comparing it to other states in the region, and cataloguing the host of ways in which North Carolina courts habitually misapply *Batson*).

In the nearly four decades since *Batson* was decided, the North Carolina Supreme Court has only *once* found that race was a substantial factor in a prosecutor's strike of a juror, despite being presented with that question on dozens of occasions. And in that case, the defendant had already served his entire sentence. *See State v. Clegg*, 867 S.E.2d 885, 911 (N.C. 2022); *see also Robinson*, 846 S.E.2d at 716 (remarking in 2020 that the Court had "never held that a prosecutor intentionally discriminated against a juror of color"); Pollitt et al., 94 N.C. L. Rev. at

1993 (through 2016, the North Carolina Supreme Court adjudicated 46 "step three" *Batson* claims raised by defendants and granted relief in none).

Since that singular, empty decision in *Clegg*, the Supreme Court of North Carolina's familiar hostility to *Batson* has returned. In addition to Mr. Richardson's case, the Court has recently issued at least four other decisions which failed to properly apply this Court's *Batson* jurisprudence. *See State v. Tucker*, 2023 N.C. LEXIS 947 (N.C. 2023); *State v. Hobbs*, 884 S.E.2d 639 (2023);[4] *State v. Campbell*, 884 S.E.2d 674 (2023); *State v. Ruth*, 884 S.E.2d 747 (2023).

This case typifies North Carolina's hostility to *Batson* since its inception. The data presented at trial was taken from a well-known historical study of jury selection at North Carolina capital trials. *See* Grosso et al., 97 Iowa L. Rev. at 1531 (finding, from a data set including more than 7,400 peremptory strikes by North Carolina prosecutors in 173 capital proceedings between 1990 and 2010, that the State struck 53% of eligible African American jurors but only 26% of all other eligible jurors). As noted, the data showed that the prosecutor in this case had, over four prior capital trials, struck qualified non-Black jurors at a rate of 21%, while striking qualified Black jurors at a rate of 74%.

The trial court refused to consider that the prosecutor's strike rate of Black jurors was 3.5 times that of non-Black jurors on the grounds that the study and accompanying affidavit from the researchers was "hearsay." *Richardson*, 891 S.E.2d

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[4] At the time of this Petition's filing, Mr. Hobbs' Petition for a Writ of Certiorari is also pending before this Court. *Hobbs v. North Carolina*, No. 23-5659.

at 200. On appeal, Mr. Richardson argued that the entire sweep of this Court's relevant precedent requires courts to at least *consider* the prosecutor's pattern and practice of strikes at step one of the *Batson* inquiry. *See, e.g., Batson*, 476 U.S. at 96 (explaining the objecting party may rely on "any . . . relevant circumstances [that] raise an inference" of discrimination); *Miller-El v. Cockrell*, 537 U.S. 322, 334, 346–47 (2003) (finding evidence of a *Batson* violation from a prior practice of discriminatory jury selection in the district attorney's office); *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) (evaluating a *Batson* objection "demands a sensitive inquiry into such circumstantial evidence of intent as may be available") (cleaned up); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243, 2245–46 (2019) (listing "relevant history of the State's peremptory strikes in past cases" as evidence pertinent to a *Batson* objection, and finding a *Batson* violation based in part on the prosecutor's history of striking Black jurors in prior trials).

Mr. Richardson also noted that North Carolina courts had never applied the rules of evidence to *Batson* hearings. And he explained to the Court how imposing rigid rules of admissibility to *Batson* challenges would practically eliminate the capability of parties to present the very sort of historical strike rate data this Court has deemed highly relevant to the analysis. *E.g.*, *Flowers*, 139 S. Ct. at 2245 ("The numbers speak loudly.").

The Supreme Court of North Carolina found no error with the trial court's refusal to consider the prosecutor's personal strike history. But not by announcing that the rules of evidence apply to *Batson* hearings in North Carolina and the trial

court correctly applied those evidentiary rules as a matter of state law. Rather, the Court held that *under the* Batson *framework itself*, trial courts have "broad discretion" whether to "employ" the rules of evidence or other "evidentiary concepts" during step one of a *Batson* inquiry. The Supreme Court of North Carolina explicitly tied its decision to this Court's jurisprudence and held that "[i]n light of the broad discretion given to trial courts at the first stage of a *Batson* inquiry . . . we do not perceive clear error in the trial court's decision to sustain the State's hearsay objection[.]" *Richardson*, 891 S.E.2d at 205.

The above analysis is wholly alien to this Court's precedent, which has consistently reiterated that "all of the circumstances that bear upon the issue of racial animosity must be consulted" when evaluating a *Batson* objection. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008); *see also Flowers*, 139 S. Ct. at 2243, 2245–46. This includes a prosecutor's prior discriminatory use of peremptory strikes, his strike rate against Black jurors, and any other relevant circumstances that could suggest racial bias. *Flowers*, 139 S. Ct. at 2243.

But the Supreme Court of North Carolina's opinion should not be surprising. The error here is redolent of some of the common ways North Carolina courts flout this Court's instruction. *See* Pollitt et al., 94 N.C. L. Rev. at 1965 ("North Carolina appellate courts misapply the law in many ways as they review *Batson* claims at the step one prima facie case stage, including . . . failing to give meaningful weight to the relevant prima facie case circumstance of a pattern of strikes against prospective minority jurors . . . [and] imposing a far too onerous burden of proof on

defendants at *Batson*'s first step."). Even a member of North Carolina's high court has acknowledged the systemic issue. *See Campbell*, 884 S.E.2d at 684 (Earls, J., dissenting) ("Today, this Court returns to the practice of refusing to acknowledge what is in plain sight and turns a blind eye to evidence of racial discrimination in jury selection in this case by contorting the doctrine and turning the *Batson* test into an impossible hurdle.").

In defiance of this Court's precedent, the decision below confers North Carolina courts with "broad discretion" to make "discretionary evidentiary determinations" in deciding what types of information it will even consider at step one of a *Batson* inquiry. *Richardson*, 891 S.E.2d at 205. Worse yet, the decision makes plain that such "discretionary" decisions will be disturbed only upon a showing of "clear error" — wrapping its subversion of *Batson* in the language of the decision's progeny. *Snyder*, 552 U.S. at 476–77 (discussing appropriate application of "clear error" standard of review). This will only exacerbate North Carolina's failure to ensure juries representative of the community, a problem even the state's Attorney General recognized in his role as co-chair of a recent task force. *See* North Carolina Task Force for Racial Equity in Criminal Justice, *Report 2020*, https://tinyurl.com/TRECreport2020 at *100-01 ("The research studies conducted under the Racial Justice Act," which include the MSU study at issue here, "demonstrate the continued need to pursue representative juries in North Carolina.").

"In the decades since *Batson*, this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding." *Flowers*, 139 S. Ct. at 2243. What North Carolina has done in the past 40 years cannot even be characterized as "backsliding" — if for no other reason than *Batson* has never had an impact on the state's jurisprudence. Only this Court can begin to resurrect *Batson* in North Carolina. Given the fundamental nature of the error below, this direct appeal presents a straightforward vehicle for the Court to provide needed remedial instruction to North Carolina's courts. Moreover, it can do so without having to grant plenary review. Without this Court's intervention, North Carolina will continue to casually disregard this Court's precedent — and *Batson* will continue to be an empty promise, powerless to help alleviate the state's continuing decades-long failure to protect its citizens from racial discrimination in the jury box.

I. This Court's precedent requires courts at step one of a *Batson* inquiry to consider all relevant facts and circumstances bearing on the question of racial animus, including the prosecutor's historical use of strikes.

Race-based exclusion of jurors violates the Fourteenth Amendment's guarantee of equal protection under the law. U.S. Const. amend. XIV; *Flowers*, 139 S. Ct. at 2242 ("Under the Equal Protection Clause . . . even a single instance of race discrimination against a prospective juror is impermissible."). This Court's decision in *Batson* established the now-familiar three-step procedure for adjudicating claims of racial animus during jury selection:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder, 552 U.S. at 476–77.

As this Court has said time and again, courts must examine "all of the relevant facts and circumstances taken together" when reviewing an alleged *Batson* violation. *Flowers*, 139 S. Ct. at 2251. Several factors can bear on the question of discrimination, including a prosecutor's prior discriminatory use of peremptory strikes. *Id.* at 2243. This has been the law for nearly 40 years. *See Batson*, 476 U.S. at 96 (explaining the objecting party may rely on "any . . . relevant circumstances [that] raise an inference" of discrimination). In fact, recognition of the power of such "pattern and practice" evidence in jury discrimination claims even pre-dates *Batson*:

> *Batson* did not preclude defendants from still using the same kinds of historical evidence that *Swain* [*v. Alabama*] had allowed defendants to use to support a claim of racial discrimination. Most importantly for present purposes, after *Batson,* the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just as *Swain* had allowed. After *Batson*, the defendant may still cast *Swain*'s "wide net" to gather relevant evidence.

Flowers, 139 S. Ct. at 2245 (cleaned up).

In sum, a prosecutor's strike history across multiple cases is highly relevant evidence a court must consider in the *Batson* calculus. *See Batson*, 476 U.S. at 92–95 (holding that evidence from a defendant's own case may be used to show jury

discrimination, in addition to evidence "of repeated striking of [Black jurors] over a number of cases . . . ."); *Miller-El*, 537 U.S. at 346–47 (holding that prior discriminatory practices and policies of a district attorney's office are relevant to deciding whether there is jury discrimination in a subsequent case by that same prosecutor's office); *Flowers*, 139 S. Ct. at 2243, 2245–46 (listing "relevant history of the State's peremptory strikes in past cases" as evidence pertinent to a *Batson* objection).

II. Granting courts individualized "broad discretion" at step one to refuse to consider relevant facts and circumstances is anathema to *Batson*'s guarantees.

From the beginning, this Court has "decline[d] . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Batson*, 476 U.S. at 99. Consequently, had the opinion below simply announced a rule that — as a matter of state law — the rules of evidence apply at *Batson* proceedings, such a rule might be permissible (even if ill-advised). But that is not what the Supreme Court of North Carolina held. Rather, it held that trial courts have individualized "broad discretion" as part of the *Batson* framework itself to apply — or not apply — the rules of evidence or other "evidentiary concepts" as it sees fit. *Richardson*, 891 S.E.2d at 205.

Post-*Richardson*, North Carolina now allows its trial courts, under the guise of the *Batson* framework, to refuse to consider information highly relevant to a *prima facie* determination. Worse yet, such refusals will be reviewed by the state's appellate courts only for "clear error." *Id.* It is unclear how this could ever in

practice serve as a meaningful paradigm for review. Under the opinion in this case, a court is permitted to seek "guidance" from "evidentiary concepts" and decide not to hear relevant information at step one. Then, that discretionary decision will only be disturbed on appeal upon a showing of "clear error." *Id.* Bluntly, this sort of unconstitutional regime will only further encourage the "heads I win, tails you lose" character of North Carolina's distorted *Batson* record, inviting even more arbitrary rulings that will be guided by individual judges' personal preferences rather than the law.[5]

In addition to its repeated admonitions that "all of the circumstances that bear upon the issue of racial animosity must be consulted," *Snyder*, 552 U.S. at 478, this Court has also never applied the rules of evidence to exclude information relevant to a *Batson* inquiry. For example, in *Foster v. Chatman*, 578 U.S. 488 (2016), the state of Georgia argued to this Court that the defense could not rely on the prosecution's jury selection file and notes to support a *Batson* claim, because the prosecutors were not called to testify and explain their files. The Court rejected this argument and held it would not "blind [itself]" to the evidence, because *Batson* makes clear that all circumstances must be consulted, including circumstantial evidence of discriminatory intent. Rather than ignore the documents as the

[5] This concern regarding arbitrariness and whipsawing is not merely hypothetical. It has already manifested in North Carolina's high court. *Compare Robinson*, 846 S.E.2d at 718 (describing the MSU study as "comprehensive") *with Tucker*, 2023 N.C. LEXIS 947 at *57 (use of the MSU study by defendants "is at best a manipulation of data, and at worst, an attempt to use misleading statistics[.]").

prosecution urged, it would treat "[a]ny uncertainties concerning the documents [as] pertinent only as potential limits on their probative value." *Id.* at 501.

In response to Mr. Richardson's citation to *Foster*, the Supreme Court of North Carolina attempted to distinguish the case:

> We find *Foster* distinguishable because that appeal concerned: (1) the third—and ultimate—stage of a *Batson* inquiry, as opposed to the stage one prima facie inquiry at issue in this case; (2) the deferential review of a trial (or hearing) court's decision to *admit* challenged evidence as part of a *Batson* claim as opposed to such a court's decision to *exclude* offered evidence; and (3) evidence specific to the jury selection in the defendant's own trial as opposed to an analysis of historical jury strikes across other trials involving a prosecutor in defendant's trial here.

Richardson, 891 S.E.2d 204 (emphasis in original).

These supposed distinctions wilt upon even cursory scrutiny. For one, this Court has made clear that *Batson* employs a "totality of the circumstances" view regardless of whether the objection is being evaluated at step one or step three. *See Johnson v. California*, 545 U.S. 162, 168 (2005) (step one); *Snyder*, 552 U.S. at 478 (step three). Secondly, there is no meaningful difference between the decision to *admit* evidence as opposed to *excluding* it. *See State v. McKoy*, 891 S.E.2d 74, 81 (N.C. 2023) (reviewing "a trial court's decision to admit or exclude evidence"). Lastly, *Batson* and its progeny explicitly reject a distinction between "evidence specific to the jury selection in the defendant's own trial as opposed to an analysis of historical jury strikes across other trials involving a prosecutor in [the] defendant's trial here." *Richardson*, 891 S.E.2d 204; *contra Flowers*, 139 S. Ct. at 2244–45

(defendant may rely on both intra-trial strike rate *and* "historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction[.]").

What's more, the North Carolina Supreme Court has repeatedly affirmed trial court denials of *Batson* objections that relied on evidence just as readily characterized as "hearsay." *See, e.g., State v. Waring*, 701 S.E.2d 615, 643 (N.C. 2010) (prosecutor explained that the juror's description of her criminal record was inconsistent with the prosecutor's research into the juror's record); *State v. Smith*, 532 S.E.2d 773, 540 (N.C. 2000) (same). Never has that Court suggested the prosecutor must do anything more than assert that documentary research revealed the juror's criminal record. The Court reached a similar conclusion in *State v. Jackson*, 368 S.E.2d 838, 839, 841–42 (N.C. 1988), which affirmed the trial court's decision at a post-trial *Batson* hearing to accept a stipulation and affidavit from the prosecutors about what happened at trial, and to deny the defense's attempt to have the prosecutors testify. The Court held that "a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney." The Court reached this conclusion to prevent, in part, "a trial within a trial." *Id.* at 842.

There is little to explain the different result in *this* case other than North Carolina's hostility to *Batson* and the MSU study in particular. Indeed, as the Court opined in a different case argued the same day as Mr. Richardson's:

> We agree with the [lower] court that the MSU study is fundamentally flawed and lacks relevance because it purports to establish purposeful racial discrimination in jury selection by utilizing cases in which *Batson* arguments were not made, *Batson* violations were not found, and/or appellate courts determined that *Batson* violations did not exist. As such, the study has no probative value.

Tucker, 2023 N.C. LEXIS 947 at *56.

This criticism evidences a fundamental misapprehension about *Batson* that pervades North Carolina's caselaw.[6] But regardless of whether the Court's criticism is valid (which it is not),[7] a supposed lack of probity does not permit North Carolina to flout this Court's *Batson* jurisprudence — which from the beginning has required courts to consider whether "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94; *see also Foster*, 578 U.S. at 501 ("Any uncertainties concerning the documents [are] pertinent only as potential limits on their probative value.").

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[6] "In most cases, courts cannot discern a prosecutor's subjective intent with anything approaching certainty. Instead, [*Batson*] 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*, 395 P.3d 186, 207–08 (Cal. 2017) (Liu, J., concurring) (cleaned up)).

[7] It is unclear how a study which simply counted prosecutorial strikes in cases that resulted in a death sentence — and showed that North Carolina prosecutors had consistently struck Black jurors at significantly higher rates — is irrelevant to a *Batson* inquiry. Regardless, the MSU study and its findings are not new—they have been repeatedly cited, discussed, and relied upon by the North Carolina Supreme Court. *See Clegg*, 867 S.E.2d at 885 (Berger, J., dissenting); *Robinson*, 846 S.E.2d at 718; *State v. Burke*, 843 S.E.2d 246, 248 (N.C. 2020); *State v. Augustine*, 847 S.E.2d 729 (N.C. 2020). The MSU study has also been cited by intermediate and high appellate courts in other jurisdictions. *See State v. Saintcalle*, 309 P.3d 326, 357 (Wash. 2013); *People v. A.S. (In re A.S.)*, 76 N.E.3d 786, 795 (Ill. App. 2017); *State v. Rashad*, 484 S.W.3d 849, 861 n.6 (Mo. Ct. App. 2016); *People v. Harris*, 306 P.3d 1195, 1258 (Cal. 2013) (Liu, J., concurring).

Moreover, the broader results of the study have been duplicated by a Wake Forest University study. In 2018, a research team including two former federal prosecutors conducted its own analysis of nearly 30,000 potential jurors in North Carolina non-capital felony trials from 2011 to 2012. The MSU study's results were confirmed: on average, North Carolina prosecutors struck Black jurors at about twice the rate of white jurors. *See* 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).

This Court's precedent simply does not allow for the sort of arbitrary discretion now permitted in North Carolina. Courts cannot be licensed to "blind" themselves to a prosecutor's record of strikes at previous trials. *Flowers*, 139 S. Ct. at 2244–45; *Foster*, 578 U.S. at 501. The arbitrariness that will ensue is predictable. Allowing the decision below to stand would effectively drive the final nail into the coffin that North Carolina has built for *Batson*.

III. This direct appeal issue was fully litigated at all levels and is not fact-bound, making this case a straightforward vehicle to remediate North Carolina's systemic failure to enforce *Batson*. Summary reversal would be appropriate given the fundamental nature of the error and its importance.

Mr. Richardson fully litigated the failure to consider the prosecutor's strike rate both at trial and on direct appeal. As such, this case makes an uncomplicated vehicle for this Court to provide much-needed remedial instruction to North Carolina's courts. Indeed, this case is an object lesson in the type of rudimentary errors that pervade North Carolina's *Batson* jurisprudence. Pollitt et al., 94 N.C. L. Rev. at 1984–85 ("Thirty 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."); *see also Clegg*, 867 S.E.2d at 916 (Earls, J., concurring) ("We must acknowledge that this Court's *Batson* jurisprudence has not been effective.")

What's worse, by giving them functionally unreviewable discretion about what to consider at the *prima facie* stage, *Richardson* emboldens the state's trial courts to effectively do anything they wish. This latest contortion of *Batson*, like

those before, will no doubt be used to further diminish the already slim likelihood of a defendant ever meaningfully succeeding on a *Batson* claim in the state.

The ignored pattern and practice evidence here, standing alone, raised an inference that the State's strikes were race-based in this case. In four capital cases over ten years prior to Mr. Richardson's trial, his prosecutor removed 74% of qualified Black jurors and only 21% of qualified non-Black jurors. This "repeated striking of [Black jurors] over a number of cases," *Batson*, 476 U.S. at 92, was plainly enough to make a *prima facie* case that the disparity in Mr. Richardson's trial was a race-based pattern and not merely a coincidence. *See Richardson*, 891 S.E.2d at 202 (quotation omitted) ("Step one of the *Batson* analysis, a *prima facie* showing of racial discrimination, is not intended to be a high hurdle for defendants to cross."); *but see* Pollitt et al., 94 N.C. L. Rev. at 1970 ("To be sure, the Supreme Court of North Carolina occasionally states that a prima facie showing is not intended to be a high hurdle for defendants to cross. However, that court's actions, discussed above, speak much louder than those words.") (cleaned up).

Consequently, this is the rare instance where the Court should consider a disposition of summary reversal. Summary reversal is appropriate "for cases where 'the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" *Pavan v. Smith*, 582 U.S. 563, 567–68 (2017) (Gorsuch, J., dissenting) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)).

The standards for applying *Batson* at the *prima facie* stage are well-settled, particularly after this Court's recent decision in *Flowers*, and the North Carolina Supreme Court's error is evident:

> This Court has made it clear beyond any room for doubt that in reviewing a ruling claimed to be a *Batson* error, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster*, 578 U.S. at 501. This requires a sensitive inquiry into such circumstantial evidence of intent as may be available. *Ibid.* … Failing to consider the challenged strikes in the context of all the facts and circumstances is thus entirely inconsistent with *Batson*.

Clark v. Mississippi, 143 S. Ct. 2406, 2411 (2023) (Sotomayor, J., dissenting from denial of cert.).

Simply put, the decision below "cannot stand if *Batson* is to retain its force in the State of [North Carolina]." *Id.* This Court should grant this Petition, vacate the judgment below, and instruct North Carolina that its courts must at least uniformly *consider* relevant evidence of strike rates proffered by a defendant when evaluating whether he has met his initial burden under *Batson*. Otherwise, citizens like Ms. Massey will continue to be denied a voice in the jury room.

CONCLUSION

For the reasons set forth above, this Court should grant Mr. Richardson's Petition for a Writ of Certiorari.

Respectfully submitted,

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