No. 23A806

IN THE

SUPREME COURT OF THE UNITED STATES

RUSSELL WILLIAM TUCKER
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

The courts of North Carolina have a long history of failing to enforce *Batson v. Kentucky*, 476 U.S. 79 (1986). Tried by an all-white jury in 1996, the case of this African American man exemplifies North Carolina's resistance to fulfilling the promise of equal treatment in jury selection. Years after trial, Petitioner discovered the State had relied on a training handout to guide its responses to his *Batson* objections. The transcript of jury selection shows that, in explaining his peremptory strikes to the trial judge, one of the prosecutors read from the handout's list of suggested reasons.

Petitioner also presented statistical evidence showing that, in capital cases, prosecutors in the county where Petitioner was tried were more than twice as likely to strike eligible venire members who were Black than other races. Additionally, in the course of four death penalty cases, one of his trial prosecutors struck Black potential jurors at more than triple the rate of other potential jurors.

A majority of the North Carolina Supreme Court dismissed the use of the training handout as not probative of discrimination, saying, "We can discern no possible scenario in which, had defendant possessed this CLE handout, it would have assisted defendant in carrying his burden at step one." *State v. Tucker*, 895 S.E.2d 532, 550 (N.C. 2023). In contrast, the dissent found evidence the prosecutor read from the handout was relevant to the question of whether the State's reasons were pretextual and concluded the handout was "an important piece of substantive evidence" supporting Petitioner's claim. *Id.* at 568 (Earls, J., dissenting).

The majority strongly condemned Petitioner's statistical evidence as flawed and unreliable. *Id*. at 555–56. Its concern was that researchers from Michigan State University (MSU) did not limit their study of strike rates to cases in which the defendant had raised a successful *Batson* objection. According to the majority, the MSU study "inaptly imputed racial motives to peremptory strikes for cases in which *Batson* arguments had not been made or *Batson* violations had not been found." *Id*. at 555.

In dissent, Justice Earls said it was legal error to disregard the MSU study and the majority had "placed an impermissibly high burden" on Petitioner. *Id*. at 574 (Earls, J., dissenting). The dissent noted that under the majority's logic, "it would be impossible for any defendant to rely on any study detailing the disparate use of peremptory challenges against people of color in North Carolina." *Id*. This is so because, in the nearly 40 years since this Court decided *Batson*, North Carolina appellate courts have only once found a substantive *Batson* violation. *Id*.

The questions presented for review are two:

I. Whether the Supreme Court of North Carolina was free to reject evidence of disparate treatment and impose on Petitioner the crippling burden of showing that the prosecution had a proven history of discriminating against Black potential jurors in order to establish a prima facie case under *Batson*?

II. Whether the Supreme Court of North Carolina violated this Court's clear precedent when it declined to consider all of the evidence relevant to his *Batson* claim, including the State's reliance on a ready-made list to explain its strikes of African Americans?

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Russell William Tucker 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 December 15, 2023, affirming the post-conviction court's denial of Mr. Tucker's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), is available at *State v. Tucker*, 895 S.E.2d 532 (N.C. 2023). A copy of the opinion is included in the Appendix.

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming Mr. Tucker's convictions and death sentence was entered on December 15, 2023. On March 1,

2024, Chief Justice Roberts granted Petitioner's timely filed motion for an extension of time in which to file this Petition to April 29, 2024. On April 17, the Chief Justice granted Petitioner's timely filed motion for an extension of time in which to file this Petition to May 13, 2024. The Court's jurisdiction is invoked under 28 U.S.C. § 1257, as Mr. Tucker is asserting a deprivation of his rights secured by 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.

STATEMENT OF CASE

Following a capital trial and sentencing hearing in the Superior Court of Forsyth County, North Carolina, Petitioner was convicted of first-degree murder and, on February 21, 1996, sentenced to death. At trial, the State struck five of five eligible African Americans from the jury. Petitioner unsuccessfully objected to each of these strikes under *Batson*.

The Supreme Court of North Carolina affirmed the murder conviction and death sentence. *State v. Tucker*, 490 S.E.2d 559 (N.C. 1997). This Court denied certiorari review. *Tucker v. North Carolina*, 523 U.S. 1061 (1998). On direct appeal, Petitioner did not raise any claim pertaining to the prosecution's strikes of African Americans.

Petitioner filed a motion for post-conviction review in the Superior Court of Forsyth County. His first set of post-conviction attorneys were removed from the case

after it was revealed that one of them had "deliberately sabotaged" his case. *State v. Tucker*, 545 S.E.2d 742 (N.C. 2000).

Petitioner received another set of post-conviction attorneys, who were allowed to file a new motion for post-conviction review. On May 2, 2006, the Superior Court of Forsyth County denied relief and the Supreme Court of North Carolina denied certiorari. *State v. Tucker*, 651 S.E.2d 560 (N.C. 2007). No *Batson* claim was raised in these state post-conviction proceedings.

On February 21, 2008, Mr. Tucker filed a Petition for Writ of Habeas Corpus in the federal district court for the Middle District of North Carolina.

On August 5, 2010, Mr. Tucker filed in the Forsyth County Superior Court a post-conviction motion seeking relief under a newly enacted state statute, the North Carolina Racial Justice Act (RJA).

On December 14, 2015, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), the federal court appointed counsel to determine whether any claims had been defaulted in state court due to the ineffectiveness of state post-conviction counsel.

On October 30, 2017, Petitioner filed an amendment to his RJA motion raising a *Batson* claim and requesting an evidentiary hearing in the Superior Court of Forsyth County.

On August 24, 2020, the Superior Court of Forsyth County summarily denied Petitioner's *Batson* claim.

On October 6, 2020, Petitioner filed a petition for discretionary review in the Supreme Court of North Carolina.

On March 3, 2021, the federal court placed Petitioner's federal habeas proceedings in abeyance pending resolution of Petitioner's RJA claims.

On April 16, 2021, the Supreme Court of North Carolina granted a writ of certiorari to review the order denying Petitioner's *Batson* claim.

On December 15, 2023, the Supreme Court of North Carolina issued an opinion affirming the post-conviction court's denial of Mr. Tucker's *Batson* claim.

SUMMARY OF PETITIONER'S *BATSON* CLAIM

Petitioner is an African American man. Early in jury selection at his capital trial, the prosecution took the unusual step of asking the trial court to ensure the destruction of all copies of the State's juror questionnaires, including any "work product notes" written in the margins. The prosecutor candidly explained he was making this request because "if we make notes on things I don't want them to be discoverable later at some other proceeding in this trial." The trial judge granted the State's motion. App. 36-39. Over the course of six days of jury selection, the prosecution proceeded to strike all five eligible Black venire members. *Tucker*, 895 S.E.2d at 541.

Petitioner unsuccessfully objected under *Batson* to each of these strikes. At no point did the trial court find a prima facie case, but did ask the prosecution to give its reasons for striking African Americans. *Id*. at 539-41. After hearing the prosecution's explanations for each strike, the trial court ruled there was no purposeful discrimination. *Id*. at 565 (Earls, J., dissenting). *See also* App. 54, 59-60, 64, 68, and 78 (trial court's findings that, as to each strike, State had provided race-neutral

explanations and did not exercise peremptory challenges in a racially discriminatory manner).

An all-white jury convicted Petitioner of first-degree murder and sentenced him to death. *Tucker*, 895 S.E.2d at 562 (Earls, J., dissenting).

After his unsuccessful efforts to obtain relief on direct appeal and in state post-conviction proceedings, Petitioner's counsel found the trial prosecutors' jury selection notebook. The notebook contained a CLE handout titled "*Batson* Justifications: Articulating Juror Negatives," listing suggested reasons prosecutors could offer if defense counsel challenged their peremptory strikes under *Batson*. Further investigation showed that a few months before jury selection began, one of the trial prosecutors attended a CLE where he was given the *Batson* Justifications handout. *Id*. at 564-66. Based on the *Batson* Justifications handout, as well as new statistical evidence of jury discrimination uncovered pursuant to the RJA, Petitioner returned to state court to pursue relief under *Batson*.

Petitioner cited a study by researchers at Michigan State University (MSU) showing prosecutors in Forsyth County were 2.25 times more likely to strike eligible venire members who were Black than other races. 895 S.E.2d at 566 (Earls, J., dissenting). MSU also examined four cases tried by one of Petitioner's prosecutors. In those cases, the State struck 62% of African American prospective jurors but only 20% of white prospective jurors. *Id*. In other words, the State struck Black potential jurors at more than triple the rate of whites.

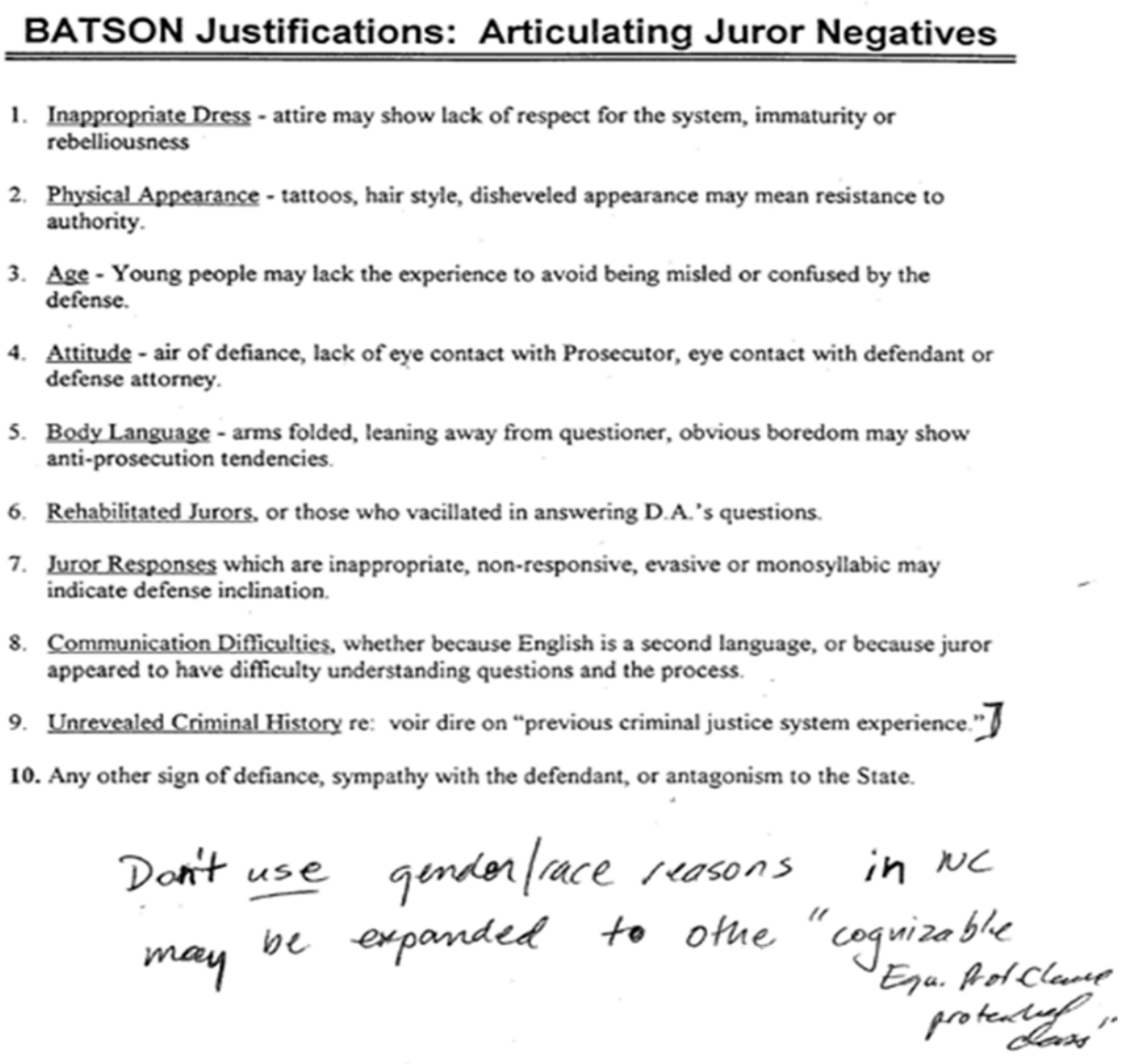
In addition, in two of these four cases, the defendants were condemned to execution by all-white juries. *Id.* Petitioner pointed as well to evidence that the same prosecutor who tried him also represented the State in the capital trial of Henry White. In explaining two of his strikes in the latter case, the prosecutor said in open court he struck two Black potential jurors because they were "[b]oth black females," among other reasons. *State v. White*, 509 S.E.2d 462, 466 (N.C. 1998). The Court of Appeals found that "race was a predominant factor" in this strike decision. *Id.*

Petitioner also supported his *Batson* claim with affidavits from nationally recognized experts in racism in America, Bryan Stevenson and Ibram X. Kendi. These experts both opined that the reasons listed on the prosecutor's training handout – a potential juror's rebelliousness, air of defiance, lack of respect, resistance to authority, antagonism, and evasiveness – reflected longstanding stereotypes of Black people as unintelligent, defiant, hostile, unattractive, and unclean.

Kendi averred that many of the listed reasons "have been used to deny rights to Blacks for centuries." App. 91, ¶ 6. Likewise, Stevenson averred that the explanations listed on the handout were "not truly race-neutral" because they were "rooted in historically derogatory labels applied to African Americans who did not show adequate deference to the prevailing racial order." App. 102, ¶ 13.

Petitioner argued his *Batson* claim was not procedurally barred and entitled to merits review because he had not previously known about the prosecutor's use of the CLE handout. Petitioner also argued the MSU study was not previously available.

Petitioner focused his claim on the strikes of three Black venire members: Thomas Smalls, Wayne Mills, and Debra Banner, arguing that a review of the transcript and the CLE handout make clear that the prosecutors responded to *Batson* objections by reading from the handout and that these three African Americans were subjected to disparate treatment and disparate questioning. Below is an image of the handout, as it was found in the prosecution file.



BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress - attire may show lack of respect for the system, immaturity or rebelliousness
2. Physical Appearance - tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age - Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude - air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors, or those who vacillated in answering D.A.'s questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

Don't use gender/race reasons in NC may be expanded to other "cognizable Eqa. Prot Clause protected class"

See also 895 S.E.2d at 564-65 (Earls, J., dissenting) (reproducing *Batson* handout).

At the time of jury selection, Thomas Smalls was 60 years old, employed, married, and had been living in Forsyth County for 40 years. His adult son worked as a police detective in South Carolina. When asked his views on the death penalty, Smalls told the prosecutor he believed in capital punishment. 895 S.E.2d at 570 (Earls, J., dissenting).

The prosecution exercised a peremptory strike against Smalls. Petitioner objected and the following ensued:

> [The prosecutor] stated, "Your Honor, with regard to Mr. Smalls, juror number three, we felt we had appropriate justification. Number one, his body language and number two, his responses which were inappropriate." … [He] also noted that Mr. Smalls "did not ever make eye contact with [him] . . . ."
>
> At one point, [the prosecutor] also described Mr. Smalls's body language as "absolutely horrible" but failed to explain his rationale for this finding. [He] also characterized Mr. Smalls as "very difficult."

895 S.E.2d at 570 (Earls, J. dissenting).

Reading the *Batson* Justifications cheat sheet, one can easily see that the prosecutor's reasons for striking Mr. Smalls "mirrored" the handout. *Id.* The prosecutor even used the word "justification."

Notable as well is that the State accepted several white jurors who expressed death penalty reservations that were "stronger and more apparent" than Smalls. *Id.* at 571. White prospective juror Alan Cubbedge said he "supposed" he could be part of a capital jury, but when asked if he could serve as the foreperson who signed the verdict sheet, Cubbedge stated he did not think he "would feel very comfortable with that." *Id.* The State also accepted white venire member Robin Dillinger, who, when asked about her death penalty views, said she was "not sure if [she was] for it or

against it." *Id.* (brackets in original). Louise Hester, another white potential juror accepted by the State, said she believed in capital punishment but did not "know if [she] could make that decision for somebody to face that or not." *Id.* (brackets in original).

Wayne Mills was another Black venire member the State excluded from the jury. Mills was a lifelong Forsyth County resident with a steady job and a family. He supported the death penalty. *Id.* The State's explanations for striking Mills appear to have been lifted from the cheat sheet.

The prosecutor said Mills was "smiling inappropriately" and "appeared somewhat confused during the questioning." *Id.* The State also complained that Mills' answers were "monosyllabic." *Id.* Finally, the prosecutor claim he struck Mills because he was not registered to vote. However, the State accepted numerous white jurors who gave "monosyllabic" or "yes, no" answers, expressed "confusion" on the record, or were not registered to vote. *Id.* at 572.

The prosecution also struck Black venire member Debra Banner. As with Mills, the prosecutor cited the fact that Banner was not registered to vote, despite passing many white potential jurors who were also not registered. *Id.* The prosecutor objected to Banner based on her "lack of stake in the community," despite the fact that she had lived in Forsyth County her entire life, married and had children there, and had worked for nine years at a local hospital. *Id.*

The State also claimed to strike Banner because she was a nurse and "those who save lives are often hesitant to make a recommendation for death." *Id.* At the

same time, the prosecution accepted white potential juror Brenton Sharpe, a pharmacist who worked exclusively with oncology patients and had "direct contact" with people who were seriously ill and dying of leukemia. *Id*. Sharpe acknowledged his job was to save his patients' lives "or to make what life they have left as comfortable as possible." *Id*. Moreover, while the prosecutor asked Sharpe whether his work in the medical field would make it difficult for him to be on a death penalty jury, he did not give Banner the same opportunity. *Id*. at 573.

Based on all of this evidence, Petitioner sought an evidentiary hearing on his *Batson* claim.

A majority of the Supreme Court of North Carolina rejected Mr. Tucker's *Batson* claim. The Court limited its analysis to the first step of the *Batson* analysis and found the claim was procedurally barred because Petitioner did not raise it on direct appeal. The majority rejected Petitioner's arguments that he was not in an adequate position to raise the claim earlier because he did not previously know the prosecutor had used the CLE handout during jury selection and did not have access to the MSU study.

The majority ruled that the handout was not probative of discrimination and its list of reasons was benign and based on an accurate reading of the case law. The majority also ruled that Petitioner's statistical evidence was irrelevant because no *Batso*n violations had been found in any of the cases included in the MSU study. The dissent concluded Mr. Tucker's claim was not procedurally barred and that his evidence showed the risk of racial discrimination was unacceptably high in this case.

REASONS FOR GRANTING THE WRIT

North Carolina has a long history of excluding Black citizens from jury service. *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, 1554 (2012) (a black venire member "was more than twice as likely to be struck by the state even when other relevant characteristics were held constant"). A study of non-capital cases tried in 2011-2012 likewise showed prosecutors in North Carolina struck black venire members at about twice the rate of whites. *See State v. Clegg*, 867 S.E.2d 885, 923 n.5 (N.C. 2022).

The appellate courts of North Carolina also have a long history of tolerating the exclusion of Black citizens from jury service. More than 35 years after this Court decided *Batson*, the Supreme Court of North Carolina – for the first time in its history – found that a prosecutor had exercised a peremptory strike against a Black citizen because of her race. *Clegg*, 867 S.E.2d at 911; *see also State v. Robinson*, 846 S.E.2d 711, 716 (N.C. 2020) (finding that as of 2020, the Court had "never held that a prosecutor intentionally discriminated against a juror of color"); 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) (analyzing all *Batson* claims presented on appeal, comparing North Carolina to other states in the region, and cataloguing how North Carolina courts have habitually misapplied *Batson*).

In the years following the *Batson* decision, the Supreme Court of North Carolina routinely denied relief because the prosecution accepted some Black people

as jurors. For example, in *State v. Ross*, the Court affirmed the finding of no prima facie case because the prosecution accepted two Black venire members who sat on the jury. 449 S.E.2d 556, 561 (N.C. 1994). Similarly, in *State v. Spruill*, the Court emphasized the prosecutor's acceptance rate of Black potential jurors. 452 S.E.2d 279, 289 (N.C. 1994). *See also State v. Gregory*, 459 S.E.2d 638, 657 (N.C. 1995) (State's acceptance of three of eight minority jurors tended to refute allegation of purposeful discrimination); *State v. Smith*, 524 S.E.2d 28, 37 (N.C. 2000) (no prima facie case where prosecution accepted first Black prospective juror questioned).

In *Snyder v. Louisiana*, this Court made clear that the Constitution "forbids striking even a single juror for a discriminatory purpose." 552 U.S. 472, 478 (2008). Even after *Snyder*, the Supreme Court of North Carolina continued to cite the acceptance of Black citizens as jurors as a reason to deny relief. *See State v. Waring*, 701 S.E.2d 615, 642–43 (N.C. 2010) (State accepted 50 percent of African American prospective jurors; Court concludes these numbers do not suggest "a systematic effort" to prevent Black people from serving as jurors); *State v. Taylor*, 669 S.E.2d 239, 255 (N.C. 2008) (State's acceptance of two of five African Americans tended to show a lack of discrimination).

The Supreme Court of North Carolina has placed on defendants the heavy burden of debunking every reason offered by the prosecution. In *State v. Golphin*, the prosecution offered a half dozen reasons for excluding a Black man from the jury. These reasons included three that even the trial judge could not abide, including the venire member's "rather militant animus," his supposed failure to "defer" to the

judge's authority, and the fact he reported overhearing two white potential jurors make a statement "with respect to what he viewed as a challenge to the due process rights of the defendants." 533 S.E.2d 168, 213 (N.C. 1997). The trial judge stated on the record he "did not perceive any conduct of the juror to be less than deferential to the Court," and that the struck Black juror displayed "clarity and thoughtfulness" in his responses. *Id*. at 213–14. The trial judge also ruled that the struck Black juror's concern about the comment he overheard was not an appropriate basis for exercising a peremptory strike.[1] *Id*. at 214.

On appeal, the Supreme Court of North Carolina engaged in no analysis of the fact that three of the six reasons the prosecutor offered were at best pretextual and at worst entwined with the history of racial terror lynchings and rooted in derogatory stereotypes of African Americans. *Id*. at 432–33.

For many years, the North Carolina appellate courts also required criminal defendants to show the prosecution's "sole" reason for a strike was race. As discussed earlier, even when the prosecutor who tried this very case began his explanation for why he struck two Black women by saying they were "[b]oth black females," the North Carolina Court of Appeals denied relief. *White*, 509 S.E.2d at 466. Despite finding that "race was a predominant factor" in the strike decision, the court denied relief because, at the time, North Carolina courts required a *Batson* claimant to show race

[1] What the juror overheard the white venire members saying was that the two African American defendants "should have never made it out of the woods [alive]." *Golphin v. Branker*, 519 F.3d 168, 181 (4th Cir. 2008) (brackets in original).

was the *sole* factor for the strike. *Id.* Only in 2010, did the North Carolina Supreme Court repudiate the sole factor test. *Waring*, 701 at 639.

More recently, the North Carolina Supreme Court has taken steps to avoid considering evidence of discrimination by confining its analysis to *Batson*'s first step. In *Hernandez v. New York*, a plurality of this Court held, "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot." 500 U.S. 352, 359 (1991). If the goal is to root out discrimination, the rationale for this rule is obvious.

State v. Campbell, 884 S.E.2d 674 (N.C. 2023), reflects the state appellate court's formulistic and hyper-technical approach to *Batson*. In *Campbell*, the defendant objected under *Batson* and the trial court found no prima facie case. The trial judge asked the prosecution to give its reasons for the strikes. The prosecutor declined, explaining that doing so "could be viewed as a stipulation that there was a prima facie showing." 884 S.E.2d at 678. The trial judge then ordered the prosecution to put its reasons on the record, while assuring the State that it would deny the *Batson* objection at step one. Among the reasons the prosecution gave for striking one of the Black potential jurors was that "she was a participant, if not an organizer, for Black Lives Matter." *Id.*

The Supreme Court of North Carolina held that the *Batson* inquiry "should have concluded when the trial court first determined that defendant failed to make a

prima facie showing," and the State "appropriately objected" when the trial court attempted to move to step two. *Id*. at 682. The Court concluded, "Accordingly, we do not consider at step one the State's post facto reply to the trial court's request for a step two determination." *Id*. Thus, the Court sidestepped the question of whether a prosecutor can strike a Black prospective juror because she is a member of a civil rights organization that advocates for African Americans.

The Supreme Court of North Carolina has historically dismissed evidence of disparate treatment of similarly situated Black and white potential jurors. For example, in *State v. Williams*, the Court said, "Disparate treatment of prospective jurors is not necessarily dispositive on the issue of discriminatory intent . . . . Because the ultimate decision to accept or reject a given juror depends on consideration of many relevant characteristics, one or two characteristics between jurors will rarely be directly comparable." 452 S.E.2d 245, 256 (N.C. 1994). In *Miller-El v. Cockrell* (*Miller-El I*), this Court found probative of discrimination the fact that "the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury." 537 U.S. 322, 343 (2003).

Despite this Court's decision in *Miller-El I*, the Supreme Court of North Carolina continued to dismiss evidence of disparate treatment if the jurors were not identical. In *State v. Bell*, the Court denied relief after concluding "no juror had experienced all . . . the circumstances that caused the State to dismiss" a minority juror. 604 S.E.2d 93, 103-104 (N.C. 2004).

In *Miller-El v. Dretke* (*Miller-El II*), this Court specifically rejected a rule that a defendant "cannot win a *Batson* claim unless there is an exactly identical white juror," holding this would "leave *Batson* inoperable" because "potential jurors are not products of a set of cookie cutters." 545 U.S. 231, 247 n.6 (2005). The Court has reiterated this principle numerous times and repeatedly engaged in comparisons of Black and white potential jurors with respect to single traits. *See Flowers v. Mississippi*, 139 S.Ct. 2228, 2249 (2019) (comparing jurors who knew individuals involved in the case); *Foster v. Chatman*, 578 U.S. 488, 505-506, 512 (2016) (comparing different jurors with regard to marital status, age, and employment history); *Snyder v. Louisiana*, 552 U.S. at 483 (comparing "relevant jurors" with a "shared, characteristic, i.e., concern about serving on the jury due to conflicting obligations").

Notwithstanding this Court's repeated reliance on single-trait comparisons of white and Black potential jurors, *just last year*, the Supreme Court of North Carolina endorsed a "whole juror" approach to evidence of disparate treatment. *State v. Hobbs*, 884 S.E.2d 639, 644 (N.C. 2023). The Court rejected a "single factor approach" because that approach fails to consider each juror's characteristics "as a totality." *Id*.

It is against this backdrop that the Court should view the North Carolina Supreme Court's rejection of Petitioner's *Batson* claim.

I. The Supreme Court of North Carolina improperly dismissed Petitioner's evidence of disparate treatment and imposed a crippling burden of showing the prosecution had a proven history of discriminating against Black potential jurors in order to establish a prima facie case under *Batson*.

In *Flowers v. Mississippi*, this Court reaffirmed the principle that a court reviewing a *Batson* objection "must examine the whole picture" and consider "all relevant circumstances" bearing on the issue of purposeful discrimination. 139 S. Ct. at 2245, 2250. Among the circumstances the Court identified was the "relevant history of the State's peremptory strikes in past cases." *Id*. at 2243. In *Flowers*, the Court considered the prosecutor's 41 strikes of Black potential jurors in four of the petitioner's six trials.[2] *Id*. at 2434-37.

This number included peremptory strikes that did not result in successful *Batson* challenges. *Id*. Of the 41 strikes of African Americans, the trial and appellate courts rejected the overwhelming majority of the petitioner's *Batson* objections. In fact, the trial and appellate courts had found only four prior *Batson* violations.[3]

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[2] The juries in two of the petitioner's trials did not reach a verdict and there was no appeal.

[3] The prosecutor struck five Black potential jurors in the first trial and the defense objected under *Batson* to these strikes. The trial court overruled all five objections. The Mississippi appellate court reversed on other grounds and did not reach the *Batson* claim. At the second trial, the prosecutor struck five African Americans. The trial court found a *Batson* violation as to one and seated the juror. No *Batson* claim was raised on direct appeal. *Flowers v. State*, 842 So.2d 531 (Miss. 2003). At the third trial, the prosecution struck 15 Black potential jurors. The trial court found no *Batson* violation. On appeal, the defendant argued that 11 of the challenges violated *Batson*. The appellate court rejected the defendant's arguments as to eight of the venire members but granted relief on the other three. *Flowers v. State*, 947 So.2d 910 (Miss. 2007). At the sixth trial, the prosecutor struck five African Americans. The defense objected to each strike. The trial court overruled all five objections and the appellate court affirmed the trial court's *Batson* rulings. *Flowers v. State*, 158 So.3d 1009 (Miss. 2014).

Here, as illustrated in an excerpt from the MSU data, there was evidence that in the four trials involving one of the prosecutors who tried Petitioner for his life, the State struck 15 of 24 minority venire members, while striking only 26 of 127 potential jurors of other races.[4]

Affidavit of Catherine Grosso and Barbara O'Brien
Prosecutorial District 21

TABLE 10
Rates of State Strikes for Cases in Prosecutorial District 21
By Entire Study Period

Name of Defendant	Mean Strike Rate	
	Black Qualified Venire Members	All Other Qualified Venire Members
Danny D. Frogge (1995)	33.3% (1/3)	22.9% (8/35)
Danny D. Frogge (1998)	36.4% (4/11)	33.3% (11/33)
Cerron T. Hooks	66.7% (4/6)	27.9% (12/43)
Thomas M. Larry	50.0% (1/2)	19.4% (6/31)
James R. Little	77.8% (7/9)	22.9% (8/35)
Blanche Moore	25.0% (1/4)	26.3% (10/38)
Carl S. Moseley	66.7% (2/3)	21.2% (7/33)
Errol D. Moses	58.3% (7/12)	23.3% (7/30)
Jeremy D. Murrell	80.0% (4/5)	25.6% (11/43)
Raymond T. Thibodeaux	27.3% (3/11)	29.4% (10/34)
Russell W. Tucker	100% (5/5)	21.2 (7/33)
Timothy L. White	42.9% (3/7)	25.7% (9/35)
Darrell C. Woods	40.0% (2/5)	18.2% (6/33)

The majority condemned Petitioner's statistical evidence in the strongest possible terms, disparaging the MSU study as "unreliable and fatally flawed," having "no probative value," "at best a manipulation of data," and "at worst, an attempt to use misleading statistics." *Tucker,* 895 S.E.2nd at 555–56. The majority concluded

[4] In addition to Petitioner's case, the same prosecutor represented the State in the cases of Thomas M. Larry, Errol D. Moses, and Darrell C. Woods.

with this admonition, "[T]he maxim that 'statistics don't lie, but statisticians do' should run through the mind of every discerning attorney and judge." *Id*. at 556.

The majority's florid language might suggest MSU's methodology was suspect or that it cherry-picked its data set. This is not the case. The majority declined to consider Petitioner's evidence for the sole reason that no prior court had found a *Batson* violation in any of the cases in the MSU study. *Id*. at 555-57. This is not consistent with current law.

This was the law from 1965 to 1986. In 1965, this Court considered racially discriminatory peremptory challenges in the case of *Swain v. Alabama*, 380 U.S. 202 (1965). *Swain* rejected the idea that a criminal defendant could establish a constitutional violation based on a prosecutor's conduct in a single case. Rather, the Court held that a defendant was required to show the prosecutor, "in case after case," disproportionately excluded qualified African Americans. 380 U.S. at 223-24.

Two decades later, in *Batson*, this Court changed course and "rejected *Swain*'s insistence that a defendant demonstrate a history of racially discriminatory strikes in order to make out a claim of race discrimination." *Flowers*, 139 S. Ct. at 2241. This Court overruled *Swain* because it "placed on defendants a crippling burden of proof" that left prosecution strikes "largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92-93.

The *Batson* Court cited *Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), for the proposition that "a consistent pattern of official racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act is not immunized by

the absence of such discrimination in the making of other comparable decisions." *Batson*, 476 U.S. at 95-96 (internal citation and quotation marks omitted).

The Supreme Court of North Carolina's decision in this case effectively resurrected the discredited burden of proof required by *Swain*. This flies in the face of this Court's precedent and "dictate[s] that 'several must suffer discrimination' before one could object" to a suspect strike. *Batson*, 476 at 96 (internal citation omitted).

II. The Supreme Court of North Carolina violated this Court's clear precedent when it declined to consider all of the evidence relevant to Petitioner's jury discrimination claim.

This Court has made clear that the "decisive question" under *Batson* is whether an explanation proffered for a strike "should be believed." *Hernandez*, 500 U.S. at 365. Responding to a *Batson* objection "does not call for a mere exercise in thinking up any rational basis" for a strike and 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." *Miller-El II*, 545 U.S. at 252.

The Supreme Court of North Carolina dismissed Petitioner's evidence that the trial prosecutor read from a training handout when explaining to the trial judge why he struck Black potential jurors. The majority stressed that the handout accurately listed "legally permissible reasons" that prior courts had found to be race neutral and thus merely reflected "established caselaw." 895 S.E.2d at 551. According to the majority, "At most, this handout is 'evidence' that a prosecuting attorney attended a CLE class on jury selection." *Id*.

Nowhere in its opinion did the majority grapple with the undeniable similarities between the prosecutor's explanations to the trial court and the language in the cheat sheet and the resulting inference that the prosecutor simply read from the handout. Nor did the majority acknowledge Petitioner's affidavits from Bryan Stevenson and Ibram X. Kendi attesting to the racist roots of the reasons listed on the CLE handout.

The dissent noted that the majority's "benign characterization" of the handout "ignore[d] the controlling legal standard under *Batson*, America's history of race-based discrimination in jury selection, and the focus of [Petitioner]'s *Batson* claim." *Id*. at 568 (Earls J, dissenting). Moreover, the record in this case indicates the prosecution used the handout as a "cheat sheet" designed to "simulate race-neutral reasons" for striking African Americans when, in fact, those reasons were pretextual." *Id*. at 568.

The key word is pretextual. This Court recently emphasized that a court adjudicating a *Batson* claim must determine "whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race." *Flowers*, 139 S.Ct. at 2244. The majority acknowledged that Petitioner's arguments about the cheat sheet focused on the pretextual nature of the prosecution's strike explanations, but claimed that was "not the pertinent issue." 895 S.E.2d at 549.

The majority's conclusion rested on a divide-and-conquer approach to the *Batson* framework. First, the majority improperly limited its review to *Batson*'s first. The majority then concluded that the cheat sheet, while relevant to step three, was

not relevant at step one. *Id*. According to the majority, there was "no possible scenario" in which the training handout would have assisted defendant in establishing a prima facie case. *Id*. at 550. The majority's reasoning is contrary to this Court's clear precedent.

Significantly, the State conceded the question of a prima facie case was moot because the prosecution placed its reasons for exercising peremptory strikes on the record and the trial court reached step three. 895 S.E.2d at 547. The Supreme Court of North Carolina dismissed this concession as "immaterial" and "not binding." *Id*.

Next, the majority limited the circumstances under which the finding of a prima facie case is moot. In discussing the burden-shifting framework of *Hernandez*, the majority held that step one is not moot "when the trial court determines that the 'defendant failed to make a prima facie showing before the prosecutor articulated his reasons for the peremptory challenges.'" 895 S.E.2d at 546 (internal citation omitted). Nowhere in its opinion did the majority acknowledge *Hernandez*'s holding that, once a trial court has ruled on the "ultimate question of intentional discrimination," the question of a prima facie case at step one becomes moot. 500 U.S. at 359.

The approach in *Hernandez* is consistent with the goal of rooting out discrimination. As the dissent explained:

> Imagine, for example, that when ordered to provide . . . race-neutral reasons for their peremptory challenges, a prosecutor . . . states . . . that they struck one of the jurors because of their race. It would be absurd, in light of this blatant racial discrimination, to say that a trial court is not obligated to review this statement for purposeful discrimination pursuant to *Batson*'s third step simply because the defendant failed to make a prima facie showing of racial discrimination. Thus, when a prosecutor provides what they purport to be race-neutral reasons for the use of a peremptory challenge, a trial court

> must be required to consider whether those statements establish purposeful discrimination.

895 S.E.2d at 567 (Earls, J., dissenting) (internal citations, quotation marks, and brackets omitted).

The majority also failed to acknowledge that the trial court in this case *did* reach the ultimate question of intentional discrimination. As to each strike, the trial judge found that the prosecutor had provided "racially neutral reasons" and had not used its peremptory challenges "in a racially discriminatory manner." App. 54, 59-60, 64, 68, and 78; *see also* 895 S.E.2d at 567 (Earls, J. dissenting) (prosecution provided reasons and the trial court ruled on these reasons). The majority's contention that the *Batson* inquiry in this case "never proceeded to step three" is clearly incorrect. *Id*. at 547.

The majority's divide-and-conquer approach is untethered to this Court's case law. The result of distinguishing between the evidence relevant at step one from evidence relevant at step three was to effectively remove Petitioner's protections under the equal protection clause. *Id*. at 567 (Earls, J. dissenting). This Court has never held that evidence clearly relevant at step three is irrelevant at step one. Artificially constraining review to step one, as the state court majority did here, did not render Petitioner's evidence of discrimination "irrelevant or cause it to disappear." *Id*. at 568.

CONCLUSION

Because the Supreme Court of North Carolina's decision in this case undermines *Batson*'s promise of equal protection, the Court should grant a writ of

certiorari and remand this case to the Supreme Court of North Carolina with instructions to consider all relevant evidence, including Petitioner's statistical evidence and the prosecution's use of a cheat sheet at step three of the *Batson* framework.

Respectfully submitted, this the 13th day of May 2024.

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