NO. 411A94-6 (ROBINSON) TWELFTH DISTRICT
NO. 441A98-4 (GOLPHIN)
NO. 130A03-2 (AUGUSTINE)
NO. 548A00-2 (WALTERS)

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA , Plaintiff-Appellee, v. MARCUS REYMOND ROBINSON , Defendant-Appellant.	From Cumberland County 91 CRS 23143

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STATE OF NORTH CAROLINA , Plaintiff-Appellee, v. TILMON CHARLES GOLPHIN , Defendant-Appellant.	From Cumberland County 97 CRS 47314; 97 CRS 47315; 97 CRS 47312

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STATE OF NORTH CAROLINA , Plaintiff-Appellee, v. QUINTEL MARTINEZ AUGUSTINE , Defendant-Appellant.	From Cumberland County 01 CRS 65079

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STATE OF NORTH CAROLINA , Plaintiff-Appellee, v. CHRISTINA SHEA WALTERS , Defendant-Appellant.	From Cumberland County 98CRS34832; 98CRS35044; 98CRS35044; 98CRS35047; 98CRS35045; 98CRS35391; 98CRS35046

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AMICUS CURIAE BRIEF OF FORMER STATE AND FEDERAL PROSECUTORS IN SUPPORT OF DEFENDANT-APPELLANTS

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Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, The Honorable Wade Barber, former Virginia Attorney General Mark Earley, Sr., The Honorable Gerald Kogan, Professor Kami Chavis, and Robert M.A. Johnson—a group of distinguished former state and federal prosecutors[1]—submit this amicus brief in support of the petitions for certiorari filed by Defendant-Appellants Marcus Robinson, Timon Golphin, Quintel Augustine, and Christina Walters.[2]

SUMMARY OF ARGUMENT

The Supreme Court of the United States has time and again recognized the central role that a fair and impartial jury plays in the American justice system. When the jury selection process is corrupted by racial discrimination, however, that role cannot be fulfilled. Racial discrimination in the jury selection process not only harms the criminal defendant whose life and liberty is at stake, it also erodes the confidence of the unfairly excluded prospective jurors and the public at large in the

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[1] The Honorable Wade Barber served as a North Carolina Superior Court Judge from 1998 to 2006. Before serving on the bench, Judge Barber served as a District Attorney in Orange and Chatham Counties in North Carolina from 1977-1984, and as President of the North Carolina District Attorneys Association from 1981-1982. Mark Earley, Sr. served as the Attorney General of the Commonwealth of Virginia from 1998 to 2001. The Honorable Gerald Kogan served as a Justice of the Florida Supreme Court from 1987 to 1998, and as Chief Justice of that Court from 1996 to 1998. Prior to his service on the Florida Supreme Court, Justice Kogan served as the Chief Prosecutor in the Homicide and Capital Crimes Division in Dade County, Florida from 1960 to 1967. Kami Chavis served as a former Assistant United States Attorney in the District of Columbia from 2002 to 2005. Ms. Chavis is now Professor and Criminal Justice Program Director at the Wake Forest University School of Law. Robert M.A. Johnson served as the County Attorney for Anoka County, Minnesota from 1982 to 2010. Mr. Johnson also served as President of the National District Attorneys Association from 2000 to 2001.

[2] No person other than amici curiae or their counsel directly or indirectly wrote this brief or contributed money for its preparation. *See* N.C. R. App. P. 28(i)(2).

justice system. It is a prosecutor's solemn duty to prevent this harm and ensure that justice is done in all cases.

Despite these clear and long-recognized harms, however, racial discrimination in jury selection continues to be a systematic problem across the United States, and specifically in North Carolina. A recent study found that, in capital cases between 1990 and 2010, North Carolina prosecutors struck qualified African-American venire members at more than *twice* the rate of other qualified venire members. Recognizing this troubling trend, the North Carolina Legislature became the first to pass a Racial Justice Act ("RJA"), which created a mechanism by which capital defendants could challenge their death sentences on the ground that race discrimination during jury selection was a significant factor in the decision to seek or impose the death penalty. Four defendants—Marcus Robinson, Tilmon Golphin, Christina Walters, and Quintel Augustine—successfully availed themselves of this procedure and obtained commutations of their death sentences to life in prison. Although each of these defendants successfully proved that racial discrimination was a significant factor in bringing about his or her death sentence, they are all at risk of having their death sentences reinstated in light of the 2013 repeal of the RJA.

Amici urge this Court not to let systemic racial discrimination in jury selection continue to degrade the justice system and strip citizens of their Constitutional rights. The stakes could not be higher for Defendant-Appellants, who face the possibility of execution even though a court has already found that

their death sentences were tainted by invidious racial discrimination. The Court should therefore grant Defendant-Appellants' petitions for certiorari, reverse the order below, and require a full examination of Defendant-Appellants' statutory and Constitutional claims.

ARGUMENT

I. Race Discrimination in Jury Selection Continues to be a Systematic Problem Across the United States and Specifically in North Carolina.

It is beyond cavil that racial discrimination in jury selection violates the United States and North Carolina Constitutions. *See*, *e.g.*, *Georgia v. McCollum*, 505 U.S. 42, 44 (1992) ("For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause."); *State v. Quick*, 462 S.E.2d 186, 188 (N.C. 1995) ("Article I, Section 26 of the North Carolina Constitution also prohibits the exercise of peremptory challenges solely on the basis of race."). Aside from being unconstitutional and patently unfair, it is well established that racial discrimination in jury selection also inflicts serious and irreparable harm on: (i) defendants who are deprived of their right to a fair and impartial jury of their peers, *see Miller-El v. Dretke*, 545 U.S. 231, 237 (2005); (ii) prospective jurors who are unfairly excluded from jury service, *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128, 140 (1994); and (iii) the public at large as confidence in the system is inevitably eroded, *see Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

As an administrator of justice, a prosecutor's solemn duty is to prevent this harm from occurring in the first instance by ensuring that racial discrimination

does not corrupt the jury selection process. *See State v. Martinez*, 795 S.E.2d 386, 394 (N.C. Ct. App. 2016) ("[A] prosecutor has the responsibility of a minister of justice and not simply that of an advocate[,] the prosecutor's duty is to seek justice, not merely to convict."); Am. Bar Ass'n, Standards for Criminal Justice, *Functions and Duties of a Prosecutor* § 3-1.2 ("The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions. . . . The duty of the prosecutor is to seek justice, not merely to convict.") ("ABA Standards for Criminal Justice").

Unfortunately, despite the axiomatic nature of these principles, racial discrimination in jury selection continues to be a systematic problem in the United States and, in particular, in North Carolina. Numerous studies and reports have shown that prosecutors have continued to exclude prospective jurors based on their race even after the U.S. Supreme Court's seminal decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). *See, e.g.*, *Miller-El*, 545 U.S. at 268-69 (Breyer, J., concurring) (discussing, for instance, a study finding that "in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of nonblack jurors; defense counsel struck 26% of black jurors and 54% of nonblack jurors; and race-based uses of prosecutorial peremptories declined by only 2% after *Batson*").

In North Carolina, the problem is even starker. A 2012 Michigan State University College of Law study ("MSU study") found that North Carolina prosecutors used their peremptory strikes in capital cases to exclude qualified African-American venire members at more than *twice* the rate of other qualified

venire members. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1548-50 (2012) (finding that, in capital cases between 1990 and 2010, prosecutors struck 52.6% of eligible African-American venire members, while only striking 25.7% of all other eligible venire members). As conceded by Dr. Joseph Katz, the State's own expert, this is a large, statistically significant disparity. The MSU study also found that in capital cases where the defendant was African-American, North Carolina prosecutors struck qualified African-American venire members at an average rate of 60.0%, compared to an average strike rate of only 23.1% against all other qualified venire members. *Id.*

Aside from these sobering statistics, the anecdotal evidence further underscores the troubling trend of racial discrimination in jury selection. In Mr. Robinson's case, for example, race played a prominent role from start to finish. In addition to a trial strategy infected by racial undertones—*see State v. Robinson*, 463 S.E.2d 218, 222 (N.C. 1995) (State presented evidence that Mr. Robinson said "he was going to burn him a whitey")—the sole prosecutor in Mr. Robinson's case, John Dickson, has a history of disproportionately striking African-American venire members. In Mr. Robinson's case, Mr. Dickson struck 50.0% of the African-American venire members, while striking only 14.4% of the other venire members. *See* Def.'s Pet. For Writ of Cert., *State of N.C. v. Robinson*, (No. 411A94-6), (N.C. May 30, 2017), at 16. The same trend was present in all three capital cases

involving Mr. Dickson that were included in the MSU study. *See id.* at 17 (noting that Mr. Dickson struck African-American venire members at significantly higher rates than all other venire members in all three cases studied). These egregious facts, in addition to the troubling statistical evidence discussed above, are part of what motivated Judge Weeks to vacate Defendant-Appellants' death sentences pursuant to the RJA. *See id.* at 9-11.

II. Race Discrimination Diminishes the Legitimacy of the Justice System.

Democratic systems of government depend on legitimacy to survive. If society loses faith in democratic institutions, those institutions cannot function. The justice system is one of the oldest and most crucial government institutions in this state and this country. As officers of the court and the face of the criminal justice system, prosecutors have a special responsibility to ensure that the system remains fair and continues to reflect the values enshrined in the Constitution.

When prosecutors permit or engage in race discrimination during jury selection, they abandon their duty to the Constitution and delegitimize the justice system. As the Supreme Court explained in *Batson v. Kentucky*, "selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." 476 U.S. at 87 (1986). This discrimination tells members of minority communities that they are not seen as equals in the eyes of the law. *See Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) ("Discrimination in the jury selection process . . . poisons public confidence in the evenhanded administration of justice."). If individuals do not believe they will be treated fairly by the justice system, they have no incentive to cooperate with law

enforcement, investigators, or prosecutors trying to solve and prosecute criminal conduct. Race discrimination in jury selection also denies minority citizens the opportunity to participate in one of America's bedrock civic traditions. By excluding African-Americans from the jury experience, prosecutors imply that they are less important to the justice system than their fellow citizens. *See Powers v. Ohio*, 499 U.S. 400, 414 (1991) (explaining that jurors rejected based on race "may lose confidence in the court and its verdicts"). Again, by sending such signals, prosecutors sow distrust and disengagement rather than confidence and participation.

Similarly, race discrimination in jury selection undermines the respected role of judges and lawyers in this country. Prosecutors and defense attorneys are expected to advocate zealously while always remaining candid with the court; while judges are to rule on issues of law fairly and impartially. When prosecutors eliminate jurors for illegitimate reasons, they rob the court and the defense of an opportunity to fulfill their duties. Discrimination tells defense attorneys the playing field is not even: prosecutors can use unfair and unconstitutional tactics to tip the scales before the trial even begins. Likewise, discrimination in jury selection disrespects the painstaking care judges take to maintain impartial courtrooms where justice can be administered fairly. *See Miller-El*, 545 U.S. at 238 (2005) ("When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial.'" (quoting *Powers*, 499 U.S. at 412)).

Moreover, race discrimination in jury selection conflicts with prosecutors' own professional standards. The National District Attorneys Association's National Prosecution Standards, for example, state that prosecutors must "not exercise a peremptory challenge in an unconstitutional manner based on group membership or in a manner that is otherwise prohibited by law." Nat'l Dist. Att'ys Ass'n, Nat'l Prosecution Standards, Standard 6-2.3 (3d ed. 2009), https://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf. Similarly, the ABA Standards for Criminal Justice state that prosecutors "should not strike jurors based on any criteria rendered impermissible by the constitution, statutes, applicable rules of the jurisdiction, or these standards, including race . . ." ABA Standards for Criminal Justice, *Functions and Duties of a Prosecutor* § 3-1.2. If prosecutors do not abide by their own standards, they cannot reasonably expect defendants, juries, and the public to remain confident in the system they embody.

III. Judicial Review is Necessary to Overcome Unconstitutional Race Discrimination.

Race discrimination in jury selection continues to pose a systematic problem that strips citizens of their Constitutional rights and threatens the legitimacy of the justice system and the courts. Much of the time, judicial review is the only avenue for redress of this insidious problem. Aside from an executive pardon—a remote possibility at best—there is no mechanism for reviewing and remedying race discrimination in the jury selection process outside of the courts. Thus, if defendants cannot access judicial review, they are left with no means of enforcing

their Constitutional rights. And without an opportunity for review by the courts, defense counsel have no means of accessing prosecutorial records that are often the only available evidence of discrimination.

In no other context do we prevent criminal defendants from seeking the opportunity to redress Constitutional violations. Race discrimination in jury selection has grave effects and should not be treated differently. Indeed, denying access to the courts delivers another blow to defendants' Constitutional rights. *See Young v. Ragen*, 337 U.S. 235, 239 (1949) (holding that the state must provide prisoners "some clearly defined method by which they may raise claims of denial of federal rights."); *Frank v. Mangum*, 237 U.S. 309, 335 (1915) (holding that states cannot deny a defendant's constitutional rights without "supplying [a] corrective process."). The State here should not be allowed to erect procedural roadblocks to meaningful review of a defendant's Constitutional claims.

CONCLUSION

Decades after *Batson*, it is clear that race discrimination continues to be a serious problem that threatens the integrity of the American justice system. This Court should send a clear message to prosecutors that racial discrimination in jury selection will not be tolerated under any circumstances. For the foregoing reasons, amici urge this Court to grant Defendant-Appellants' petitions for certiorari, reverse the order below, and require a full examination of Defendant-Appellants' statutory and Constitutional claims.

July 16, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 28(J) WORD LIMIT

I certify that the font used in this brief is 12-point proportional spaced font with serifs. In reliance on the word count reported by Microsoft Word, I certify that this brief, including footnotes and citations, contains no more than the 3,750 words allowed by Rule 28(j) of the North Carolina Rules of Appellate Procedure.

This 16th day of July, 2018.

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