No. 23-6804

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

To minimize the impact of the opinion below, the State is forced to refashion it into something it was not. The decision did not announce or apply a state-law procedural rule governing the presentation of evidence during *Batson* objections. Indeed, as the Petition concedes, a blanket holding that the rules of evidence apply to *Batson* proceedings might have been constitutional, even if unworkable. This Court does not generally concern itself with how a state applies its rules of evidence. *See Batson v. Kentucky*, 476 U.S. 79, 99 (1986).

But the Supreme Court of North Carolina has announced no such rule — in this case, or ever. Rather, consistent with its decades of hostility to this Court's precedent, it invented in *Richardson* a nebulous exception to the clearly established constitutional mandate that "all of the circumstances that bear upon the issue of racial animosity must be consulted" when evaluating a *Batson* objection, particularly circumstances which reflect on the prosecutor's personal history of racially disparate jury selection. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243, 2245–46 (2019).

Now — as part of the *Batson* framework itself in North Carolina — courts have individualized "broad discretion" to invoke amorphous "evidentiary concepts" for non-binding "guidance" in picking and choosing which circumstances to consider at step one. *State v. Richardson*, 891 S.E.2d 132, 205 (N.C. 2023). The 14th Amendment permits no such discretion.

But North Carolina has demonstrated that it does not care. Beyond correctly stating but serially misapplying the law, the state high court has now crossed the line into explicitly altering, and affirmatively weakening, the constitutional process *Batson* demands. A state with an unmatched history of hostility to *Batson* cannot be permitted to sink itself below the constitutional floor, particularly in a way which will further exacerbate its troubling history of unchecked juror discrimination. This Court should grant the Petition.

A. The decision below clearly conflicts with, and subverts, this Court's precedent.

To protect the decision below, the State recasts the holding. It makes two related attempts, neither of which is persuasive. First, it asserts that *Richardson* merely "applied the rules of evidence to exclude" otherwise relevant facts and circumstances. (BIO p 12) Later, it suggests that this was "only a decision in which the state high court chose not to 'create' 'an exception' to the state evidentiary rules." (BIO p 12) As conceded by the Petition, neither scenario would likely give rise to an issue warranting this Court's attention. *Batson*, 476 U.S. at 99 (declining "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges").

But *Richardson* applied no such existing rule, nor announced any new rule, regarding the applicability of the rules of evidence, the admissibility of hearsay during *Batson* proceedings generally, or any other question of state law. Instead, it engrafted a discretionary component to the step one *Batson* analysis — a discretion the 14th Amendment simply does not permit:

> 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.

Richardson, 891 S.E.2d at 205 (emphasis added).

Under *Richardson*, a trial court is now permitted to seek "guidance" from "evidentiary concepts" and decide not to hear relevant information at step one. That decision is, in the language of the opinion, within the trial court's "discretion." And that "broad discretion" is the discretion inherent to trial courts "at the first stage of a *Batson* inquiry." Consequently, the "discretionary" decision to refuse to consider relevant facts and circumstances will also be reversed on appeal only upon a showing of *Batson* "clear error." *Id.* To the extent the Supreme Court of North Carolina has announced a new rule, it is not one of evidentiary presentation. Rather, it is a fundamental altering of the constitutional procedure *Batson* demands — which unambiguously requires courts to at least *consider* the prosecutor's pattern and practice of strikes at step one. *Snyder*, 552 U.S. at 478; *Flowers*, 139 S. Ct. at 2243, 2245–46.

And lest there be any confusion, the decision did not simply apply a pre-existing state-law rule of procedure, either. The Supreme Court of North Carolina has *never* before *Richardson* so much as suggested that the rules of evidence apply to

Batson proceedings. To the contrary: it has at every prior opportunity avoided creating "trials within trials" in litigating *Batson* challenges.

Shortly after *Batson* was announced, the Court rejected the notion that *Batson* objections should be resolved by application of normal evidentiary standards. In rebuffing a defendant's argument that he should have been permitted to cross-examine the prosecutor at step two of the *Batson* framework, the Court held that it was appropriate for the trial court to accept an affidavit from the prosecutors regarding their reasons for the strike:

> We hold that a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney. In balancing the arguments for and against such an examination, we believe the disruption to a trial which could occur if an attorney in a case were called as a witness overbears any good which could be obtained by his testimony. *We do not believe we should have a trial within a trial.* The presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross-examination.

State v. Jackson, 368 S.E.2d 838, 839, 841–42 (N.C. 1988) (emphasis added). The North Carolina Supreme Court has repeatedly affirmed step-two trial court denials of *Batson* objections that relied on evidence 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). The Court's concerns about the onerousness of "trials within trials" apparently extends only to step two of the framework.

Regardless, *Richardson* neither announced a new state-law rule, nor applied an existing one. Rather, it engrafted essentially unreviewable discretion onto the step

one *Batson* framework in a way that weakens an unambiguous constitutional mandate and invites arbitrariness. (Pet. pp 8-19) "Failing to consider the challenged strikes in the context of all the facts and circumstances is . . . entirely inconsistent with *Batson*." *Clark v. Mississippi*, 143 S. Ct. 2406, 2411 (2023) (Sotomayor, J., dissenting from denial of cert.). The Court should grant this Petition.

B. This case presents an ideal vehicle to remediate North Carolina's four decades of defiance.

North Carolina's historical antagonism to *Batson* is perhaps unrivaled by any jurisdiction. (Pet. pp 8-10, 12-14, 21-22); *see generally* 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). At the time of the decision's 30th anniversary in 2016, the record was stark:

- "The Supreme Court of North Carolina . . . decided seventy-four cases on the merits in which it adjudicated eighty-one *Batson* claims raised by criminal defendants. . . . that court ha[d] not found a substantive *Batson* violation in any of those cases. In seventy-one of those seventy-four cases, that court found no *Batson* error whatsoever. In the three remaining cases, that court held the trial court erred at *Batson*'s first step in finding no prima facie case existed and conducted or ordered further review. However, none of these three cases . . . ultimately resulted in the holding of a substantive *Batson* violation."

- "[I]n all the 114 North Carolina appellate *Batson* cases involving minority jurors decided on the merits since 1986, the courts . . . never found a substantive *Batson* violation where a prosecutor ha[d] managed to articulate even one reason, however fantastic, for the peremptory challenge."

- "Two of the North Carolina Court of Appeals' forty-two cases involve successful 'reverse *Batson*' claims where the court found purposeful discrimination against white jurors challenged by black defendants." These cases were "the only cases in North Carolina appellate history

> finding substantive *Batson* violations where attorneys [had] provided reasons for strikes."

Pollitt et al., 94 N.C. L. Rev. at 1961–64.

During roughly that same time, the researchers who performed the excluded study in this case determined, even after adjusting for race-neutral characteristics, that North Carolina prosecutors struck Black jurors at nearly two and a half times the rate they struck all other jurors. 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, 1543–53 (2012); *see also* 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). As one commentator has noted with regard to the State's use of peremptory strikes in North Carolina criminal trials, "[t]he impact of race is neither theoretical nor minor, but real and substantial[.]" Robert P. Mosteller, *Responding to* McCleskey *and* Batson: *The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 132–34 (2012).

Ironically, North Carolina's Attorney General, in his capacity as co-chair of a recent racial equity task force, recognized that the State fails to ensure juries representative of the community. He supported that assertion with the very same data his Office now conveniently characterizes as "unreliable." (BIO p 7); *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.").

Indeed, the State proclaims that "All parties agree that racial discrimination is unacceptable, particularly in the context of jury selection." (BIO p 13) Yet the situation in North Carolina has gotten no better in recent years. In fact, just the opposite is true. (Pet. pp 9-10) Perhaps the failure of *Batson* in North Carolina up to this point can be attributed to mere, if chronic, "misapplication[s] of settled law." (BIO p 8); *but see* Pollitt et al., 94 N.C. L. Rev. at 1964–83.

But *Richardson* represents something different. North Carolina has crossed a constitutional Rubicon. Beyond simply misapplying the constitutional framework, the state's high court has now affirmatively altered it in a way which frustrates this Court's clear command — that *all* of the relevant facts and circumstances must be considered at step one. *See Batson*, 476 U.S. at 96; *Miller-El v. Cockrell*, 537 U.S. 322, 334, 346–47 (2003); *Snyder*, 552 U.S. at 478; *Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016); *Flowers*, 139 S. Ct. at 2243, 2245–46.

Absent this Court's intervention, the future results are predictable — North Carolina's citizens will continue to be improperly denied access to the jury box, and its courts will "turn[] a blind eye," as they have since 1986. *State v. Campbell*, 884 S.E.2d 674, 684 (N.C. 2023) (Earls, J., dissenting). This Court should not.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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