No. 411A94-5 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland
	)	91 CRS 23143
MARCUS REYMOND ROBINSON	)	

****

BRIEF OF *AMICUS CURIAE* NORTH CAROLINA CITIZENS EXCLUDED FROM JURY SERVICE BASED ON RACE IN SUPPORT OF DEFENDANT-APPELLEE MARCUS ROBINSON

****

INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Amici adopt Defendant-Appellant's Statements of the Case and Facts.

STATEMENT OF INTEREST

Amici are North Carolina citizens who were qualified to serve on capital juries but excluded by prosecutors because they are African-American. *Amici*'s race-based exclusion from the most important decision-making process in North Carolina's justice system wounded their dignitary interests, violated federal and state constitutional guarantees of equal treatment, undermined the justice system's legitimacy, and rendered the state's capital punishment regime and the death sentence in this case unfair and unreliable. The decision below remedies these harms through well-supported findings of fact and carefully reasoned conclusions of law. Therefore, *Amici* urge the Court to affirm.

ARGUMENT

I. INTRODUCTION

When Benjamin David was President-Elect of the North Carolina Conference of District Attorneys, he stated that prosecutors are "the conscience for the community" who should confront "race and justice" as "a great social issue that has been years in the making and is bigger than any of us." Benjamin David, *Community-Based Prosecution in North Carolina: An Inside-Out Approach to Public Service at the Courthouse, on the Street, and in the Classroom*, 47 Wake

Forest L. Rev. 373, 374-76 (2012). As Conference President, David confronted this great social issue by condemning a predecessor's race-based elimination of qualified African-American jurors from service in a high-profile criminal case. David acknowledged that so "fundamentally flawed" a verdict "cannot stand the test of time," and that race-based jury strikes deny the defendant and the entire community a fair, reliable judgment. Anne Blythe, *Perdue Pardons Wilmington 10*, Raleigh News & Observer (Jan. 1, 2013).[1]

For the same reasons, prosecutors' race-based exclusion of qualified African-American jurors in this case – as well as in capital cases throughout the 1990s in the former Second Judicial Division, in Cumberland County, and across North Carolina – left Mr. Robinson's death sentence "fundamentally flawed" and unable to "stand the test of time." District Attorney David's words echo this Court's condemnation of the structural harm caused by racial bias in jury selection. "The integrity of the judicial system is at stake" when such bias

> entangles the courts in a web of prejudice and stigmatization. To single out blacks and deny them the opportunity to participate as jurors in the administration of justice – even though they are fully qualified – is to put the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law.

---

[1] Available at http://www.newsobserver.com/2013/01/01/2576074/governor-pardons-wilmington-10.html. District Attorney David's condemnation of the race-based jury strikes in the Wilmington 10 case belies his criticism of the Racial Justice Act, 47 Wake Forest L. Rev. at 397, at least as RJA is applied to remedy race-based jury strikes in this and other cases.

State v. Cofield, 320 N.C. 297, 303-304, 357 S.E.2d 622, 625-27 (1987).

Yet prosecutors did entangle North Carolina's courts in that "web of prejudice and stigmatization." They did so by defining *Amici* and other qualified African-American jurors not as individuals, but as members of a racial class. The group-based stereotype erased *Amici*'s individuality, wounded their dignitary interests, and silenced their voices on the most solemn legal and moral question available to members of a democratic society – whether government may exercise its ultimate power over an individual through the penalty of death.

This Court shares the duty to confront and not evade the "wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection" in this case and in capital cases throughout North Carolina. *State v. Robinson*, Cumberland County 91 CRS 23143 (Order of April 22, 2012), p. 3. As future Chief Justice Mitchell emphasized in *Cofield*, "the intent of the people of North Carolina was to guarantee *absolutely unto themselves* in *all* cases their system of justice would be free of both the reality and the appearance of racism, sexism and other forms of discrimination in these twilight years of the Twentieth Century." *Cofield,* 320 N.C. at 310-11, 357 S.E.2d at 630 (Mitchell, J., concurring).

These principles apply to the petit jury as well. *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 364 S.E.2d 416 (1988). The people of North Carolina renewed their commitment to these principles in the Racial Justice Act. G.S. §

15A-2010 *et seq.* (2009). The RJA therefore stands well within this state's distinctive tradition of leadership on best-practice, evidence-based criminal justice reforms designed to increase transparency and accountability wherever government exercises its uniquely concentrated power over individuals, their lives, and their liberty. *See*, *e.g.*, Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 Utah L. Rev. (forthcoming). The well-supported findings of fact and conclusions of law in the Order below acknowledge and remedy the infection of racial bias in the state's death penalty system and in this case. Therefore, the Order should be affirmed.

II. UNDOING THE DAMAGE: CONFRONTING AND CURING BIAS IN THE JUSTICE SYSTEM

United States Supreme Court Justice Antonin Scalia bluntly acknowledged the significant role of race in prosecutorial decision-making, stating that the "unconscious operation of irrational sympathies and antipathies," including racial prejudice "is real [and] acknowledged in our cases."[2] Justice Scalia viewed local democracy, with its demands for transparency, accountability, and fairness from elected officials, as the best cure for the racial bias that infects criminal justice decision-making. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

---

[2] Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811 - McCleskey v. Kemp of Jan. 6, 1987, *McCleskey v. Kemp* file, in Thurgood Marshall Papers, The Library of Congress, Washington, D.C.

Some of North Carolina's leading justice officials have taken up that challenge. As an elected prosecutor, Benjamin David strives to heal the "great divide … along racial fault lines" that causes serious "trust issues" between African Americans and the justice system whose most powerful decision-makers – attorneys, judges, and law enforcement officers – are overwhelmingly white. David, 47 Wake Forest L. Rev. at 393-399. David finds partners eager to work across those racial fault lines to prevent harm before it happens, "rather than working to undo the damage a district attorney was causing." *Id*. at 399. He gained new perspective while building those bridges -- particularly from listening attentively to the unique individual voices of African Americans who "peeled back the secret codes and buried lessons" of their long struggle for equal treatment. *Id*.

The Office of the Mecklenburg County District Attorney also pioneered a Prosecution and Racial Justice Program to identify and eliminate racial bias in prosecutorial decision-making. Wayne McKenzie, *et al.*, *Prosecution and Racial Justice: Using Data to Advance Fairness in Criminal Prosecution* 3 (2009). Program leaders had to overcome resistance to self-assessment. But prosecutors found that "hold[ing] themselves accountable for their decisions" helped to increase transparency, reduce racial division and suspicion, and enhance system legitimacy. *Id*. at 8; *cf*. Tpp. 909-910 (expert testimony of Bryan Stevenson,

discussing similar success in Office of United States Attorney Veronica Coleman-Davis).

North Carolina District Court Judge Louis A. Trosch, Jr. is similarly dedicated to confronting and curing racial bias in justice systems. In his hearing testimony, Judge Trosch explained that empirical evidence of the harm caused by such bias led him to confront the influence of race in his own decision-making. Tp. 1017. He implemented procedures to counter racial bias in his courtroom, and now shares his expertise by training other judges across the country. Tp. 1020; *cf.* Jerry Kang*, Implicit Bias: A Primer for Courts* 4-6 (National Center for State Courts 2009); Pamela Casey, *et al*., *Minding the Court: Enhancing the Decision-Making Process* 5, 10-12 (American Judges Association 2012). Nor is Judge Trosch alone in taking such concrete steps. In the federal district court, cautionary instructions address the effects of implicit bias in jury deliberations. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 169 (2010).

Elected justice officials who confront racial bias and work to cure it contrast sharply with others who adopt a politically correct silence or react with resentment and resistance to empirical evidence and proposals for change. *See State v. Saintcalle*, 2013 Wash. LEXIS 617 at *20 (opinion of Wiggins and Owens, JJ.,

discussing role of implicit bias in suppressing awareness and action); Tpp. 845-49, 860-65 (expert testimony of Bryan Stevenson discussing silence and resistance); Kang, *Implicit Bias: A Primer for Courts* at 2 (same). Yet the harms from such bias are real, documented, and devastating. *Amici* and other qualified African-American jurors were denied a voice in capital decision-making because of their race. They were excluded from service without the dignity of an explanation. Behind their backs, insult piled on injury as prosecutors proffered factually controverted excuses for the racially-influenced strikes. And in the bitterest cut of all, the courts abandoned these jurors and further diminished their dignity by accepting such excuses.

III. HARM TO EXCLUDED JURORS

As an expert on race and the law, Professor Bryan Stevenson testified that African Americans are "dramatically less likely to serve on juries," and that in North Carolina they are "excluded anywhere from two to three times more frequently than white prospective jurors." Tpp. 986-97. Stevenson also found that when jurors were not allowed to serve, they felt "really victimized, really burdened" by their elimination from the venire. Tp. 890.

Race-based jury strikes are harmful "not only for the excluded jurors but for their communities as well." Tp. 891. Stevenson cited first-hand accounts and supporting research showing how "deeply demeaning and frustrating" race-based

strikes are "to communities of color that just want the opportunity to serve." Tp. 897. Stevenson testified that when excluded jurors had "experienced Jim Crow, they would talk about segregation. They would talk about the practices and customs that were designed to humiliate and demean and marginalize people of color, and their experience of being struck really seemed to trigger" fresh pain from those memories and experiences. Tp. 892.

Professor Stevenson relied on information from a number of North Carolina citizens as well as court opinions and records to conclude that racial bias was a significant factor in prosecutors' peremptory strikes against qualified capital jurors at the time of Defendant-Appellant's trial. Tpp. 890-92, 897; *Robinson* Order ¶ 221. Sadly, the record below contains abundant detail on the harm to jurors from such race-based treatment. From the plethora of examples, this Brief discusses the experiences of four qualified jurors.

A. A Legacy of Discrimination: The Exclusion of Sonya Jeter Waddell

In *State v. White*, the North Carolina Court of Appeals held that "race was a predominant factor" in the prosecutor's peremptory strike of African-American juror Sonya Jeter Waddell. The Court could do little else; the prosecutor said he struck Waddell because she was black. Tpp. 868-70 (discussing *State v. White*, 131 N.C. App. 734, 739-40, 509 S.E.2d 462, 466 (1998)). The *White* Court was

"confounded" by defense counsel's failure to perfect the objection and the Court's resulting inability to remedy the harm from Ms. Waddell's race-based exclusion from jury service. *Id*.[3]

For Waddell, the indignity of her experience with state-sanctioned discrimination was vivid. The prosecutor "never looked at me" during voir dire, she explained, but instead "treated me as if I was on trial. I felt like I was being interrogated because he asked me more questions than he asked other potential jurors. I felt intimidated by him." Def. Ex. 36, ¶¶ 9-10. When Waddell learned that the prosecutor explicitly cited her race as a reason for excluding her from jury service, she was "angry because I have always had faith in our criminal justice system and I feel like that faith has been abused." *Id*. ¶ 14. Waddell is dismayed that her "legacy will include this kind of discrimination." *Id*.

B. Haile Selassie and a Gold Earring: The Exclusion of John Murray

John Murray also felt the sting of a prosecutor's discriminatory lash – indeed, from the same prosecutorial office that litigated Defendant-Appellant's case. That prosecutor targeted Murray in another Cumberland County capital case despite the facts that Murray served our nation in the military, had a cousin who

[3] This unanimous opinion was written by the Honorable Patricia Timmons-Goodson, who served as a Cumberland County prosecutor before ascending to the bench of both the North Carolina Court of Appeals and this Court. Tpp. 924-27.

was a law enforcement officer, and was an advocate of both the death penalty and life without parole as harsh punishments that deter crime. Def. Ex. 2, *State v. Golphin* Tpp. 2136, 2043-44, 2066; Def. Ex. 42, ¶ 10.

Several aspects of the prosecutor's treatment of Murray are particularly shocking. First, as in Sonya Jeter Waddell's experience of discrimination, the prosecutor baldly claimed race as a factor by targeting Murray for questioning about how he felt as a "black man" about an encounter with police. Def. Ex. 2, *State v. Golphin* Tp. 2073. The prosecutor also subjected Murray to a line of racialized and nearly nonsensical questioning about Bob Marley, Rastafarianism, and Ethiopian Emperor Haile Selassie. *Id*. Tpp. 2083-84. White jurors were not asked such questions, which race and law expert Bryan Stevenson identifies as evidence of racial bias. *Robinson* Order ¶¶ 289, 292.

But that was not the end of the prosecutor's race-based treatment of Murray. Out of Murray's hearing, the prosecutor sought to exclude him from jury service due to his insufficiently "deferential" and overly "militant" attitude; because he had a gold earring in his left ear; and – in a stunning subversion of justice – because Murray had alerted the court to comments by two other prospective jurors that the defendants in the case should have been killed before trial. Def. Ex. 2, *Golphin* Tpp. 2011-12. The trial judge rejected the prosecutor's excuses as unfounded, and expressly noted that Murray's answers during voir dire showed "a

substantial degree of clarity and thoughtfulness." *Id*. Tpp. 2014-15; *Robinson* Order ¶ 300.

Yet the court allowed the prosecutor to bar Murray from jury service because, when he was five years old, his father was convicted of robbery and because he had a DWI conviction. The court found these to be "non-racial" reasons for eliminating Murray from the venire despite Murray's statement under oath that his father's conviction "would not affect him at all as a juror," and despite the state's passing many white jurors with significant criminal convictions, including DWI. *Id*. Tpp. 2112-15; *cf*. *id*. Tpp. 1416, 1891-92, 2763-64, 2854-56 (voir dires of jurors with convictions for breaking and entering, assault, and felonious larceny).

The prosecutor's highly racialized treatment of Murray fulfills Justice Thurgood Marshall's warning that a "prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." *Batson v. Kentucky,* 476 U.S. 79, 106 (1986) (Marshall, J., concurring). As a testifying expert in this case, Professor Stevenson found Murray's response consistent with his research on the harm such racial bias causes to prospective jurors. Like Justice Marshall, Murray's years of experiencing racism left him knowing "that black men are often viewed as hostile," and with the

poignant feelings of discomfort and disappointment with the jury selection process and the justice system: "I am not hostile, and have never been militant. … I think I would have been a fair and attentive juror." Def. Exh. 42, ¶¶ 1, 10.

C. A Bias-Rich Situation: The Exclusion of Pamela Collins

District Attorney Benjamin David, Judge Louis Trosch, and others have shown that constructive measures are available that can prevent and heal the infection of racial bias in criminal cases. One well-known tool for this purpose is the Implicit Association Test, or IAT, which Harvard University has made readily available on the internet.[4] The National Center for State Courts has indicated that IATs and similar tools are reliable ways for "judges and other court staff to manage" the "complex and bias-rich situation" of the typical American courtroom. Kang, *Implicit Bias: A Primer for Courts, supra* at 6.

Amicus Pamela Collins experienced such a "bias-rich situation" when a prosecutor targeted her for racially-based disparate treatment during a capital voir dire, including the use of an expressly race-based quota system. Collins' experience with state-sanctioned discrimination began when the State interrogated her about past relationships with people who were addicted to drugs and alcohol. Def. Ex. 2, *State v. Fowler* Tpp. 44-47. The State never asked any of the seated

[4] One example of a popular IAT can be found at https://implicit.harvard.edu/implicit/takeatest.html.

white jurors similar questions, despite the admissions of six on their juror questionnaires to having had such acquaintances. *See* Def. Ex. 67 (questionnaires of Stuart Hair, Hayden Pennell, Lloyd Patterson, Susan Galbraith, Patricia Connors, and Heike Sweeney).

But other aspects of the prosecutor's discriminatory treatment of Collins were far more overt. The prosecutor sought to justify Collins' elimination from a capital venire because the State had already "selected two black females" for jury service. Def. Ex. 2, *State v. Fowler* Tp. 53. Adding insult to the injury of such an overtly race-based quota system, the prosecutor also claimed that Collins should not be allowed to serve because there were "physical indications … of insincerity in her answers," such as "body language, lack of eye contact, laughter, and hesitancy." *Id*. Tpp. 50-51; *Robinson* Order ¶ 299.

The trial judge found that the prosecutor's complaints about Collins were "too subjective" to justify her exclusion from jury service. Def. Ex. 2, *State v. Fowler* Tp. 76. Regrettably, "[p]eople of all races show evidence of implicit bias against nonwhites." Jerry Kang and Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action*," 94 Cal. L. Rev. 1063, 1072 (2006) ("Seventy-five percent of Whites [and fifty percent of Blacks] show anti-Black bias."). Thus, as both Justice Marshall and John Murray noted from harsh experience, body language and facial expressions are too often filtered through

stereotyped schemas in a racially biased way. *Cf*. *State v. Saintcalle*, 2013 Wash. LEXIS 617 at *20-26 (opinion of Wiggins and Owens, JJ., discussing effects of implicit bias); *id*. at *97-103 (Gonzalez, J., concurring) (same).

Collins' experience provides yet another example of such racialized distortions. But the prosecutor's explicit racial quota system, her racially-targeted questioning about addiction, and her use of racialized tropes to tarnish Collins as not "completely truthful … based on the body language" were not the only examples of the discrimination that eliminated Collins from jury service. When the trial judge hesitated in accepting the State's excuses for excluding Collins, the prosecutor asked for more time. She then used her lunch break to conduct a targeted investigation of Collins, and dug up a 13-year old deferred felony prosecution for obtaining property by false pretenses. The prosecutor argued that Collins' failure to report this deferred prosecution on her jury questionnaire showed that she was not the "forthright-type person that we would like on our jury." Def. Ex. 2, *State v. Fowler* Tpp. 71-75.

The trial judge corrected the prosecutor. He noted that, under North Carolina law, "participants in the deferred prosecution program are able to answer truthfully that they have not been charged or convicted of criminal offenses once they have successfully completed the program." *Id*. Tp. 77. Yet the court allowed

the prosecutor to exclude Collins from jury service based on that targeted investigation and its results. *Id*.

This final blow from the prosecutor's racialized targeting of Collins is all the more painful in light of the disparate treatment of similarly situated whites in the venire. The State passed Lloyd Patterson, a white juror who had a DUI and admitted during voir dire to additional charges for "some underage ID's." *Id*. at Tpp. 106-07. Had this jury selection process been racially neutral, the prosecutor would have investigated and revealed Patterson's additional charges. These included assault on a government officer and a guilty plea to simple worthless check – with the latter conviction very similar to the one used to eliminate Collins from the venire.[5] This raw disparity illustrates a broader empirical fact: a criminal charge or conviction is the second most frequently cited excuse for eliminating African Americans from capital juries, after ambivalence about the death penalty. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions,* 98 Minn. L. Rev. (forthcoming, 2013).

---

[5] *State v. Patterson,* Mecklenberg County Docket Nos. 95 CR 034464, 91 CR 091452, 91 CR 091453. This Court can take judicial notice of these readily-available public court records. *State v. Williams,* 362 N.C. 628, 637 n.4, 669 S.E.2d 290, 297 n.4 (2008).

D. No Similarly-Situated Whites: The Exclusion of Laverne (Keys) Zachary

Amicus LaVerne Zachary (nee Keys) also is "shocked and disappointed" by her racially biased elimination from capital jury service. Def. Ex. 41, ¶ 7. Despite defense counsel's evidence and vigorous argument to the contrary, the trial court found that there were no "similarly-situated whites that were accepted as jurors" despite having the same or similar characteristics that the prosecutor claimed to be objectionable in Keys. Def. Ex. 2, *State v. al-Bayyinah* Tp. 1112. The court accepted the prosecutor's excuses as based on a "legitimate hunch" or "past experience." *Id*.

In fact, the prosecutor weighed a prospective juror's acquaintance with a party, a witness, or an attorney only against the African-American jurors like Keys and not against whites.[6] The prosecutor also weighed prior experience with violent crime only against African-American jurors like Keys and not against whites. The prosecutor claimed to target Keys for elimination from jury service because her father had been killed while driving a taxi, and no one was ever caught or prosecuted for the crime.

---

[6] The state passed several jurors despite their acquaintances with witnesses – including one who dined with a number of the witnesses regularly. Def. Ex. 2, *State v. Al-Bayyinah* Tpp. 795, 818, 1149-50, 1694-97. The state also passed many jurors who were acquainted with attorneys, including criminal defense attorneys. *Id*. at Tp. 937, 702, 729, 757, and 867.

But another juror in the same pool had a brother who was murdered, and no one was caught or prosecuted for the crime. The adopted brother of yet another juror was stabbed seven times, and no one was caught or prosecuted for the crime. Still another knew a victim of child molestation whose family was dissatisfied with the prosecution of the case. The stepfather of another juror tried to shoot the juror's mother. Another juror's aunt shot her uncle. Another juror's husband was shot to death. Another juror's brother-in-law was "attacked and sliced up with a knife." Another's wife was mugged, and no one was caught or prosecuted for the crime. Def. Ex. 2, *State v. al-Bayyinah* Tpp. 508-509, 869, 1251, 1418, 1633-34, 1775.

All of these jurors were white. The prosecutor passed all of them, while striking Keys. One of these white jurors testified under oath that her brother's murder "probably would" affect her view of the case. Specifically, she told the prosecutor, "it's been a long time ago, but it's still with me, 'cause the people that killed him, they're still walking around." Like Keys, that juror said she could set her experience aside in order to be a fair and impartial juror. Def. Ex. 2, *State v. al-Bayyinah* Tpp. 677-79, 1024, 1077. But it was Keys, the African American, whom the prosecutor did not trust to fulfill her civic duty. This record, along with the abundant and "largely unrebutted" evidence below, *Robinson* Order at 3, shows that the proffered excuses for striking black jurors were not genuine bases for the disparate treatment.

The Order below confronts and takes a significant step towards healing the harms to *Amici* and similarly qualified but excluded African-American jurors through its detailed, amply-supported findings that racial discrimination infected prosecutors' capital jury selection throughout the 1990s in this case, in the former Second Judicial Division, in Cumberland County, and across the state of North Carolina. *Id*. ¶ 237. The Order is a necessary corrective because, under the pre-existing legal regime, *Amici*'s dignitary and equal protection interests in serving on North Carolina juries constituted a right without a remedy.

IV. A RIGHT WITHOUT A REMEDY: JUDICIAL FAILURES TO CONFRONT AND CURE RACIAL BIAS IN JURY SELECTION

The experiences of the four jurors discussed above only hint at the overwhelming failure of the courts to protect qualified African Americans from the racial bias that erases them from the quintessentially democratic role of sitting as a juror. Citing abundant documentation of that failure, Justice Breyer concluded that "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring). A Justice on the Washington Supreme Court put the problem even more bluntly: "*Batson* was doomed from the beginning because it requires one elected person to find that another elected person … acted with a discriminatory purpose. This has proved to be an impossible

barrier." *State v. Saintcalle*, 2013 Wash. LEXIS 617 at *143 (Chambers, J., dissenting (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

That same evidence has led many judges and legal scholars to call for total abolition of the peremptory strike – a development prophesied by a former Chief Justice of this Court. In *State v. Jackson*, then-Associate Justice Henry E. Frye cautioned that, without vigilance, the guarantee of equal treatment for prospective jurors would become "a right without a remedy." 322 N.C. 251, 260-61, 368 S.E.2d 838, 843 (1988) (Frye, J., concurring). Surveying *Batson*'s wreckage, Justice Breyer issued the most recent call from the U.S. Supreme Court for federal constitutional abolition of the peremptory strike. *Miller-El,* 545 U.S. at 266-67, 273 (Breyer, J., concurring). A plurality of the Washington State Supreme Court recently issued a roadmap for severely curtailing or abolishing the peremptory strike, and the Court unanimously shared a concern over racial bias in jury selection. *Saintcalle*, *supra*; *cf. id*. at *28-36 (opinion of Wiggins and Owens, JJ., calling for reconsideration of peremptory strike rule); *id*. at *43 (Madsen, C.J. and James M. Johnson, J., concurring (noting "growing concerns about unconscious and implicit racial bias that could … affect jury selection")); *id*. at *50 (Stephens, Charles W. Johnson, and Fairbanks, JJ., concurring (acknowledging "problem of the discriminatory use of peremptory challenges")); *id*. at *57-58 (Gonzalez, J., concurring (urging abolition of peremptory strikes)).

The courts' failings have subjected jurors such as *Amici* to repeated and renewed humiliation whose roots run deep. During the American precolonial, colonial, and antebellum periods, it was unimaginable to many that African Americans would ever be "peers" qualified to sit on a jury and pass judgment on other (white) members of the community. *See, e.g.,* Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* From Lynch Mobs to the Killing State: Race and the Death Penalty in America 97-99 (Charles M. Ogletree, Jr. & Austin Sarat, eds., 2006).

Only after passage of the Reconstruction Amendments did the United States Supreme Court finally confront the *de jure* exclusion of African Americans from jury service in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879). But in a portent of things to come, "*Strauder* was easily circumvented" and the exclusion of African Americans from juries continued more or less unabated. Equal Justice Initiative, *Racial Discrimination in Jury Selection: A Continuing Legacy*, 10 (2010) [hereafter "EJI Report"]. Court officials were active in government-sanctioned racism. They removed African-American names from jury lists, printed them on paper of a different color, or manipulated standards of education and "good moral character" to mean "no blacks allowed." *Id*. Extralegal violence like the Wilmington Riots of 1898 also subverted the federal mandate that African

Americans be allowed to serve on juries. Tp. 846 (testimony of race and law expert Bryan Stevenson).

The next generation of African Americans suffered yet another blow with *Norris v. Alabama*, 294 U.S. 587 (1935), when the Supreme Court merely acknowledged that blatant, total exclusion of African Americans from juries was unconstitutional yet rampant. Emboldened white officials became more creative in their *de facto* exclusion of African Americans from juries. The Court rubbed salt in the wound with *Swain v. Alabama*, 380 U.S. 202, 220-222 (1965). Issuing this decision at the height of the Second Reconstruction, the Court helped prosecutors and hurt jurors by making it harder to prove unconstitutional discrimination. Under *Swain*, no litigant was able to mount a successful claim of discrimination for twenty years. EJI Report, *supra*, at p. 14.

Batson v. Kentucky marginally eased the standard for proving racially discriminatory use of peremptory strikes. 476 U.S. 79, 96-98 (1986). But *Batson* "was doomed from the beginning." *Saintcalle, supra* at *143 (Chambers, J., dissenting). Then in *Purkett v. Elem*, 514 U.S. 765, 767-768 (1995), the Court trivialized the right to equal treatment by ruling that prosecutors did not even have to come up with "persuasive, or even plausible" justifications during the *Batson* procedure.

The Court's devolving doctrine led some states to heighten procedural protections for unfairly excluded jurors, such as providing *de novo* review of *Batson* challenges. North Carolina was not among those states. Tpp. 985-86 (testimony of race and law expert Bryan Stevenson, contrasting Alabama and North Carolina). To the contrary, North Carolina steadily expanded the number of peremptory strikes in capital cases and, simultaneously, opportunities for discriminatory exclusion of qualified jurors from capital venires. *Id.* Tpp. 905-906; *Robinson* Order ¶ 232.

Thus, in a sad fulfillment of Justice Frye's warning, the right of qualified jurors such as *Amici* to be treated as individual human beings instead of as members of a stigmatized group effectively became "a right without a remedy." As of a few years ago, this Court, "in sixty-one opportunities … has not once held that a trial court erred in finding no *Batson* violation." Amanda S. Hitchcock, *"Deference Does Not by Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. Rev. 1328, 1334 (2006). This continues a historical trend, *see, e.g.,* Paul E. Schwartz, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. Rev. 1533, 1577 (1991), marked by this Court's "lack of interest in claims based on disparate questioning." Catherine M. Grosso and 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, 1542 (2012).

V. BUSINESS AS USUAL

Such toothless responses to evidence of racial bias encourage discriminatory peremptory strikes and the accompanying harm to the dignitary and constitutional interests of qualified jurors such as *Amici*. For example, in *Miller-El*, the United States Supreme Court found "clear and convincing" evidence that Texas prosecutors not only targeted African Americans with questions specifically designed to eliminate them from the venire, but also that the prosecutors based their behavior on a manual that included racial stereotypes. 545 U.S. at 234. Sadly, the record in this case reveals that similar prosecutorial training was provided by North Carolina's Conference of District Attorneys, and to similar effect. "Instead of training on how to comply with *Batson v. Kentucky* . . . North Carolina prosecutors received training in 1995 and 2011 about how to circumvent *Batson*." *Robinson* Order, ¶ 227.

Defense Exhibit 16 poses a stark contrast to the leadership of judges and prosecutors who confront bias and work towards eliminating it. This training handout from the Conference of District Attorneys' "Top Gun" program instructs North Carolina prosecutors to evade *Batson* with canned, pretextual excuses for race-based strikes. Professor Bryan Stevenson testified to the obvious: such

coaching is not "intended to reduce the likelihood of implicit bias." Tp. 762. Instead, it is a frighteningly effective way to erase the individuality of *Amici* and other qualified African-American jurors through group-based stereotypes, to eliminate their dignitary interest in civic and democratic participation, and to silence their distinctive voices in the most important deliberative decision-making process available in any court of law.

Justice Frye foresaw these harms as well when, just two years after *Batson*, he warned that prosecutors could continue with "business as usual" by creating juror "'profiles' that may be constructed in a manner so as to systematically exclude blacks" from service. *Jackson*, 322 N.C. at 260, 368 S.E. 2d at 843 (Frye, J., concurring). The "Top Gun" training program, and continued prosecutorial resistance to readily available means for preventing and curing the infection of racial bias in jury selection, reveal such an unabated "business as usual" indifference to the dignitary interests of qualified jurors such as *Amici*.

The resulting mass of solid evidence reveals a widespread infection of racial bias in North Carolina's justice system, with significant injury to qualified African-American jurors like *Amici*. In this state, "[e]ven after controlling for other factors potentially relevant to jury selection, a black venire member had 2.48 times the odds of being struck by the state as did a venire member of another race" during

the time periods relevant to the instant case. Grosso and O'Brien, 97 Iowa L. Rev. at 1553.

But there is even more painful evidence of race-conscious jury selection in *State v. Burmeister*. In that Cumberland County case, the defendants were white supremacists who hunted down and murdered African- American victims. Major Walter M. Hudson, *Racial Extremism in the Military*, 159 Mil. L. Rev. 1, 1-3 (1999). In a sharp reversal of typical patterns, the *Burmeister* prosecutors -- including one who tried the instant case -- used nine of their ten peremptory strikes to remove non-black venire persons, struck only one African-American juror, and accepted eight African-American jurors for service. Paul Woolverton, *State Works To Counter Bias Claims In Racial Justice Act Hearing***,** Fayetteville Observer (Oct. 5, 2012).[7] Despite the overtly racist nature of their crimes, the murderers received life sentences and an accomplice was sentenced to time served. Hudson, 159 Mil. L. Rev. 26-27 & n.127.

Perhaps the most distressing evidence of the widespread infection of race throughout North Carolina's capital jury selection system is comprised in the prosecutors' own affidavits. Some concede the inability to come up with race-neutral reasons for peremptory strikes. Others proffer *ex post* justifications that are flatly contradicted by the record. *Robinson* Order, ¶ 228. Where prosecutors could

[7] *Available at* http://fayobserver.com/articles/2012/10/04/1208700.

have followed bold leadership in confronting and working to eliminate racial bias in jury selection, such conduct is instead a repetition and reinforcement of fundamentally demeaning and degrading attitudes that harm the dignity of *Amici*, other qualified African-American jurors, and the integrity of the justice system. Such conduct effectively "put[s] the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law." *Cofield*, 320 N.C. at 303, 357 S.E.2d at 626.

VI. THE DIGNITY OF PERSONS AND INTEGRITY OF COURTS

Inextricably tied to the idea of fairness in the American justice system are the principles that only a fair-cross section of the community has the moral authority to condemn a fellow citizen, and that the members of the community have an equal right to be part of that decision-making process. Prosecutors' racially biased peremptory challenges cause cognizable and, through the Racial Justice Act, redressable harm to *Amici* and other qualified individual African-American jurors who were barred from serving based on their race.

The palpable harm to *Amici*'s dignity is symptomatic of the underlying damage to the legitimacy of both the justice system and the verdicts rendered. As this Court warned in *State v. Cofield*,

> [t]he judicial system of a democratic society must operate evenhandedly . . . [and] be perceived to operate evenhandedly. Racial discrimination in the selection of grand and petit jurors deprives both

> an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice.

320 N.C. at 302, 357 S.E.2d at 625. Where, as here, abundant and mutually supportive evidence reveals systematic infection of capital jury selection with racial bias, that structural error renders the proceedings and the resulting judgment "fatally flawed." *Id*. at 304, 357 S.E.2d at 626.

The United States Supreme Court emphasized the same point in *Georgia v. McCollum*, 505 U.S. 42, 43 (1992) ("discriminatory challenges . . . harm the community by undermining public confidence in this country's system of justice.'"). More recently, in *Miller-El*, the Court reasoned that race discrimination in jury selection "casts doubt over the obligation of the parties, the jury and indeed the court to adhere to the law throughout the trial." 545 U.S. at 237-38. Such doubt undermines public confidence in the verdicts rendered, which in turn impedes the ultimate and worthy goals of the judicial system. *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 139 (1994).

Thus, "[r]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers v. Ohio*, 499 U.S. 400, 402 (1991). Allowing discrimination from racially biased peremptory challenges to continue unabated perpetuates a legacy of animosity and distrust toward judicial systems among excluded jurors and their communities. American constitutional and ethical principles condemn the kind of discrimination

epitomized by the disparate juror strikes in this trial and elsewhere in North Carolina.

This Court should seize the opportunity to redeem these systemic failures by affirming the Order below. As James Ferguson observed in his closing arguments during the hearing below, "[H]uman kind has been trying for a long time to get this system right and we're not there yet." Tp. 2596. The Racial Justice Act was a step towards "getting it right." The RJA did not purport to repair the system or to eliminate bias within it. The RJA partially remedied the harm, worked not only on jurors such as *Amici* and their communities from race-based peremptory strikes, but also harm to the legitimacy of criminal justice systems and to the fair and reliable verdicts those communities deserve.

CONCLUSION

For all the foregoing reasons, *Amici* respectfully ask this Court to affirm the Order below.

Respectfully submitted this the 9th day of August, 2013.

/s/Electronic Submission
Janet Moore

Janet Moore
For Identification Purposes Only:
Assistant Professor of Law
University of Cincinnati College of Law
Post Office Box 210040
Cincinnati, Ohio 45221-0040
Telephone: 513.600.4757
Email: janet.moore@uc.edu
North Carolina State Bar No. 24944

ATTORNEY FOR *AMICUS CURIAE*
NORTH CAROLINA CITIZENS
EXLUDED FROM JURY SERVICE
BASED ON RACE *

* Ryan W. Goellner, *Juris Doctor* Candidate 2015, University of Cincinnati College of Law, assisted Counsel for *Amicus Curiae* in researching, drafting, and editing this Brief.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Brief of *Amicus Curiae* Qualified Jurors in Support of Defendant-Appellee has been filed pursuant to Rule 26 by electronic means with the Clerk of the Supreme Court of North Carolina.

I further hereby certify that a copy of the above and foregoing Brief has been electronically served upon the following:

Robert T. Thompson
Assistant District Attorney
Robert.T.Thompson@nccourts.org
G. Robert Hicks, III
George.R.Hicks@nccourts.org
Assistant District Attorney
117 Dick Street, Suite 427
Fayetteville, NC 28301

William P. Hart, Sr.
Danielle Marquis Elder
Jonathan P. Babb
bhart@ncdoj.gov
dmarquis@ncdoj.gov
Jbabb@ncdoj.gov
North Carolina Department of Justice

Donald H. Beskind
Box 90360
Durham, North Carolina 27708
beskind@law.duke.edu

D. Clark Smith
Smith Moore Leatherwood
300 N. Greene Street, Suite 1400
Greensboro, NC 27401
(336) 378-5442
Clark.smith@smithmoorelaw.com

Malcolm R. Hunter, Jr.
Center for Death Penalty Litigation
201 West Main Street, Suite 301
Durham, NC 27701
Tye@cdpl.org

This the 9th day of August, 2013.

/s/Electronic Submission

Janet Moore
Assistant Professor of Law
University of Cincinnati College of Law
(For Identification Purposes Only)