No. 25-5469
(CAPITAL CASE)

IN THE

Supreme Court of the United States

BRYAN CHRISTOPHER BELL and ANTWAUN KYRAL SIMS, PETITIONERS,

v.

STATE OF NORTH CAROLINA, RESPONDENT.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This Court should grant review and rule on the merits of the *J.E.B.*[1] claim, and it can do so on the uncontested issues alone. The State does not defend Assistant District Attorney Greg Butler's use of gender discrimination in jury selection, as reflected in his own sworn affidavit. It also does not defend North Carolina's use of the procedural bar to extend its long-standing hostility to claims of discrimination in jury selection, rendering the bar inadequate to foreclose review. This Court need go no further to rule for Petitioners.

It should do so for two reasons. First, it will course-correct in North Carolina, where, in the words of one of the Supreme Court of North Carolina's justices, the state's "jurisprudence is contrary to Supreme Court precedent" and the state has abandoned "its responsibility to enforce constitutional guarantees of equal justice under the law." Pet. App. 43a n.3; *see also* Br. Emancipate NC et al. 6–13 (recounting North Carolina's failure to root out "common and flagrant" jury discrimination). Second, granting review and reversing will provide much needed guidance in the administration of jury selection because "this Court's holding in *J.E.B.* has not been embraced or understood by the bench and the bar." Br. Duke Univ. Sch. of L. Ctr. For Crim. J. et al. 15. In light of these circumstances, this is a weighty case, worthy of review.

[1] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

The opposition the State does provide should be given no weight. The face of the decision below turns on an evaluation of whether a *J.E.B.* claim on appeal would have been frivolous, i.e. an assessment of its potential merit, not an abstract categorization of the claim. And notwithstanding the State's dissembling, the decision marked an unpredictable departure from the text of the statutory bar and the state jurisprudence on it. The procedural bar is neither adequate nor independent.

Gender discrimination in the administration of criminal law, including in jury service, is anathema to fundamental fairness and our democratic system. *See Flowers v. Mississippi*, 588 U.S. 284, 293 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."). Even-handed access to jury service is a vanguard for public "confidence in the fairness of the American criminal justice system." *Id.* at 296 (citing *Batson v. Kentucky*, 476 U.S. 79, 98–99 (1986)). The holding of the court below flies in the face of this Court's "unceasing efforts" to protect that confidence, particularly where, as here, the stakes are highest. *Batson*, 476 U.S. at 85. The prosecution's cavalier approach to jury discrimination exemplifies the need for this Court's further guidance, particularly as it relates to gender discrimination in jury selection. The Court has jurisdiction and should grant relief on the meritorious *J.E.B.* claim.

DISCUSSION

I. THERE IS NO QUESTION THE PEREMPTORY STRIKE AT ISSUE IS UNLAWFUL

There is no dispute that the peremptory strike in this case was animated by gender bias and violated *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). At no point in the evidentiary hearing, in its briefing and argument to the Supreme Court of North Carolina, or in its Brief in Opposition to this Court has the State ever asserted that the trial judge erred when it ruled that the State's strike of Viola Morrow was motivated by discriminatory intent. Nor could it. The prosecutor admitted to discriminatory intent in his affidavit. Though the State subpoenaed the prosecutor to testify at the evidentiary hearing, it withdrew the subpoena shortly before the hearing, Pet. App. 129a, and never elicited any evidence that provided any reason to doubt the prosecutor's admission. With no contrary assertions from the State, this Court is left with an unchallenged finding that the State violated Equal Protection in its capital prosecution of Mr. Bell and Mr. Sims.

Further, the State does not have a legitimate interest in convictions – like those in this case – that are corrupted by discrimination. As this Court has explained, the "very integrity of the courts is jeopardized" when the prosecution's choice of jurors is tainted by discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). Such discrimination touches "the entire community," *Batson*, 476 U.S. at 87 and "places the fairness of the criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 402 (1991); *see also* Br. Fair & J. Pros. 10–13.

The State asserts that "the prosecution" made several statements about gender during jury selection and that those statements reflected the reasons for the State's strike of Mr. Morrow. BIO 10–12, 26. However, the State has muddied the water on an important factual point. None of the statements the State relies on were made by prosecutor who actually struck Ms. Morrow—Assistant District Attorney Greg Butler. Instead, the statements about wanting "a few men" and a "representative jury," having "nothing but seven white women" on the jury, and having a jury with "all women" were made by District Attorney Dewey Hudson or Assistant District Attorney Robert Roupe. Tr. 578, 1160, 1161, 1164, 1730, Reply App. 1a–6a.[2]

By contrast, when Butler explained why he struck Ms. Morrow, he never referred to any of the concerns raised by Mr. Hudson or Mr. Roupe. Rather, when pressed by the judge to give his reasons for getting rid of Ms. Morrow, Butler offered just one: Ms. Morrow's arthritis. Tr. 1731–32, Reply App. 7a–8a. When the defendant challenges a peremptory strike exercised by the State, the 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*, 545 U.S. at 252.

Here, Butler provided only one reason for striking Ms. Morrow, which was her health. He did not indicate that he shared his colleagues' concerns and did not assert that he was using the strike of Mr. Morrow in an attempt to "rebalance" the jury.

[2] These materials are also available with the balance of the jury selection transcripts and other court files at https://www.phillipsblack.org/bell-and-sims-v-north-carolina.

Based on these circumstances, the one reason that Butler identified for the strike of Ms. Morrow when pressed by the trial judge was not at all consistent with the new reasons that Butler later gave in his affidavit from 2012. Mr. Butler's true reasons, therefore, were indeed hidden until years later when he expressly endorsed his colleague's views on the need to engage in gender discrimination. Butler's undisputed intentional discrimination thus calls out for relief, notwithstanding the State's ultimately meritless procedural defenses.

II. THE PROCEDURAL BAR IS NEITHER INDEPENDENT NOR ADEQUATE AND DOES NOT BAR REVIEW

The Supreme Court of North Carolina has adopted an atextual interpretation of a procedural bar that has heretofore never been used to preclude, in postconviction, a claim that was not preserved at trial. That interpretation was both interwoven with federal law and wholly unpredictable. It also extended North Carolina's long history of hostility to jury discrimination claims. And none of this would have been possible but for trial counsel's uncontested deficient performance in failing to preserve Petitioners' *J.E.B.* claim. Nothing the State has said should foreclose this Court's review of it.

A. The Procedural Bar Is Interwoven with Federal Law

Federal courts have jurisdiction to review a federal claim notwithstanding a state procedural bar if the bar either rests on a merits determination or is interwoven with federal law. *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). Either is sufficient to establish federal jurisdiction. *Id.* Here, the state court's decision was interwoven

with federal law, involving an assessment of the *J.E.B.* claim's potential merits. Br. Fed. Cts. Scholars 6–11.

Nonetheless, the State contends the decision below was independent of an assessment of the merits of Petitioners' *J.E.B.* claim and thereby independent of federal law. As part of its argument, the State asserts that *Foster v. Chatman*, 578 U.S. 488 (2016) is "off point" because the state supreme court decision in the case had "no reasoning" and because the trial court decision concluded the *Batson* claim had "no merit." BIO 20. Not so. The state court conducted a fact-intensive review of the particular claim, engaging in "four pages of what it termed a '*Batson* . . . analysis.'" *Foster*, 578 U.S. at 498. That assessment of the federal claim was case- and fact-specific and, therefore, interwoven with federal law. *Id.*

Although the posture is different here because the claim was not raised at trial, the conceptual question asked by the state court in *Foster* and the Supreme Court of North Carolina in this case is the same: are there new facts in post-conviction that render the underlying federal claim viable? Pet. App. 19a. As in *Foster,* that answer depends on the relationship between the evidence available at trial and the evidence in post-conviction, as well as the legal requirements of the claim—i.e., the merits.

The Supreme Court of North Carolina made that comparison across nine five pages of "*J.E.B.* analysis" that was, as in *Foster*, specific to the facts of this case and the elements of the federal claim. Pet. App. 18a–27a. That analysis was not about an abstract categorization of the claim; it was about applying the facts in this case to the

J.E.B. elements. Thus, as in *Foster*, the state court's decision involved an in-depth discussion of the merits of the federal claim. *Foster* is not "off point"—it is dispositive of the issue in Petitioners' favor.

The Court in *Stewart v. Smith*, 536 U.S. 856 (2002) (per curiam) drew precisely the same line Petitioners propose here. In *Stewart*, the Arizona state court applied a procedural bar that the Ninth Circuit Court of Appeals deemed "not independent" and, thus, allowed for federal review. 536 U.S. at 859. To determine whether the Ninth Circuit Court of Appeals was correct, this Court needed to know whether the Arizona court's assessment of the barred claim was based on a blanket rule for all claims asserting a given violation or whether it depended on the specifics of the claim in light of the facts asserted. *Id.* A blanket rule would be independent; a context-specific requiring an assessment of what the petitioner asserted in light of the claim's legal requirements would not.

The particular phrase at issue in *Stewart* was "of sufficient constitutional magnitude," and that determination, it turned out, was made by asking what issue was asserted, not anything about what facts supported the claim at issue in the case. Indeed, the Arizona Supreme Court explicitly noted that the procedural rule referenced a "ground" for relief, confirming an abstract assessment. Hence, the bar in *Stewart* was independent of federal law.

In this case, the operative phrase is "in a position to adequately raise," and the determinative issue is whether that question can be answered by asking what claim

is asserted or assessing the underlying facts of the claim itself. There is no question it is the latter. The Supreme Court of North Carolina based its ruling on a "fair consideration of the record," Pet. App. 60a–61, which the court examined at length before concluding that the claim could have been raised on appeal. Pet. App. 20a–29a. The term "adequately" reinforces the case-specific approach that *Stewart* made clear is intertwined with federal law.[3]

Foster and *Stewart* confirm this Court's jurisdiction: The Supreme Court of North Carolina's application of the asserted facts to the elements of the *J.E.B.* claim rendered its decision interwoven with federal law.

B. The Procedural Bar Is Inadequate to Preclude Review

Prior to the decisions below, a defendant could raise an unpreserved trial error in postconviction proceedings in North Carolina. That practice was consistent with the procedural bar statute "by its own terms" as well as prior practice. Pet. 24 (quoting *Ford v. Georgia*, 498 U.S. 411, 425 (1964)). However, the Supreme Court of North Carolina's departure from that practice evinced hostility towards a fundamental constitutional guarantee: the administration of criminal law free from race-and gender-based discrimination. Pet. 25–30. The State has failed to contest as much, thereby waiving the issue.[4] The State has also failed to contest trial counsel's

[3] That the merits assessment is implicit, rather than stated as an explicit merits ruling, is immaterial. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1986) (explaining that a state procedural bar is not independent when the state court rules "either explicitly or implicitly" on the merits of the federal claim).

[4] The State erroneously claims the concurrence's concerns about the lack of redress in North Carolina for *Batson* and *J.E.B.* claims was limited to postconviction. BIO 14. That is not true. The concurrence again and again explains that "appellate remedies are effectively unavailable" for these claims in

deficient failure to preserve the *J.E.B.* claim as providing cause for granting relief on the meritorious *J.E.B.* claim. Pet. 30–32. The Court need go no further than these waived issues, as Petitioners need only prevail on one basis for the Court to grant relief on his concededly meritorious claim. S. Ct. R. 15; *Perez v. Mrtg. Bankers Ass'n*, 575 U.S. 92, 107 (2015) (finding waiver of issue not contested in brief in opposition); *Alabama v. Shelton*, 535 U.S. 654, 661 n.3 (2002) (finding arguments not raised in brief in opposition waived).

But the State's arguments pose no more barrier to granting relief than the ones it has waived. The State's main argument is that there are provisions of North Carolina law that can, under extreme circumstances, in the appellate court's discretion provide for merits review of some unenumerated set of claims. Those provisions might, in some instances, include claims for discrimination in jury selection in capital cases, but not always and not in any case the State cites.[5] Indeed, the State's proposed framework, where every unpreserved error has to be litigated as some version of a miscarriage of justice, would produce very much the opposite of a

North Carolina. Pet. App. at 87a; *see also Id.* at 36a (citing "one and only one" appellate case granting relief on such a claim); *Id.* at 91a (describing *Batson* and *J.E.B.* as a "right without a remedy"). That unavailability itself also raises important constitutional concerns, as reflected in part by even the State's rephrased question presented. BIO i; *see also Yates v. Aiken*, 484 U.S. 211, 218 (1988); *Testa v. Katt*, 330 U.S. 386, 393 (1947).

[5] There appear to be two, and only two, cases reviewing the merits of unpreserved *Batson* claims. Each of those were pending when *Batson* was decided. *State v. Davis*, 386 S.E.2d 418, 422–23 (N.C. 1989); *State v. Robbins*, 356 S.E.2d 279, 293 (N.C. 1987). Not addressing those claims would have raised independent constitutional problems had the court failed to do so. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). There appears to be no other decisions where the North Carolina appellate courts have reviewed on the merits an unpreserved *Batson* or *J.E.B.* claim since *Davis* and *Robbins*.

"firmly established and regularly followed" procedural bar. *Walker v. Martin*, 562 U.S. 307, 316 (2011) (cleaned up).

Of course, North Carolina has adopted no such framework. Indeed, for all of its discussion of various appellate mechanisms which were supposedly available to Petitioners, the State has cited no case suggesting that the existence of these escape valves actually render, within the meaning of the procedural bar, a claim available to "adequately raise" on appeal. N.C. Gen. Stat. § 15A-1419(a)(3).

Even the authorities the State does muster do little to advance its arguments. For example, the State suggests the claim would have been reviewable, if only Petitioners had raised it on appeal as a basis for proving trial counsel was ineffective. BIO 26. But, again, the Supreme Court of North Carolina has said otherwise. In *State v. al-Bayyinah*, 616 S.E.2d 500, 509–10 (N.C. 2005), the defendant raised an ineffective assistance of counsel claim, but the Court denied review because "[t]rial counsel's strategy and the reasons therefor [were] not readily apparent from the record . . . ." This result was consistent with the court's long-standing approach to ineffective assistance of counsel claims. As the court explained in *State v. Fair*, 557 S.E.2d 500, 525 (N.C. 2001) – which the State relies on – "because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal." Thus, contrary to the State's assertion, Mr. Bell and Mr. Sims could not have pursued ineffective assistance of counsel claims in their direct appeals.

Another patently wrong suggestion from the State is that each Petitioner could have invoked a state constitutional provision that allows the Supreme Court of North Carolina exercise its supervisory authority over trial courts and, thereby, grant relief. BIO 25 (citing N.C. art. IV, § 12(1)). Even if, in dire situations in *capital* cases such review may be available, Mr. Sims' case was reviewable on direct appeal at the intermediate appellate court, which lacks supervisory authority under the state constitution, making this means for review wholly unavailable to him. *Compare* N.C. art. IV, § 12(1) (providing supervisory authority to Supreme Court); *with* N.C. art. IV, § 12(2) (lacking any such provision of authority).

Regardless, the State offers no case demonstrating that the existence of these offramps from miscarriages of justice provide defendants with an opportunity "adequately raise" claims as required by N.C. Gen. Stat. § 15A-1419(a)(3). Though the State claims these provisions grant defendants the opportunity to raise otherwise unpreserved arguments, the provisions do not provide defendants with a meaningful way to present arguments that were not raised at trial. Indeed, the Supreme Court of North Carolina has itself explained that its supervisory authority is "rarely used" and arises only under "unusual and exceptional circumstances." *State v. Stanley*, 215 S.E.2d 589, 594 (N.C. 1975). It has also declined to grant review under Rule 2 because

the defendant was "no different from other defendants who failed to preserve their constitutional arguments."[6] *State v. Ricks*, 862 S.E.2d 835, 840 (N.C. 2021).

The State does acknowledge that in *State v. Maness*, 677 S.E.2d 796 (N.C. 2009), the Supreme Court of North Carolina denied review under Rule 2 in a case with an unpreserved *J.E.B.* argument but asserts that the court "merely rejected the application of Rule 2 to the specific facts and circumstances of that case." BIO, p. 25. However, those "specific facts and circumstances" are virtually identical to the facts in this case. In *Maness*, the defendant raised a *Batson* objection at trial but then raised an unpreserved *J.E.B.* argument for the first time on appeal. The Supreme Court of North Carolina declined to review the *J.E.B.* argument, concluding that the defendant's "claim of gender bias" was "not an exceptional circumstance calling for invocation of Rule 2." *Id.* at 804. These facts are nearly identical to the facts in this case. As a result, there is little doubt the Supreme Court of North Carolina and the North Carolina Court of Appeals would have denied review under Rule 2 in this case.

North Carolina courts also regularly deny review of unpreserved *Batson* and *J.E.B.* claims. In *State v. Best*, 467 S.E.2d 45, 52 (N.C. 1996), the Supreme Court of North Carolina denied *Batson* and *J.E.B.* arguments precisely because "[t]he defendant did not object to any of the peremptory challenges on the ground of

[6] In other cases, the State regularly takes the position that Rule 2 *cannot* excuse the failure to preserve a claim. *See, e.g.*, Br. for the State at 3, *State v. Radmomski*, No. COA23-340 (N.C. App. Oct. 5, 2023) ("Nor can Rule 2 excuse Defendant's failure to comply with procedural rules."); Br. for the State at 6, *State v. Campbell*, No 252PA14-2 (N.C. July l1, 2016) ("Rule 2 of the North Carolina Rules of Appellate Procedure is available for only two purposes, preventing manifest injustice to a party or expediting a decision in the public interest . . . .").

discrimination against women or African-American women." Similarly, in *State v. Adams*, 439 S.E.2d 760, 764–65 (N.C. 1994), the court refused to consider a *Batson* argument because the defendant "failed to object to the prosecution's use of peremptory challenges on the ground they were based on race." And in *State v. Clay*, 355 S.E.2d 510, 512 (N.C. 1987), the North Carolina Court of Appeals rejected a *Batson* argument because the defendant "waived her right to contest the State's use of its peremptory challenges by not objecting to that action until after the State had presented its evidence." Ultimately, to the extent that Rule 2 and the Supreme Court of North Carolina's supervisory authority provide a theoretical means for merits review, they are illusory for the vast majority of defendants, are not a substitute for reviewing claims that were not raised at trial, and do not place defendants in an "adequate position" to raise unpreserved arguments on direct appeal.

Instead, Petitioners' situation should have been governed by *State v. Allen*, 861 S.E.2d 273 (N.C. 2021). Pet. 24–25. There, the Supreme Court of North Carolina rejected the State's argument that the defendant was "precluded from raising his shackling claim on post-conviction review because he failed to object to his purported shacking at trial." *Allen*, 861 S.E.2d at 291. The court characterized the State's position as "extra-textual" and contrary to its view that such a requirement "would . . . effectively prevent post-conviction review of all claims." *Id.* The court in *Allen* explained the claim was not available on direct review because the record concerning the shackling had not been developed at trial, which would have occurred had there

been an objection. Here, consistent with long-standing practice, Petitioners' *J.E.B.* claim could not have been "adequately raised" on appeal because there was no related objection at trial.

State v. Tucker, 895 S.E.2d 532 (N.C. 2022) does no more to help the State. BIO 22–23. The State offers *Tucker* up as example of how consistent the Supreme Court of North Carolina is in enforcing the bar. But *Tucker* is distinguishable from this case in a crucial way. Unlike the trial attorneys in this case, the trial attorney in *Tucker* "raised a *Batson* objection at trial, receiv[ed] a ruling from the judge, and ha[d] the trial court note on the record that the issue may be subject of review on appeal." *Tucker*, 895 S.E.2d at 549. As a result, *Tucker* had the key ingredient that is missing from this case: an objection at trial. *Tucker* is therefore not relevant to the situation Petitioners face where trial counsel failed to raise an objection.

Allen and the long-standing practice in North Carolina should have provided Petitioners with an opportunity to have their *J.E.B.* claim reviewed on the merits. Pet. 22–25. The Supreme Court of North Carolina's novel departure to prevent review poses no barrier to this Court reaching the merits of the *J.E.B.* claim.

III. THIS COURT'S INTERVENTION IS WARRANTED NOW

Justice Thurgood Marshall warned that if courts ignored "smoking guns" in *Batson* cases, there would be "little hope of combatting" more subtle forms of discrimination in our court system. *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting). This case is a quintessential example of just such a

"smoking gun." The prosecutor openly admitted to discriminatory intent in his peremptory strike of Viola Morrow. The trial court then found that the strike was motivated by discriminatory intent. And at every level of the court system, the State has made no attempt to defend the merits of the strike. This Court should grant review because the Supreme Court of North Carolina has twisted and corrupted North Carolina's procedural bar to avoid granting relief for blatant, rank discrimination in the make-up of a jury in a capitally-tried case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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