SUPREME COURT OF NORTH CAROLINA

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No. 411A94-6 DISTRICT TWELVE

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

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No. 548A00-2 DISTRICT TWELVE

STATE OF NORTH CAROLINA )
)
v. ) From Cumberland County
) 98 CRS 34832, 35044
CHRISTINA SHEA WALTERS )
)

**********

No. 441A98-4 DISTRICT TWELVE

STATE OF NORTH CAROLINA )
)
v. ) From Cumberland County
) 97 CRS 47314, 47315, 47312
TILMON CHARLES GOLPHIN )
)

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No. 130A03-2 DISTRICT TWELVE

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| STATE OF NORTH CAROLINA | ) | |
| | ) | |
| v. | ) | From Cumberland County |
| | ) | 01 CRS 65079 |
| QUINTEL MARTINEZ AUGUSTINE | ) | |
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**BRIEF OF AMICUS CURIAE**
**NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.**
**IN SUPPORT OF DEFENDANTS-APPELLANTS**

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**IN SUPPORT OF DEFENDANTS-APPELLANTS**

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## STATEMENT OF THE CASE AND FACTS

Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. (hereinafter "LDF") adopts Defendants-Appellants' Statement of the Case and Facts.[1]

## STATEMENT OF INTEREST

LDF is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, organizing and outreach, LDF strives to secure equal justice under the law for all Americans, and

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

to break down barriers that prevent African Americans from realizing their full civil and human rights. Since its inception, LDF has sought to eliminate the arbitrary role of race on the administration of the criminal justice system by challenging laws, policies, and practices that have a disproportionate impact on African Americans and other communities of color.

LDF has long been committed to ensuring racial equality in jury selection, having served as counsel or amicus curiae in multiple cases before the United States Supreme Court on this issue. *See*, *e.g.*, *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Swain v. Alabama*, 380 U.S. 202 (1965). Moreover, as counsel in *McCleskey v. Kemp*, 481 U.S. 279 (1987), LDF has a significant interest in the North Carolina Legislature's response to the *McCleskey* decision by permitting statutory claims of racial discrimination based on statistical evidence.

LDF has also represented individuals who have been sentenced to death in North Carolina as part of its advocacy for a fair and just criminal justice system. For example, LDF was counsel in *Woodson v. North*

*Carolina*, 428 U.S. 280 (1976), in which the United States Supreme Court invalidated North Carolina's mandatory death penalty scheme as a violation of the Eighth and Fourteenth Amendments.

Given its mission, history, and expertise in opposing racial injustice generally—and in combating racial discrimination in the use of peremptory strikes and in the imposition of the death penalty specifically—LDF has a substantial interest in the issues raised in Defendants-Appellants' cases.

## INTRODUCTION

Since the early days of LDF's existence—when Thurgood Marshall represented capitally charged and death-sentenced African-American individuals across the South—to the present day, LDF has been deeply concerned with the pernicious influence of race in the administration of the death penalty. That concern is certainly justified with respect to the death penalty in North Carolina. Throughout North Carolina's history, its death penalty has had a deep and troubling association with racial discrimination. Multiple statistical studies—utilizing data across several decades—demonstrate the continuing effect of race in North Carolina's death penalty, especially with respect to the race of the victim

and the race of prospective jurors.

Yet, despite this compelling evidence of systemic racial discrimination, the ability for capitally-charged and death-sentenced individuals to seek judicial relief has been largely truncated by the United States Supreme Court's decision in *McCleskey*, which ruled that statistical evidence alone is insufficient to support an inference that decisionmakers acted with a discriminatory purpose. LDF represented Warren McCleskey in that case and continues to believe that it was wrongly decided.

But the North Carolina Legislature responded to the unduly restrictive holding in *McCleskey* by passing the North Carolina Racial Justice Act, N.C.G.S. §§ 15A-2010 *et seq*. (2009) ("RJA"), which provides statutory relief from the death penalty based on statistical evidence of racial discrimination. With this statutory mechanism, Defendants presented compelling evidence of racial bias in the prosecution's use of peremptory challenges in Cumberland County, in the prosecutorial district and judicial divisions containing Cumberland County, and throughout North Carolina.

That prosecutors discriminated against African-American prospective jurors is clear from the record and led the Superior Court of Cumberland County to vacate Defendants' death sentences. Knowing now that there is significant evidence of racial discrimination in Defendants' cases, it is incumbent upon this Court to allow Defendants to seek and secure sentencing relief. Otherwise, this continuing stain of racial discrimination will undermine not only the legitimacy of Defendants' death sentences, but also public confidence in the integrity of North Carolina's judicial system as a whole. LDF urges this Court to grant Defendants' requested relief, thereby making clear and unequivocal that the courts of North Carolina will not tolerate racial discrimination in jury selection and the administration of the death penalty.

## ARGUMENT

### I. This Court Must Not Allow Racial Discrimination to Taint a Death Sentence.

Throughout North Carolina's history, racial discrimination has placed an unacceptable stain on its death penalty system. With the passage of the Racial Justice Act, Defendants were also able to establish that race was a significant factor in the prosecution's use of peremptory

challenges in Cumberland County, in the prosecutorial district and the judicial divisions containing Cumberland County, and across the State of North Carolina at the time of their capital trials. This Court, therefore, must permit Defendants to pursue relief from death sentences that are unquestionably tainted by this compelling evidence of racial bias.

### A. North Carolina Has a Long and Tragic History of Racial Discrimination in Its Death Penalty System.

North Carolina's death penalty has a long and tragic association with racial discrimination. African Americans—mostly slaves—comprised 71% of those executed from 1726 to 1865. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2044-45 (Sept. 2010) (hereinafter "Kotch, *Racial Justice Act*"). "[M]any slaveowners believed that these public executions served an important purpose in deterring misbehavior among the slave population at large." *Id.* at 2047-48. This trend of primarily executing African Americans continued in North Carolina between the end of the Civil War and 1910, with African Americans making up 74% of the 160 people executed during that time even though they were, at most, 38% of the overall population. *Id.* at 2053.

In 1910, the State of North Carolina assumed responsibility for executions, which ensued until 1961, when the last North Carolina prisoner was executed before the death penalty was ruled unconstitutional by the United States Supreme Court in *Furman v. Georgia,* 408 U.S. 238 (1972). Kotch, *Racial Justice Act* at 2039. During that time between 1910 and 1961, 283 of 362 (78%) individuals executed were African American. *Id.* At the same time, North Carolina's African-American population ranged from only 32% in 1910 to 25% in 1960. *Id.* at 2056. Presently, 78 of the 152 (51%) individuals on North Carolina's death row are African American[2] although African Americans comprise only 22% of North Carolina's general population.[3]

One of the most indelible legacies of slavery and Jim Crow on North Carolina's death penalty is the persistent trend of executing people, especially African Americans, for crimes committed against white victims. The execution of African Americans accused of raping white women stands as a stark example: from the pre-*Furman* era of 1910 to

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[2] Death Penalty Info. Ctr., *Current Death Row Populations by Race* (as of July 1, 2017), https://deathpenaltyinfo.org/race-death-row-inmates-executed-1976?scid=5&did=184.

[3] N.C. Office of State Budget & Mgmt., State Demographer, County Estimates, *Population in North Carolina Counties by Race* (as of July 1, 2016), https://files.nc.gov/ncosbm/demog/totalbyrace_2016.html.

1961, 67 of 78 men executed for rape were African American, and the victim was confirmed to be white in 58 of those cases. *Id.* at 2066. Moreover, a study of North Carolina homicides from 1980 to 2007 found that "the odds of a death sentence for those suspected of killing Whites are approximately three times higher than the odds of a death sentence for those suspected of killing Blacks," and the "race of the victim effect is largest for Black suspects suspected of killing White victims, who are five times more likely to be sentenced to death than Black suspects with Black victims." Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. Rev. 2119, 2120, 2141 (Sept. 2011) (hereinafter "Radelet, *Race and Death Sentencing*"). Numerous other studies confirm the persistent influence of the victim's race in the administration of the death penalty in North Carolina:

- Analysis of 1977-78 North Carolina data: Defendants of any race who killed a white victim were "six times more likely to be found guilty of first degree murder than defendants in cases with nonwhite victims."[4] "In addition, nonwhite defendants were

[4] Isaac Unah, *Empirical Analysis of Race and the Process of Capital Punishment in North Carolina*, 2011 Mich. St. L. Rev. 609, 622 (2011) (hereinafter "Unah, *Empirical Analysis*") (quoting Barry Nakell & Kenneth A. Hardy, *The Arbitrariness of the Death Penalty* 146-48 (1987)) (hereinafter "Nakell, *Arbitrariness*"); *see also* Radelet, *Race and Death Sentencing*, at 2134 (citation omitted); Barbara O'Brien, et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. Rev. 1997, 2005 (Sept. 2016) (hereinafter "O'Brien, "*Untangling the Role*").

more likely to receive the death penalty compared to whites."[5]

- Analysis of 1977-80 North Carolina data: "Among [ ] homicides with additional felony circumstances present . . . 13.6% of those suspected of killing Whites were sentenced to death, compared to 4.3% of those suspected of killing Blacks."[6]

- Analysis of 1993-97 North Carolina data: "When a nonwhite defendant kills a white victim, the death-sentencing rate is 5.1 percent. However, when a nonwhite defendant kills a nonwhite victim, the death-sentencing rate is only 1.5 percent."[7]

- Analysis of 1990-2009 North Carolina data: (1) "Cases in which the defendant killed at least one white victim were significantly more likely to receive a death sentence than cases in which the defendant killed only black victims"; (2) "Prosecutors were significantly less likely to bring cases in which black defendants killed only black victims to a capital trial than any other case"; (3) "Juries were significantly less likely to sentence defendants to death in cases where white defendants kills only black victims than any other case."[8]

Equally troubling is the historic and longtime exclusion of African Americans from capital juries. This disturbing trend is rooted in the absolute bar to jury service for African Americans during the time of slavery. Kotch*, Racial Justice Act*, at 2072. Even after the United States Supreme Court ruled in *Strauder v. West Virginia*, 100 U.S. 303 (1880),

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[5] Unah*, Empirical Analysis*, at 622 (citing Nakell, *Arbitrariness*, at 94).

[6] Radelet, *Race and Death Sentencing*, at 2135 (citing Samuel R. Gross & Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* 89 (1989)).

[7] Unah, *Empirical Analysis*, at 637.

[8] O'Brien, *Untangling the Role*, at 2043.

that the Fourteenth Amendment prohibited states from enacting laws that barred African Americans from serving on juries, North Carolina instituted statutory requirements to jury service during the first half of the twentieth century that effectively achieved the same result. For example, North Carolina statutes during that time required: "(1) payment of taxes for the preceding year; (2) good moral character; and (3) sufficient intelligence" for jury service, which gave wide discretion to exclude African Americans from juries. Kotch, *Racial Justice Act*, at 2073. As an example, this Court noted in a 1948 decision that no African American was eligible for jury service, let alone seated, in an eastern North Carolina county where African Americans made up the majority of the population. *State v. Speller*, 229 N.C. 67, 68-70, 47 S.E.2d 537, 538-39 (1948), *cited in* Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 Ohio St. J. Crim. L. 103, 126 n.109 (2012) (hereinafter "Mosteller, *Responding to* McCleskey *and* Batson").

Even though the United States prohibited the systemic exclusion of African Americans from juries, *see Swain v. Alabama*, 380 U.S. 202

(1965), and the discriminatory use of peremptory challenges against African Americans, *see Batson v. Kentucky*, 476 U.S. 79 (1986), African Americans are still disproportionately excluded from jury service, as demonstrated in Defendants' cases. *See infra* Section I.B. Similarly, a recent study conducted by former prosecutors examined 2011 felony trials in North Carolina and found that prosecutors used peremptory challenges against African-American prospective jurors at twice the rate they excluded white prospective jurors. Ronald F. Wright, et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue,* 2018 Univ. Ill. L. Rev. 4, 26 (Sept. 7, 2017), https://ssrn.com/abstract=2994288 (available via SSRN).

In his concurrence in *Batson*, Justice Marshall emphasized how the "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant" because, *inter alia*, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Batson*, 476 U.S. at 103, 105 (Marshall, J., concurring). Additionally, "the conscious or unconscious racism" of prosecutors or judges may lead to differing perceptions of African American jurors, as compared to white jurors, and

the court's ready acceptance of the prosecutor's proposed explanation for the challenge. *Id.* at 106. The record of *Batson* rulings in this Court and the North Carolina Court of Appeals justifies Justice Marshall's concerns about the difficulties of remedying the racially discriminatory use of peremptory challenges: the appellate courts of North Carolina have never ruled that a prosecutor intentionally discriminated against a juror of color since *Batson* was decided.[9] Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957, 1961-62 (Sept. 2016) (hereinafter, "Pollitt, *Thirty Years of Disappointment*").

### B. This Court Should Not Let the Racial Discrimination in Defendants-Appellants' Cases Stand Unaddressed.

Despite the substantial amount of statistical evidence of racial discrimination in North Carolina's death penalty, the United States

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[9] On three occasions, this Court found the trial court to have erred in finding no prima facie case of discrimination in the first of *Batson*'s three-step inquiry and conducted or ordered further review, but it has never reached an ultimate finding of intentional discrimination. Pollitt, *Thirty Years of Disappointment*, at 1961. The North Carolina Court of Appeals has found intentional discrimination in the peremptory challenges used against two white prospective jurors, and a prima facie case of discrimination—which did not lead to findings off intentional racial discrimination—in two other cases. *Id.* at 1961-63. However, no North Carolina appellate court has found that a peremptory challenge was used in an intentionally discriminatory manner against a prospective juror of color. A search for decisions issued by this Court and the North Carolina Court of Appeals after the publication of this study did not yield any state appellate decisions finding *Batson* violations.

Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), has placed significant obstacles to remedying this discrimination. In a closely divided 5-4 decision, the majority in *McCleskey* acknowledged that there was "a discrepancy that appears to correlate with race" in terms of whom Georgia prosecutors decided to charge with capital crimes. *Id.* at 312. Nevertheless, the Court concluded that the stark statistics of racial disparities established in the case were not sufficient to prove a "discriminatory purpose," as required by the Fourteenth Amendment, and characterized the racial disparities as "an inevitable part of our criminal justice system." *Id.* at 295-99, 312. As Justice Blackmun commented in his dissent, the *McCleskey* Court "sanction[ed] the execution of a man despite his presentation of evidence that establishes a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence." *Id.* at 345 (Blackmun, J., dissenting).

LDF is the legal organization that represented Warren McCleskey before the United States Supreme Court and continues to believe that the *McCleskey* decision was an incorrect interpretation of the Fourteenth Amendment, which has sharply limited the ability of victims of racial

discrimination in the criminal justice system, including capital defendants, to seek judicial redress. Indeed, Justice Powell, who wrote the majority opinion in *McCleskey* and cast the deciding vote, publicly stated in retirement that, in retrospect, he would have decided *McCleskey* differently. Opinion, *Justice Powell's New Wisdom*, N.Y. Times (June 11, 1994), https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html.

However, in passing the RJA, the North Carolina Legislature specifically responded to the unjust constraints imposed by *McCleskey* on federal claims of racial discrimination by permitting state statutory claims of racial discrimination based on statistical evidence. *See* Barbara O'Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the* McCleskey *Court Wouldn't*, 2011 Mich. St. L. Rev. 463, 463-64, 473-74 (2011); Mosteller, *Responding to* McCleskey *and* Batson at 116; Kotch*, Racial Justice Act* at 2111-13. With that opportunity provided by the RJA, Defendants have presented overwhelming statistical evidence of racial discrimination in the selection of juries in capital cases in Cumberland County (where they were sentenced to death), in the prosecutorial district

and judicial divisions containing Cumberland County, and across the entire state of North Carolina.

Defendant Marcus Robinson's statistical evidence was comprised of an exhaustive study of jury selection that utilized: (1) "a complete, unadjusted study of race and strike decisions for 7,421 venire members drawn from the 173 proceedings for the inmates of North Carolina's death row in 2010"; (2) "a regression study of a 25% random sample drawn from the 7,421 venire member data set that analyzed whether alternative explanations impacted the relationship between race and strike decisions"; and (3) "a regression study of 100% of the venire members from the Cumberland County cases." Order Granting Motion for Appropriate Relief p. 44, *North Carolina v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012) (hereinafter "*Robinson* Order").

Having reviewed this evidence, as well as the evidence presented by the State, the Superior Court of Cumberland County made the following findings, among many, in a meticulous and comprehensive 167-page opinion in Mr. Robinson's case:

- "[P]rosecutors statewide struck 52.6% of eligible black venire members, compared to only 25.7% of all other eligible venire members. . . . The probability of this disparity occurring in a race-neutral jury selection process is less than one in ten

trillion." *Id.* p. 58.

- "Of the 166 cases statewide that included at least one black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members. . . . The probability of this disparity occurring in a race-neutral jury selection process is less than one in 10,000,000,000,000,000,000,000,000,000." *Id.* p. 59.

- "The statewide disparity in strike rates has been consistent over time, whether viewed over the entire study period, in four five-year periods, or two ten-year periods." *Id.*

- In the "Fourth Judicial Division as constituted since January 1, 2000," which includes Cumberland County, "prosecutors struck an average of 62.4% of eligible black venire members, compared to only 21.9% of all other eligible venire members. . . . The probability of this disparity occurring in a race-neutral jury selection process is less than one in 1,000." *Id.* p. 65.

- In the "former Second Judicial Division as constituted from January 1, 1990 through December 21, 1999," when it contained Cumberland County, "prosecutors struck an average of 51.5% of eligible black venire members, compared to only 25.1% of all other eligible venire members. . . . The probability of this disparity occurring in a race-neutral jury selection process is less than one in 100,000,000,000." *Id.*

- In "Cumberland County (and Prosecutorial District 12) from January 1, 1990 through July 1, 2010, . . . prosecutors struck an average of 52.7% of eligible black venire members, compared to only 20.5% of all other eligible venire members. . . . The probability of this disparity occurring in a race-neutral jury selection process is less than one in 1,000." *Id.* pp. 65-66.

- "After fully controlling for the 12 non-racial variables" that are "highly predictive for prosecutorial strike decisions," such as reservations about the death penalty and having been accused of a crime, "the race of the venire member is still statistically

> significant with *p*-value of <0.001 and an odds ratio of 2.48 . . . . The probability of observing a racial disparity of this magnitude in a race-neutral jury selection process is 1.34 in 1,000,000. . . . There is a 95% chance that the odds of a black venire member being struck by the State, after controlling for non-racial variables, is between 1.71 and 3.58 times higher than the odds of other venire members being struck." *Id.* p. 78.

- "After fully controlling for eight variables," which are highly predictive for prosecutorial strike decisions specific to the Cumberland County data set, "the race of the venire member is still statistically significant with a *p*-value of <0.01 and an odds ratio of 2.57 . . . . There is a 95% chance that the odds of a black venire member being struck by the State in Cumberland County, after controlling for non-racial variables, is between 1.50 and 4.40 times higher than the odds of other venire members being struck." *Id.* p. 82.

The Superior Court of Cumberland County made similar findings in the case of Defendants Tilmon Golphin, Christina Walters, and Quintel Augustine. Order Granting Motions for Appropriate Relief pp. 136-201, *North Carolina v. Golphin, et al.*, Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079 (N.C. Super. Ct. Dec. 13, 2012) (hereinafter "*Golphin* Order"). The Superior Court accordingly vacated Defendants' death sentences and resentenced them to life without parole. *Robinson* Order p. 167; *Golphin* Order p. 210.

The statistical evidence in Defendants' cases reveals the type of racial discrimination that continues to exist beyond the protection of the Fourteenth Amendment due to the *McCleskey* decision, and the type of

discrimination that the RJA was designed to redress. Especially when considered in the context of the other evidence of discrimination presented by Defendants—such as the history of racial discrimination in jury selection, the role of unconscious bias in jury selection, and individual case examples of jury discrimination, *see Robinson* Order pp. 112-19, 132-155; *Golphin* Order pp. 87-97, 112-136—this Court simply cannot ignore the inevitable conclusion from the statistical analyses in these cases. That conclusion is that African Americans are routinely and systematically excluded from capital juries because of their race in Cumberland County, in the prosecutorial district and judicial divisions containing Cumberland County, and across North Carolina. That bell cannot be unrung, and to foreclose the possibility of sentencing relief to Defendants at this juncture would be wholly unjust and undermine the legitimacy and credibility of North Carolina's judicial system. Indeed, it would be a tragedy for the members of this Court to one day have the same regret as Justice Powell by letting stand, untouched, a death sentence infected by such compelling evidence of racial bias.

## II. The Integrity of North Carolina's Judicial System Is Contingent on Juries Free of Racial Bias.

This Court, as well as the United States Supreme Court, has consistently recognized the crucial role that a jury plays to ensure public confidence in our judicial system. Ignoring the compelling evidence of jury discrimination in Defendants' cases, therefore, not only harms Defendants and the unlawfully struck jurors, but also undermines the integrity of the judicial process itself. The substantial evidence of racial discrimination in the selection of Defendants' juries erodes public confidence in North Carolina's judicial system and must be remedied by this Court.

### A. This Court and the United States Supreme Court Have Long Recognized the Importance of Juries Untainted by Racial Bias.

The importance of ensuring that Defendants be tried by a legitimately convened jury—for them personally, but also to the community at large—cannot be overstated. Over two centuries ago, this Court noted that North Carolina's "courts of justice should be so organized as to afford full assurance to every suitor, that his cause shall be patiently investigated, and impartially decided." *Smith v. Hortler*, 4 N.C. (Car. L. Rep.) 131, 131 (1814) (holding that a defendant could not

receive a fair trial because of potential jury-pool biases); *see also Duncan v. Louisiana*, 391 U.S. 145, 153 (1968) (noting that the jury is "fundamental to our system of justice"). The jury "spreads amongst all classes a respect for the decisions of the law" and "makes all feel that they have duties to fulfill towards society, and that they take a part in its government[.]" *Cooper v. Seaboard Air Line R. Co.*, 163 N.C. 150, 150, 79 S.E. 418, 419 (1913) (citation omitted); *see also Powers v. Ohio*, 499 U.S. 400, 406 (1991) ("One of [the jury's] greatest benefits is in the security it gives the people that they . . . being part of the judicial system of the country can prevent its arbitrary use or abuse.") (citation omitted). And by employing the community's "commonsense judgment," the jury acts as a "hedge against the overzealous or mistaken prosecutor" or "perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citation omitted).

To achieve its goals, the jury must be a "body truly representative of the community." *State v. Scott*, 314 N.C. 309, 311-12, 333 S.E.2d 296, 297-98 (1985) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). Restricting the privilege of passing judgment to a subset of the community engenders doubts regarding the validity of those judgments.

*See Powers*, 499 U.S. at 407 (emphasizing that public confidence in the legitimacy of the jury is essential to help ensure the "continued acceptance of the laws by all of the people") (citation omitted); *State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982) ("[T]he appearance of a fair trial before an impartial jury is as important as the fact of such a trial.").

Because representative juries are the foundation of public confidence in our courts, eliminating racial discrimination takes on particular urgency in the context of jury selection. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017); *Scott*, 314 N.C. at 311-12, 333 S.E.2d at 297-98 (holding that the jury must be free of racial discrimination to ensure it is a "body truly representative of the community") (quoting *Smith*, 311 U.S. at 130). In fact, the centrality of the jury trial to a functioning democracy led the Reconstruction Republicans to place special emphasis on purging the racism from Southern juries. *See* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 897, 923-25 (Jan. 2004); *see also id.* at 926 ("An increasing number of Republicans saw the disabilities that prevented blacks from serving on state juries as the central impediment

to justice for blacks in the South.").

Similarly, North Carolina revised its Constitution to expressly prohibit jury discrimination: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Const. Art. I, § 26. This Court has called this a "declara[tion]" by the "people of North Carolina . . . that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice." *State v. Moore*, 329 N.C. 245, 247, 404 S.E.2d 845, 847 (1991) (quoting *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987)); *see also State v. Peoples*, 131 N.C. 784, 784, 42 S.E. 814, 815 (1902) (recognizing that excluding African Americans from juries is an "assertion of their inferiority, and a stimulant to . . . race prejudice") (quoting *Strauder*, 100 U.S. at 303).

The United States Supreme Court has likewise repeatedly recognized that racial discrimination must be eliminated from jury discrimination. As the Court explained just last year, after the Civil War, "racial discrimination in the jury system posed a particular threat both to the promise of the [Fourteenth] Amendment and to the integrity of the jury trial." *Peña-Rodriguez*, 137 S. Ct. at 867. Thus, the United States

Supreme Court has repeatedly held that racial exclusion of jurors is unconstitutional. *See id.* (collecting cases). These cases reiterate that racism undermines the core promise of a jury trial by destroying the "fact and the perception" that the jury system is truly a "check against the wrongful exercise of power by the State and its prosecutors." *Powers*, 499 U.S. at 411 (citation omitted). Indeed, "prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice[.]" *Miller-El v. Dretke*, 545 U.S. 231, 237-38 (2005) (citation and quotation marks omitted).

In sum, prosecutors "may strike hard blows" but not "foul ones," and must "refrain from improper methods calculated to produce a wrongful conviction" no less than they may "use every legitimate means to bring about a just one." *State v. Sanderson*, 336 N.C. 1, 8, 442 S.E.2d 33, 38 (1994) (citation and internal quotation marks omitted). Racial discrimination in peremptory strikes violate both that principle and venerable precedent.

### B. A Death Sentence Tainted by Racial Discrimination in Jury Selection Harms the Defendant and the Prospective Juror and Threatens the Integrity of the Entire Judicial System.

When, as here, there is evidence of racial discrimination in jury

selection, the defendant is deprived of his fundamental right to the considered judgment of a representative jury as a check against the exercise of arbitrary or biased state power. *See Batson*, 476 U.S. at 86-87 (citing *Strauder*, 100 U.S. at 309) (explaining that a jury of one's peers helps "secure the defendant's right under the Fourteenth Amendment to protection of life and liberty against race or color prejudice"). Moreover, a racially discriminatory peremptory strike creates a significant risk "that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994).

Unhindered racially biased peremptory challenges place "the courts' imprimatur on attitudes that historically" have denied African Americans full citizenship and "entangles the courts in a web of prejudice and stigmatization." *Cofield*, 320 N.C. at 303, 357 S.E.2d at 625-26. That is because racial discrimination in jury selection undermines the "integrity of the judicial system." *Id.* at 304, 357 S.E.2d at 626; *see also id.* at 301, 357 S.E.2d at 625 ("This Court has long recognized the wrong inherent in jury proceedings tainted by racial discrimination."). This Court has appreciated this reality for over one hundred years. *See id.* at

301, 357 S.E.2d at 625 (examining *Peoples*, 131 N.C. at 790, 42 S.E. at 816 (1902)).

Social science confirms the depth of the harm to the defendant. Non-diverse juries are less deliberative, bring a narrower set of life experiences to bear, make more factual mistakes, and are less likely to consider the full body of evidence. *See* Neil Vidmar, *The North Carolina Racial Justice Act: An Essay on Substantive & Procedural Fairness in Death Penalty Litigation*, 97 Iowa L. Rev. 1969, 1972-75 (Oct. 2012) (collecting evidence and examples). And they are less able to prevent the insidious effects of explicit and implicit bias. *Id.* at 1975-80; *see also Peters v. Kiff*, 407 U.S. 493, 503 (1972) (stating that racial prejudice within the jury system "create[s] the appearance of bias in the decision of individual cases, and . . . increase[s] the risk of actual bias as well.").

The harm to the illegally struck juror is just as consequential. Not only are the juror's state and federal constitutional rights infringed, he or she "suffers a profound personal humiliation heightened by its public character." *Powers*, 499 U.S. at 413-14. A report by the non-profit Equal Justice Initiative emphasizes the impact on individuals subjected to this humiliation. *See* Equal Justice Initiative, *Illegal Racial Discrimination*

*in Jury Selection: A Continuing Legacy* 28-34 (Aug. 2010) (hereinafter "EJI Report"), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf. Twenty years after being struck, one African-American juror "grew emotional" when he "recalled how the prosecutor's racist actions made him feel unworthy." *Id.* at 30.[10] Another African-American juror, struck because he "had traffic tickets and expressed hesitation about the death penalty" (although white individuals with similar characteristics were not struck), was unsurprised "because that's how the system is around here." *Id.* at 29. These and other stories illustrate how racially biased peremptory challenges undermine African Americans' confidence in the judicial system.

That skepticism among African-American prospective jurors about the integrity of the judicial process is connected to the overall harm to the entire community's perception of justice. This Court has emphasized "that the judicial system of a democratic society must operate evenhandedly" and "be perceived to operate evenhandedly" if "it is to

[10] His strike was recognized to be a *Batson* violation by the Court of Criminal Appeals of Alabama in 1992. *Neal v. Alabama*, 612 So. 2d 1347, 1349-50 (Ala. Crim. App. 1992); EJI Report at 30 & n.150.

command the respect and support of those subject to its jurisdiction." *Moore*, 329 N.C. at 247, 404 S.E.2d at 847 (citation omitted); *see also Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992) (concluding that bias in the jury system "undermine[s] the very foundation of our system of justice—our citizens' confidence in it"); *Batson*, 476 U.S. at 87 (recognizing that jury discrimination "undermine[s] public confidence in the fairness of our system of justice") (citation omitted); *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (observing "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts") (citation omitted). In short, jury discrimination causes the belief that "the deck has been stacked in favor of one side." *J.E.B.*, 511 U.S. at 140 (internal citation and quotation marks omitted); *see also* Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 Yale L.J. 2236, 2269-70 (May 2014) (citing research showing "that people's perceptions of an authority's legitimacy are influenced most by their perceptions of the fairness of the process and procedures by which it enforces the law").

For the African-American citizens of North Carolina—indeed, for all citizens of this State—to have confidence in the rule of law, racial

discrimination in jury selection must be eliminated. Given the constraints from the *McCleskey* decision, it is crucial for Defendants to be able to use statistical evidence to show how their individual cases reflect a pattern of systemic and widespread racial discrimination in jury selection to fully address the harm suffered by capital defendants, the `illegally struck jurors, and the larger community. This is precisely why the North Carolina Legislature passed the RJA. If this Court were to foreclose Defendants from seeking appropriate remedies—through the RJA or other relevant state statutory or federal constitutional claims—it would place a devastating judicial imprimatur on the racial discrimination that has been established in these cases.

## CONCLUSION

Over three decades ago, the United States Supreme Court was presented with compelling statistical evidence of racial discrimination in the *McCleskey* case. Justice Powell, who cast the deciding vote against remedying the discrimination, came to regret his decision, but the devastating consequences are felt to this day. LDF respectfully urges the members of this Court to avoid Justice Powell's mistake, but instead leave a legacy of unequivocal condemnation of racial discrimination in

North Carolina's judicial processes, especially with the life-or-death consequences of a capital case. Thus, for the foregoing reasons, LDF respectfully requests this Court to provide all appropriate relief under the RJA, N.C.G.S. § 15A-1335, and/or the United States Constitution, as argued by Defendants-Appellants in the appeals at issue.

Respectfully submitted, this the 16th day of July, 2018.

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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.

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## CERTIFICATE OF SERVICE

I hereby certify that, on July 16, 2018, I served a copy of the foregoing **Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. in Support of Defendant-Appellants**, by electronic means upon the following counsel of record for the parties:

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