6-28-2019

Amicus Curiae Brief of the Fred T. Korematsu Center for Law and Equality in Support of Defendant-Appellant

Fred T. Korematsu Center for Law and Equality

No. 406P18 FOUR-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	From Sampson County
v.	)	
	)	
CORY DION BENNETT	)	

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AMICUS CURIAE BRIEF OF THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF DEFENDANT-APPELLANT

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Rules:

Other Authorities:

STATEMENT OF THE CASE AND FACTS[1]

Amicus Curiae adopts the statements of the case and facts as set forth by defendants in *State v. Bennett*, No. 406P18, and *State v. Hobbs*, No. 263PA18.

STATEMENT OF INTEREST

The identity and interest of Amicus Curiae is set forth in the Motion for Leave to File Amicus Curaie Brief, filed with this proposed amicus brief.

INTRODUCTION

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court spelled out one available procedural framework for addressing race discrimination in jury selection, but invited states to supplement or modify that framework as appropriate. In 2018, the Washington State Supreme Court took up that invitation, first by adopting a court rule that applied prospectively, and then through a court decision that constitutionalized a portion of that court rule. The court grounded the rule and decision in its acknowledgment that explicit and implicit or unconscious bias were improperly affecting jury selection in Washington, that *Batson* imperfectly addressed explicit bias, and that the *Batson* framework was wholly incapable of addressing implicit bias.

The instant cases present the opportunity for this Court to take steps similar to its sister court in Washington. The Court should acknowledge that both explicit

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[1] Pursuant to N.C. R. App. P. 28(i)(2), Amicus states that no person or entity other than Amicus Curiae, its members, or its counsel, directly or indirectly, either wrote the brief or contributed money for its preparation.

and implicit bias taint jury selection in North Carolina, and that the default *Batson* framework imperfectly addresses explicit bias and entirely fails to address implicit bias. Under North Carolina law, and as allowed under *Batson*, this Court has the power to prescribe modifications similar to those the Washington Supreme Court adopted, to enforce the constitutional rights of both North Carolina litigants and citizens who fulfill their civic duty by answering the call to jury service.

The rights of North Carolinians can be properly safeguarded if this Court adopts two key reforms from Washington State: First, trial courts should review and adjudicate the validity of a peremptory strike whenever a genuine concern over racial bias is presented. Second, a peremptory should be disallowed whenever, under the totality of circumstances, an objective observer could view race as a factor in the strike. Under this modified framework, peremptories are disallowed if a genuine concern over racial discrimination is present, unless the court can say with confidence that racial bias is **not** at play. This rebalanced approach acknowledges the pervasiveness of racial bias and prioritizes remedying racial discrimination in jury selection over allowing a given peremptory challenge against a qualified juror.

ARGUMENT

I. RACIAL DISPARITY EXISTS IN NORTH CAROLINA'S CRIMINAL JUSTICE SYSTEM, INCLUDING WITH REGARD TO THE EXERCISE OF PEREMPTORY CHALLENGES.

In 2010, bar leaders and scholars in this state formed a Task Force on Racial and Ethnic Bias ("N.C. Task Force") to consider available research and analyze the influence of racial bias in North Carolina's justice system. *See* N.C. Advocates for

Justice, *History of the Task Force on Racial Bias*, NCAJ.COM.[2] This was a precursor to the North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System ("NC-CRED"), comprised of prosecutors, defenders, academics, advocates, and judges from this state—including a Justice of this Court. *See* NC-CRED, *About*, NCRACIALJUSTICE.ORG (2015).[3] Both esteemed bodies acknowledged troubling signs of racial disparity across North Carolina's criminal justice system. *See* N.C. Task Force, *Statement on Racial and Ethnic Bias in the Criminal Justice System* (citing studies)[4] and *Executive Summary* (same)[5]; NC-CRED, *About* and *Projects*, *supra* n.3. Such disparities culminate in a heightened rate of incarceration for persons of color in this state, and especially for black North Carolinians, that far outpaces the rate for whites. *See, e.g.*, Prison Policy Initiative, *North Carolina profile*, PRISONPOLICY.ORG (data charts showing black incarceration rate is almost five times higher)[6]; NC-CRED, *North Carolina Prison Population Figures and Demographics* (same)[7]; NC-CRED, *About*, *supra* n.3 (noting blacks make up 22% of general population but 57% of prison population).

A growing body of nationwide research has shown an ongoing and sizeable influence of racial bias, especially implicit bias, on criminal justice practices and incarceration rates. This body of research was explored extensively in Washington

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[2] https://www.ncaj.com/index.cfm?pg=TaskForceHistory.
[3] http://ncracialjustice.org/.
[4] http://www.ncaj.com/docDownload/443353.
[5] https://fbaum.unc.edu/papers/NCAJ_Exec_Summary.pdf.
[6] https://www.prisonpolicy.org/profiles/NC.html.
[7] http://ncracialjustice.org/wp-content/uploads/2015/08/North_Carolina_Prison_Population_Figures_and_Demographics-7.png

State after it was reported in late 2010 that one of the Washington Supreme Court's justices, at a public conference and in response to concerns expressed about racial disparity, stated that African Americans are "disproportionately represented in prison because they have a crime problem" and that race discrimination played no significant role. Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES (Oct. 21, 2010).[8] This statement prompted an ad hoc statewide Task Force on Race and the Criminal Justice System to examine the available research and explore the causes of any race disparity in the criminal justice system. The Task Force was comprised of numerous respected organizations and institutions from across the state, including judicial and executive agencies, prosecutor and defender associations, bar groups, law schools and university departments, and community organizations.

The Task Force ultimately issued a comprehensive report ("Task Force Report") that it presented to the state supreme court on March 2, 2011, in a historic, first-ever public symposium the court convened to explore these issues. *See* Task Force, *Prelim. Report on Race and Wash.'s Crim. Justice System* (2011).[9] As

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[8] https://www.seattletimes.com/seattle-news/two-state-supreme-court-justices-stun-some-listeners-with-race-comments/.

[9] https://law.seattleu.edu/Documents/korematsu/race%20and%20criminal%20justice/preliminary%20report_report_march_1_2011_public_cover.pdf, *reprinted in* 47 GONZ. L. REV. 251 (2011), 35 SEATTLE U. L. REV. 623 (2012), 87 WASH. L. REV. 1 (2012). The Washington Supreme Court has since held annual symposia on issues of race and criminal justice. The next year's topic was Juvenile Justice and Racial Disproportionality, with the 2018 topic being "Legal Financial Obligations (LFOs): Beyond Defining the Problem; Advancing Solutions." Information about the annual symposia, with video links, is *available at* https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2.

explained in the report, abundant research shows that individuals in our society tend to associate people of color with criminality and to exhibit substantially divergent behavior in experiments based on the manipulation of race, often without awareness or acknowledgment race is playing any role, especially when neutral justifications are available. *See id.* at 19, A-17 to A-18. The research further shows race significantly influences decisions made throughout the criminal justice process, such as decisions to investigate, arrest, find guilt, or impose a particular sentence. *See id.* at 11-20, A-18 to A-20. This effect has also been shown in the use of peremptory challenges in particular, with significant racial disparities demonstrated in actual cases across a wide variety of states, in controlled experiments, and confirmed in surveys of the bar and public. *See, e.g.*, *State v. Saintcalle*, 178 Wash. 2d 38, 43-45 (Wiggins, J., lead op.), 85-91 (González, J., concurring) (2013) (citing sources).

On the basis of this information, the Washington Supreme Court ultimately took formal notice of the significant influence of implicit racial bias on criminal justice and specifically on the use of peremptory challenges. *See id.* at 42-50 & n.1; *see also State v. Gregory*, 192 Wash. 2d 1, 22 (2018) (acknowledging the court's "judicial notice of implicit and overt racial bias" in the criminal justice system). In acknowledging these circumstances, the court aptly commented that it "would be naïve to assume" a given state "is somehow immune" from such a prevalent, nationwide problem. *Saintcalle*, 178 Wash. 2d at 45, 46-49. Indeed, a growing body of research specific to North Carolina shows that the same problems exist in this

state. *See, e.g.*, Frank R. Baumgartner et al., *Targeting young men of color for search and arrest during traffic stops: evidence from North Carolina, 2002-2013*, POLITICS, GROUPS, AND IDENTITIES (2016) (review of over 18 million traffic stops finding "dramatic disparities" based on race that are "growing over time" with "strong evidence" they resulted specifically from "racial bias").[10]

The specific problem at issue in the instant cases is the well-established widespread, ongoing, and material influence of racial bias on the use of peremptory challenges to exclude prospective jurors. Abundant research confirms the prevalence of this problem specifically in North Carolina. *See, e.g.*, Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J. L. & ECON. 189, 199-201 (2018) (finding racially biased peremptory usage in actual North Carolina cases); Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407 (2018) (same); 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 (2012) (same); Mary Rose, *The Peremptory Challenge Accused of Race of Gender Discrimination? Some Data from One County*, 23 L. & HUM. BEHAV. 695 (1999) (same). This ongoing pattern of discrimination violates constitutional rights, results in less diverse and less effective juries, and seriously undermines the appearance of fairness. *See Saintcalle*, 178 Wash. 2d at 41-42, 44-50, 85-91, 98-101; *cf. State v. Cofield*, 324 N.C. 452, 459 (1989) (noting heightened

[10] https://fbaum.unc.edu/articles/PGI-2016-Targeting.pdf.

state constitutional protection of jurors against exclusion based on race is meant to ensure the judicial system is "perceived to operate evenhandedly").

The default *Batson* framework has not curbed this enduring problem in North Carolina. Notwithstanding the evidence of ongoing and widespread racial discrimination in the use of peremptories in this state, a recent review of appellate decisions found that this Court and the North Carolina Court of Appeals have almost never found racial discrimination in the use of a peremptory strike—and in the only two cases acknowledging such discrimination, it was against white jurors. *See* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957 (2016). As the Washington Supreme Court acknowledged in the face of similar data in that state, *Saintcalle*, 178 Wash. 2d at 46, such a track record is "highly suggestive" that North Carolina's current framework is failing because it imposes too great an evidentiary burden for the invalidation of a peremptory due to racial bias.

Based on the evidence of racial discrimination in North Carolina peremptory usage and the lack of any meaningful remedy to date, this Court is now being called upon in numerous pending cases to address this issue. In the instant cases, each defendant has invited the Court to take this "opportunity to review and invigorate its *Batson* jurisprudence" and "to instruct trial judges in the proper handling of such challenges." *State v. Bennett*, No. 406P18, Pet. for Disc. Rev. at 1, 11; *see also State v. Hobbs*, No. 263PA18, Pet. for Disc. Rev. at 19. In other pending cases, this Court has been specifically called upon to acknowledge the significant influence of implicit

bias on the criminal justice system, including in jury selection. *See State v. Crump*, 815 S.E.2d 415, 423-24 & n.2 (N.C. Ct. App. 2018), *rev. granted*, 820 S.E.2d 811; *State v. Robinson*, No. 411A94, Br. of Amicus Curiae Professors Engaged in Implicit Bias Research, 2013 WL 9047372 (Aug. 9, 2013). And in still other pending cases, the parties have asked this Court to consider reforming the *Batson* framework, pointing to Washington State as a model. *See State v. Burke*, No. 181A93-4, Def.-App.'s Supp. Br., 2019 WL 944785, at *19-20 (Feb. 15, 2019); *State v. Golphin*, No. 441A98-4, Def.-App.'s Reply Br., 2019 WL 657458, at *22-23 (Feb. 1, 2019).

II. THIS COURT HAS AUTHORITY TO REMEDY AND PREVENT RACIAL DISCRIMINATION IN NORTH CAROLINA JURY SELECTION.

This Court is authorized under North Carolina and federal law to modify or supplement the default *Batson* framework in furtherance of the administration of justice and equality. As recognized in *Batson*, racial discrimination in jury selection was declared unconstitutional under the Fourteenth Amendment's guaranty of equal protection long ago. *See* 476 U.S. at 85 (citing *Strauder v. W. Virginia*, 100 U.S. 303 (1880)). Yet the mere recognition of this constitutional principle was never enough to ensure it was respected. *See id.* at 93. Over a century later, in the face of continuing widespread race discrimination in the use of peremptory strikes, *Batson* set forth a three-part, burden-shifting test to replace the "crippling burden of proof" the Court had previously set for proving a racially motivated strike. *Id.* at 92.

In establishing its new test for eradicating racial discrimination in the use of peremptories, the Supreme Court in *Batson* left each state free to supplement or modify that framework within constitutional limits. The Court specifically

"decline[d]" to "formulate particular procedures to be followed," recognized "the variety of jury selection practices followed" in state trial courts, and expressly made "no attempt to instruct these courts how best to implement" the Court's holding. 476 U.S. at 99 & n.24. The Court has since emphasized that states "have flexibility in formulating appropriate procedures to comply with *Batson*." *Johnson v. California*, 545 U.S. 162, 168 (2005); *see also Powers v. Ohio*, 499 U.S. 400, 416 (1991) (noting it "remains for trial courts to develop rules . . . to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice").

The flexibility each state has been afforded under *Batson* is consistent with the Supreme Court's "established practice" of "allowing the States wide discretion" to "experiment with solutions" within constitutional limits, rather than dictating "state rules of criminal procedure" or "imposing a single solution on the States from the top down." *Smith v. Robbins*, 528 U.S. 259, 272-75 (2000). When the Supreme Court prescribes a procedural "framework" to "vindicate [a] constitutional right," as in *Batson*, that framework is "merely one method of satisfying" constitutional requirements. *Id.* at 276. Each state remains authorized to "craft procedures that . . . are superior to, or at least as good as," the approved framework, so long as equivalent "assurance" is provided that constitutional rights will be protected. *Id.* at 272, 276. This means any state is free to change its *Batson* procedures to be more—but not less—protective against racial discrimination in jury selection. *See, e.g.*, *Johnson*, 545 U.S. at 168 (invalidating heightened burden for prima facie case).

Under North Carolina law, this Court has two separate sources of authority

to supplement or modify this state's *Batson*-related trial court procedures. First, this Court is statutorily authorized to "prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly," as a matter of policy. N.C. Gen. Stat. § 7A-34; *see also* N.C. Const. art. IV, § 13(2). This may include the announcement of a new or modified procedural rule in the adjudication of a given case. *See, e.g.*, *State v. Hudson*, 331 N.C. 122, 157-58 (1992) (noting Court adopted new sentencing rule in prior case "pursuant to its powers to prescribe rules of practice and procedure under N.C.G.S. § 7A-34"); *Peace v. Emp't Sec. Comm'n*, 349 N.C. 315, 328 (1998) (specifying applicable burden of proof after noting that "[i]n the absence of state constitutional or statutory direction, the appropriate burden of proof must be judicially allocated on considerations of policy, fairness and common sense" (internal quotes omitted)).

In this instance, the General Assembly has merely provided for the general use of peremptory challenges, without addressing *Batson* or specifying any procedures to be followed to prevent racial discrimination as required under the federal constitution. *See* N.C. Gen. Stat. §§ 9-19, 15A-9. As such, this Court has broad authority to prescribe appropriate procedures for overseeing the use of peremptory strikes, including modifications to the judicially created *Batson* framework currently followed in this state. And as reflected in *Hudson*, this Court would be justified in exercising this authority to reform North Carolina's current *Batson* framework due to "practical concerns" that the framework is "unworkable" and does not prevent "misuse." 331 N.C. at 157-58 (internal quotations omitted).

Second, this Court has inherent authority to alter or supplement trial court procedures to remedy ongoing constitutional violations. This Court's "inherent power" includes the "authority to do all things that are reasonably necessary for the proper administration of justice." *Beard v. N. Carolina State Bar*, 320 N.C. 126, 129 (1987). Further, under the North Carolina constitution, it is the specific and avowed duty of this Court "to provide a forum for individuals claiming that procedural rules abridge [constitutional] rights." *Simeon v. Hardin*, 339 N.C. 358, 373 (1994) (citing N.C. Const. art. IV, § 13(2)). In such cases, this Court has the "power to fashion an appropriate remedy" depending on the circumstances, including the particular right and procedures at issue. *Id.* (internal quotations omitted). This authority supersedes any legislative or executive power or enactment. *See id.*

Here, abundant research has shown that racial bias is tainting jury selection in North Carolina on a broad and ongoing basis. *See supra*, at 6. This violates the federal constitutional rights of both North Carolina litigants and citizens appearing for jury service in such cases. *See, e.g.*, *Powers*, 499 U.S. at 406 (discussing how the constitutional rights of both litigants and jurors are violated when race influences the use of peremptory challenges). It also violates the North Carolina constitution, which specifically provides that "[n]o person shall be excluded from jury service on account of . . . race, color . . . or national origin." N.C. Const. art. IV, § 26. This provision gives heightened protection to prospective jurors in order to ensure that the judicial system operates "evenhandedly" and is "perceived to operate evenhandedly." *Cofield*, 324 N.C. at 459. North Carolina's current approach to

peremptory challenges fails to meet these demands.

III. THIS COURT SHOULD ACKNOWLEDGE THE NATURE AND SCOPE OF THE PROBLEM, INCLUDING IMPLICIT RACIAL BIAS.

It is often said the first step toward solving any problem is to acknowledge it exists. In *Flowers v. Mississippi*, the U.S. Supreme Court emphasized the need to examine each peremptory strike "in the context of all the facts and circumstances" that surround it. No. 17-9572, 2019 WL 2552489, at *16 (June 21, 2019). The facts and circumstances in that particular case were so troubling, the Court was compelled to say "[w]e cannot just look away." *Id.* The very same should be true here, where the broader range of relevant facts and circumstances shows that racial disparity and implicit bias infect the use of peremptory challenges at a widespread and systemic level throughout North Carolina. This Court should take notice of these broader circumstances as an initial step, much like the Washington Supreme Court did in *Saintcalle*, to inform and refine any reforms this Court adopts and to enlighten any further proposals or arguments the Court receives going forward. This type of acknowledgment is especially appropriate and important when the Court is engaged in policymaking or rulemaking and assessing whether a judicial standard is adequate to address a particular problem. *See, e.g.*, *Alford v. Shaw*, 318 N.C. 289, 295, 306 (1986) (deciding scope of business judgment rule "from a historical and economic as well as a legal perspective" and taking "judicial notice" of recent growth in North Carolina's population, commerce, and industry).

Here, there are three important circumstances this Court should formally and expressly acknowledge at the outset to inform its approach to *Batson* and more

broadly. First, it is known that stark racial disparity exists across North Carolina's justice system. *See, e.g.*, NC-CRED, *North Carolina Prison Population Figures and Demographics*, *supra* n.7 (data showing extremely disparate incarceration rates); NC-CRED, *Jury Pool Information Project*[11] (reporting that North Carolina jury pools are 81% white though whites make up only 64% of the population). While disparities do not prove discrimination on their own, they are highly suggestive and call out for study, explanation, and reform. *See, e.g.*, NC-CRED, *About*, *supra* n.3.

Second, it is known that race has an ongoing, widespread, and significant influence on the use of peremptory strikes both nationally and specifically in North Carolina. *See, e.g.*, *Saintcalle*, 178 Wash. 2d at 43-46, 48-49, 53-55 (Wiggins, J., lead op.), 85-91 (González, J., concurring) (cataloguing research and data); *supra* at 6 (numerous studies on North Carolina jury selection); *e.g.*, Grosso, *supra*, 97 IOWA L. REV. at 1542-43, 1548 (finding that even after controlling for numerous race-neutral factors, North Carolina prosecutors in capital cases still peremptorily removed black jurors at a rate 2.48 times greater than other jurors).

Third and finally, it is known that implicit racial bias has a significant and widespread influence on decision-making, including in legal proceedings and on the use of peremptories, and thus materially contributes to these known disparities. *See, e.g.*, NC-CRED, *Implicit Bias Project*[12] (explaining that "brain science is revolutionizing the way we think about racial disparities and racism" and that "[n]ew scientific research is documenting that we all are influenced by []

[11] http://ncracialjustice.org/projects/jury-pool-information/
[12] http://ncracialjustice.org/projects/implicit-bias-trainings/

unconscious biases and that they can dictate our behavior without our approval or awareness"); Task Force Report, *supra* n.9, at 19 (noting it has been "confirmed by hundreds of articles in peer-reviewed scientific journals" that implicit racial biases are both "pervasive" and "large in magnitude," and "we are not, on average or generally, cognitively colorblind" (internal marks and quotes omitted)); *Saintcalle*, 178 Wash. 2d at 46-49 (acknowledging and discussing this body of research).

While the research on implicit bias is abundant, thorough, and compelling, two examples provide immediate insight into this research and its implications for the instant cases and more broadly. First, a 2010 episode of ABC's hidden camera show, *What Would You Do?*, captured people's candid reactions to actors trying to steal a bike in broad daylight in a public park—and in doing so, revealed how race regularly affects people's perception and behavior. *See* ABC, *What Would You Do?* (May 7, 2010) (link below).[13] In the episode, two similarly dressed actors, a white man and a black man, individually made obvious attempts to break the lock on a bike as people passed by. *See id.* at 0:01 to 3:37. For the most part, the white man was left alone, whereas the black man was repeatedly confronted and challenged:

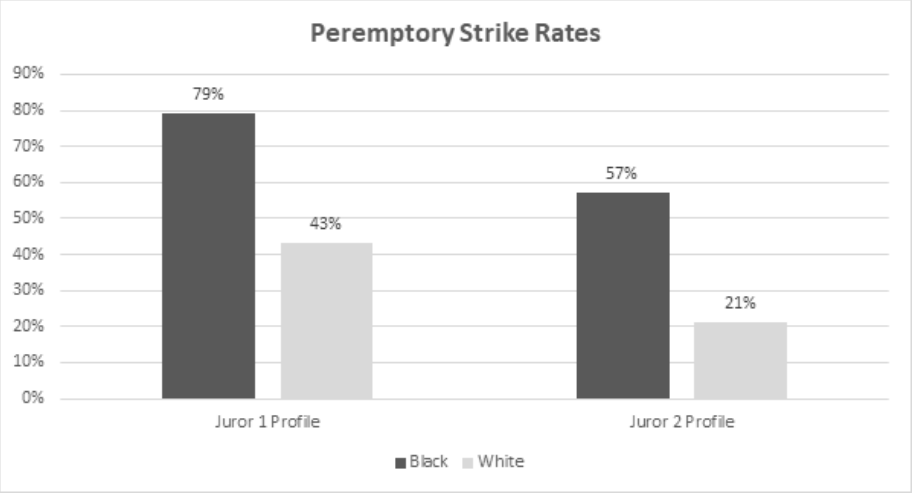
[13] https://www.youtube.com/watch?v=ge7i60GuNRg.

See id. Perhaps the white actor was given the benefit of the doubt—maybe it was his bike and he had lost his key or forgotten the combination. The black actor, though, did not receive this benefit and instead suffered from the opposite presumption: that he was trying to steal the bike. Many of these passers-by presumably would have disclaimed that race had anything to do with their thinking or conduct. But when all the interactions are viewed as a whole, it is undeniable that race shaped the perceptions and behavior of the onlookers to a significant degree. And whether this was the result of admitted bias, concealed conscious bias, or unconscious bias, the outcome is the same: disparate treatment based on race.[14]

Second, a controlled experiment on the use of peremptory challenges shows the staggering effect implicit racial bias has on jury selection in particular. *See* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007). In this experiment—replicated with attorneys, law students, and college students—subjects were given a criminal trial scenario and two prospective juror profiles, and were then asked which of the two jurors they would remove with a peremptory strike. *See id.* at 266-67. The two profiles included a variety of sundry details, such as education history, occupation, and views on particular issues. *Id.* at 265-66. Only one variable was

[14] At least one federal judge shows this video to jurors to educate them about implicit bias. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1182 n.250 (2012). The final segment of the video presents the same basic scenario, but with a white woman attempting to steal the bike, who is repeatedly offered assistance. The implications of this or any other forms of gender bias and its intersection with race are beyond the scope of this amicus brief.

manipulated: race. In one condition, Juror 1 was depicted as white and Juror 2 as black; in the other condition, their races were flipped, but all other details remained the same. *Id.* at 266. As seen in the below chart, the strike rates were dramatically different in the two conditions, with a strong bias shown against the prospective black juror—that is, whichever profile happened to be depicted as black:



Id. at 267. The experimenters observed that these results "are strikingly similar in direction as well as magnitude to conclusions of archival analyses of real peremptory use." *Id.* at 269. While these results are unsettling, they are unsurprising—once one acknowledges and appreciates the prevalence and significance of implicit racial bias on decision-making.

An especially troubling aspect of implicit racial bias crystallized in these experiments is that it is extremely difficult to identify the influence of such bias on a case-by-case basis. Take the peremptory experiment: On the whole, the influence of race is obvious. But when asked to identify the reasons for their choice, subjects overwhelmingly pointed to race-neutral aspects of the profiles, such as "familiarity with police misconduct" or "skepticism about statistics," rather than race. *Id.* at

267-68. And as the experimenters acknowledged, they could not say whether any given test subject was influenced by race, only that race played a major role overall:

> We observed bias against Black venire members only when examining decisions made by several participants; indeed, for any given participant, we are unable to determine whether the peremptory was influenced by race or whether the justification provided was valid. Only in the aggregate does evidence of racial bias emerge . . . .

Id. at 269. In these circumstances, precise case-by-case evaluation remains unattainable regardless of whether racial bias is conscious but concealed, or unconscious. In either form, the influence of such bias on a particular peremptory strike remains unobservable, while its effect across all cases is significant and widespread. The challenge is what to do about it.

This Court ought not to look away from these known facts and circumstances, especially not for purposes of its own rulemaking. Instead, it should expressly acknowledge and address them. They provide the context needed to determine if the default *Batson* framework can adequately address the problem of racial discrimination in jury selection that exists in North Carolina. They show that an effective solution must account for overt, concealed, and unconscious bias. And they underscore the urgent need to address race discrimination in jury selection to ensure litigants receive fair trials and to vindicate the rights of North Carolina citizens who have answered the call to fulfill their civic duties through jury service. As occurred in Washington, formally and expressly acknowledging these known facts as an initial step will not only help inform the Court on how best to proceed, it will also ensure that further arguments and proposals the Court receives in this and related contexts will be properly focused, informed, and responsive to the

widespread and undeniable problem the Court is confronting.

IV. THIS COURT SHOULD ADOPT KEY REFORMS FROM WASHINGTON STATE TO ADDRESS RACIAL DISCRIMINATION IN NORTH CAROLINA JURY SELECTION.

Once this Court acknowledges the problem of both explicit and implicit racial bias resulting in the widespread and ongoing exclusion of jurors based on race, the question remains how best to tackle it. After confronting and acknowledging the substantial evidence of racial disparities and implicit racial bias, the Washington Supreme Court opted to depart from the U.S. Supreme Court's long, failed history of incremental reform in this area. *See Saintcalle*, 178 Wash. 2d at 43-46, 53-54 (acknowledging need for change); Wash. General Rule 37, *Jury Selection* ("GR 37") (establishing alternative framework)[15]; *State v. Jefferson*, 192 Wash. 2d 225 (2018) (incorporating core standard of alternative framework as a constitutional test for all pending cases). This Court should follow suit.

As recognized in *Jefferson*, the key issue here—and the central failings of *Batson*—is the applicable burden of proof. 192 Wash. 2d at 242-43 ("(1) *Batson* makes 'it very difficult for defendants to prove [purposeful] discrimination even where it almost certain exists' and (2) *Batson* fails to address peremptory strikes due to implicit or unconscious bias, as opposed to purposeful race discrimination") (footnotes omitted). To overcome racial discrimination in jury selection, including concealed or unconscious bias, the burden of proof to invalidate a peremptory strike must change drastically from the default approach. A definitive or even persuasive

[15] https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/GR37.pdf.

showing of race discrimination cannot be required, because in any given case, such discrimination is too easily concealed and too difficult to identify or prove for such an approach to work. *Id*.; *see also supra*, at 14-17.

When "the appropriate burden of proof" on an issue is "judicially allocated," as here, it should be based on "considerations of policy, fairness and common sense." *Peace*, 349 N.C. at 328. While objectors traditionally have been required to affirmatively prove race discrimination to vindicate their constitutional rights, this has simply been a matter of judicial fiat rather than positive law and is subject to change. *See, e.g.*, *State v. Hough*, 299 N.C. 245, 249 (1980); *Miller v. State*, 237 N.C. 29, 47 (1953); *Akins v. Texas*, 325 U.S. 398, 400 (1945). As this Court has acknowledged, a special "presumption of [race] discrimination" may be warranted in a given context for the protection of constitutional rights, especially when a "procedure is susceptible of abuse," as here. *Hough*, 299 N.C. at 250. Ultimately, the chosen standard is supposed to "reflect the value society places" on the "interest sought to be protected." *Peace*, 349 N.C. at 327.

Here, a comparison of relative interests and values confirms that a drastic shift in the applicable burden of proof is warranted. Race discrimination in the use of peremptories delegitimizes the judicial process, wrongfully excludes citizens from one of the two key avenues of direct participation in government—jury service and voting—and denigrates the excluded jurors. *See, e.g.*, *Powers*, 499 U.S. at 406-09. It results in less diverse and thus less effective and fair juries. *See Saintcalle*, 178 Wash. 2d at 49-50. It entrenches the under-representation of minority groups, with

each strike against a minority juror having an especially detrimental effect given the overall pool of potential replacements. *See id.* at 100 (González, J., concurring); NC-CRED, *Jury Pool Information*, *supra* n.11 (noting North Carolina jury pools are overwhelmingly white). For the excluded groups, this engenders distrust of the legal system and thwarts the role of the jury as an intended check on potential governmental abuse. *See Saintcalle*, 178 Wash. 2d at 100 (González, J., concurring); *Powers*, 499 U.S. at 406. Finally, all of this seriously impairs public trust and confidence in the judicial system, which is rightfully assigned primary importance in North Carolina. *See Saintcalle*, 178 Wash. 2d at 106; *Cofield*, 324 N.C. at 459.

On the other side of the equation, the value of any given peremptory challenge is highly doubtful, minimal at best, and should easily give way in the face of genuine concerns about racial bias. To begin with, any given strike merely concerns whether one juror, whom a neutral judge has deemed fit to serve, will participate in a group deliberation process. Furthermore, studies of actual peremptory usage and laboratory experiments both have shown that "attorneys generally are ineffective" at identifying unfavorable jurors when exercising peremptories, notwithstanding some misplaced confidence. *See Saintcalle*, 178 Wash. 2d at 103-04 (González, J., concurring) (discussing studies). No systemic benefits from the use of peremptories have been substantiated, and at the very least, any such benefits are flimsy in comparison to the grave harms of race discrimination. *See id.* at 102-08. In sum, the minimal value of peremptory strikes pales in comparison to expunging racial bias from jury selection.

Recognizing the need for a drastic reform, the Washington Supreme Court adopted a new rule that flips the default *Batson* framework on its head, presuming racial bias is involved whenever there are plausible indicators to that effect, and in those cases, requiring proof that race is **not** a factor to salvage the peremptory strike. While the entirety of Washington's new rule warrants adoption, there are two core elements to the rule that accomplish this important and needed shift: minimalizing the prima facie case requirement and adopting an "objective observer could view" standard. Each of these core elements is discussed below in further detail for this Court's consideration.

A. The validity of a peremptory challenge should be adjudicated whenever a genuine concern over racial bias is presented.

The first core element of Washington's rule is to minimize the first step of the default *Batson* framework requiring a "prima facie case." This step has materially thwarted meaningful review of peremptory strikes without justification, largely because of confusion about what actually qualifies as a prima facie case of race discrimination. *See, e.g.*, *Saintcalle*, 178 Wash. 2d at 96 (González, J., concurring). While the U.S. Supreme Court has spelled out that this burden is intended to be met "whenever the circumstances 'permit the trial judge to draw an inference that discrimination has occurred,'" and has emphasized that "trial courts should not be engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question,'" many courts have nonetheless treated this requirement as "more demanding" and highly discretionary. *Id.* (quoting *Johnson*, 545 U.S. at 170, 172, 173). Because this requirement has precluded the simple

disclosure of reasons and meaningful judicial review for racial bias even when genuine concerns exist, it is harmful and should be abandoned.

Washington's rule now broadly permits any party or the trial court to "raise the issue of improper bias," and in such cases, turns immediately to the exercising party to disclose the actual reasons for the peremptory. GR 37(c)-(d). Given the normal prohibitions against harassing or frivolous litigation conduct, the importance of maintaining credibility with the trial court, and the fact that a colloquy over the validity of the objection will follow, parties can be expected to refrain from raising such an objection unless there are genuine reasons for concern. And whenever such a concern exists, given the nature of the problem being addressed and the relative interests at stake, meaningful review for racial bias is appropriate. In the rare case when a party raises a frivolous or harassing objection, it can be disposed of quickly and sanctions can be imposed as appropriate.

In practice, there are a variety of circumstances that could trigger a genuine concern over racial bias in any given instance. One important factor, among others, may be whether the struck juror is a member of a racial group that historically has been subject to discrimination in jury selection, nationally or in the local community. Other factors may arise from the particular dynamics of the case, the jury pool, or voir dire proceedings, including the strength of the proffered reason for the strike. Regardless, whenever a genuine concern over racial bias is presented, the validity of the peremptory strike should be adjudicated.

B. Peremptory challenges should be disallowed whenever an objective observer could view race as a factor.

The second core element of Washington's rule is the ultimate standard for reviewing suspect peremptory challenges: whether "an objective observer could view race as a factor" in the strike. GR 37(e). The rule spells outs that "an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion" of potential jurors. GR 37(f). This standard is directly responsive to the key deficiencies the Washington Supreme Court has explained about the default *Batson* framework: it requires judges to accuse lawyers of racism, utterly fails to address implicit or unconscious bias, and is too weak to capture most race discrimination. In contrast, the "objective observer could view" standard allows for an impersonal inquiry, incorporates the influence of unconscious bias, and demands the utmost degree of confidence to sustain any suspect peremptory. In these ways, the standard properly rebalances the *Batson* framework in favor of eradicating racial bias.

Courts in Washington and elsewhere have used this type of standard when the circumstances demand it, for reasons that apply with special force here. As one example, Washington courts apply a similar standard to determine whether to grant a new trial when a jury has considered extrinsic evidence. *See, e.g.*, *Richards v. Overlake Hops. Med. Ctr.*, 59 Wash. App. 266, 273 (1990) (conducting "an *objective* inquiry" into "whether the extraneous evidence . . . could have affected the jury's determination" (emphasis in original)). Similarly, New Jersey courts apply a like standard to determine whether a commercial license was properly revoked based on

a potentially corrupt relationship related to organized crime. *See In re Pontoriero*, 439 N.J. Super. 24, 41 (N.J. Super. Ct. App. Div. 2015) (asking "whether a reasonably objective observer could believe that [a known] criminal associate could influence the licensee"). In each instance, an objective and stringent standard is needed, whether because the court is barred from delving into the jury's deliberations but must still protect the integrity of the process, or because corruption is so difficult to prove but important to eradicate for public confidence. Here, an objective and stringent test is needed for similar reasons, given that the court is practically barred from delving into a party's or counsel's unconscious biases, and might be hesitant to make any direct accusations against them, but must address the prevalent and problematic nature of racial bias in the use of peremptories and the public appearance of racial inequity in jury selection.

When the "objective observer could view" standard is applied to a peremptory strike, any genuine concerns about racial bias will usually invalidate the strike, unless those concerns can be overcome with compelling evidence race played no role. *See, e.g.*, *Jefferson*, 192 Wash. 2d at 250-51. Overcoming the presumption in this way will require a combination of an entirely persuasive justification for excluding the juror—likely approaching the threshold of a challenge for cause—and the absence of any distinctively questionable circumstances. Usually though, once there are genuine concerns about racial bias, those concerns will persist, and the peremptory will thus be denied.

The instant cases present no exception. In *State v. Hobbs*, for example, the

prosecutor used seven out of nine peremptories to remove black jurors, and when the last of these strikes was challenged, the prosecutor gave *eleven* reasons for striking that juror. 817 S.E.2d 779, 788 (N.C. Ct. App. 2018). In addition to the implausibility of the sheer number of reasons given as actual reasons, many were weak, vague, or uncorroborated. *See id.* (noting reasons included that juror "had left several questions on the juror questionnaire unanswered," "had given some 'perplexing' responses," was "once singing 'the sun will come out tomorrow'" when walking out of court, and allegedly "nodded affirmatively" in response to another juror's statement). Regardless of the prosecutor's other reasons and the other circumstances surrounding the strike, the specter of racial bias remains, and the peremptory should be deemed invalid.

CONCLUSION

Amicus urges the Court not to look away from what it knows—racial disparities exist in North Carolina's justice system; bias, explicit and implicit, contributes to these disparities and affects the use of peremptory strikes; and the *Batson* framework does a poor job of uncovering explicit bias and is wholly incapable of redressing implicit bias. Amicus urges the Court to act more quickly than did the Washington Supreme Court when it first acknowledged the scope of the problem. This Court can act on the explicit authorization in *Batson* and the abundant authority this Court has under the North Carolina constitution and statutes to fashion an appropriate rule. Amicus suggests the approach taken by the Washington Supreme Court as a roadmap, as it will accomplish what the current

Batson framework does not: safeguarding the constitutional rights both of litigants and of North Carolina citizens who answer the call for jury service, and, in doing so, restoring public confidence that the jury selection process in North Carolina is fair.

Respectfully submitted, this the 28th day of June, 2019.

FRED T. KOREMATSU CENTER
FOR LAW AND EQUALITY

By: /s/ Donald H. Beskind
Donald H. Beskind
N.C. State Bar No. 8138
Duke University School of Law
Box 90360
Durham, NC 27708
(919) 612-3955
beskind@law.duke.edu

Local Counsel for Fred T. Korematsu Center for Law and Equality

N.C. R. App. P. 33(b) Certification:

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

By: /s/ Robert S. Chang
Robert S. Chang*
WA State Bar No. 44083
Seattle University School of Law
901 12th Avenue
Seattle, WA 98122
(206) 398-4025
changro@seattleu.edu

Executive Director and Counsel for Fred T. Korematsu Center for Law and Equality

By: /s/ Taki V. Flevaris
Taki V. Flevaris*
WA State Bar No. 42555
Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
(206) 245.1700
Taki.Flevaris@pacificalawgroup.com

Counsel for Fred T. Korematsu Center for Law and Equality

* *Motions for Admission Pro Hac Vice Pending*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I served a copy of the foregoing AMICUS CURIAE BRIEF OF THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF DEFENDANT-APPELLANT by electronic means upon the following counsel of record for the parties:

Brent D. Kiziah
Attorney for the State
Assistant Attorney General
c/o Education Assistance Authority
P.O. Box 12812
RTP, NC 27709
(919) 248-4663
Brent@ncseaa.edu
Counsel for State of North Carolina

Franklin E. Wells, Jr.
175 E. Salisbury Street
Asheboro, NC 27203
(336) 625-1436
fwells.law@gmail.com
Counsel for Mr. Bennett

This the 28th day of June, 2019.

/s/ Donald H. Beskind
Donald H. Beskind
Local Counsel for Fred T. Korematsu Center
for Law and Equality