Campbell Law Review

Volume 44
Issue 1 *Winter 2022*

Article 1

2021

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Recommended Citation
Ian A. Mance, *Cheat Sheets and Capital Juries: In State v. Tucker, North Carolina's Attorney General and Supreme Court Contend with Evidence of Prosecutors' Efforts to Circumvent* Batson v. Kentucky, 44 Campbell L. Rev. 3 (2021).

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Cheat Sheets and Capital Juries: In *State v. Tucker*, North Carolina's Attorney General and Supreme Court Contend with Evidence of Prosecutors' Efforts to Circumvent *Batson v. Kentucky*

IAN A. MANCE*

ABSTRACT

This Article considers ongoing litigation in State v. Tucker*, a case currently before the Supreme Court of North Carolina, involving prosecutors' use of peremptory challenges to secure an all-white jury in a capital trial involving a Black defendant. The argument proceeds in three parts. Part I contends that prosecutors' surreptitious use of a "cheat sheet" that recited "justifications" for peremptory challenges in Tucker's capital trial evidences their intent to discriminate against him and the Black members of the venire. Part II critiques the N.C. Attorney General's decision to defend the trial prosecutors' use of the document. Part II, Section A argues that his office's response to* Tucker *has exposed limitations of its commitment to addressing the issues identified by the N.C. Task Force on Racial Equity and Criminal Justice, which he co-chaired. Part II, Section B argues that ending racial discrimination in jury selection in North Carolina will require the Office of the Attorney General to demonstrate that there are limits to the conduct it will defend on appeal. Part III considers the arguments advanced by the Attorney General in response to the allegations raised in Tucker's petition. Part III, Section A discusses the growing recognition of exceptions to procedural bars that might otherwise prohibit courts from considering evidence of racial discrimination in jury selection. Part III, Section B argues that the equal protection doctrine does not permit prosecutors to employ devices designed to undermine the operation of*

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mechanisms imposed by courts to guard against racial discrimination. Part III, Section C discusses unique considerations regarding the adjudication of homicide cases involving Black defendants in North Carolina and argues that courts should closely scrutinize claims of racial discrimination in the jury selection process in such cases.

INTRODUCTION

The Supreme Court of North Carolina is expected to soon hear arguments in *State v. Tucker*, a capital case from Forsyth County that is likely to be one of the most consequential cases for racial justice to be heard this term. Russell William Tucker, a Black man, was convicted of murder by an all-white jury for a 1994 shooting at a Kmart in Winston-Salem and was sentenced to death.[1] Earlier this year, the court granted his petition for a writ of certiorari to consider arguments that prosecutors in his trial violated *Batson v. Kentucky*, the U.S. Supreme Court's landmark case on racial discrimination in jury selection, when they struck every Black member from his prospective jury.

Among other evidence, Tucker's lawyers have offered a Michigan State University study indicating that the State discriminated on the basis of race in selecting his jury. Buttressing their claim is a document discovered in prosecutors' files years after Tucker's trial, known colloquially as the "cheat sheet,"[2] which contains a prewritten list of what it describes as "*Batson* justifications." The justifications, or excuses, appear to have been designed for prosecutors to offer in the event defense counsel challenged a peremptory strike as racially based. The document recites purportedly race-neutral reasons for insulating strikes of Black jurors from defense challenges, including that jurors had poor "body language," were "monosyllabic," or gave off an "air of defiance."[3] In Tucker's case, the text of the document mirrors language and rationales offered by prosecutors in response to the defense's *Batson* objections during *voir dire* at his trial.[4]

Three and a half decades after *Batson*, North Carolina sits alone among its sister states in the Fourth Circuit, having never reversed a conviction on

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1. State v. Tucker, 490 S.E.2d 559, 560–61 (N.C. 1997); Michael Hewlett, *Death-Row Inmate Says Prosecutors Excluded Black Jurors in His Case, Two Others in Forsyth County*, WINSTON-SALEM J. (Feb. 25, 2020), https://journalnow.com/news/local/death-row-inmate-says-prosecutors-excluded-black-jurors-in-his-case-two-others-in-forsyth/article_8bf58f03-4981-5aa0-b13e-9c001a2a3f2a.html [https://perma.cc/6NNJ-HKLZ].

2. *See, e.g.*, State v. Augustine, 847 S.E.2d 729, 732 (N.C. 2020) (discussing "use of a prosecutorial 'cheat sheet' to respond to *Batson* objections"); Jacob Biba, *Did Prosecutors Use a 'Cheat Sheet' to Strike Black Jurors in North Carolina Death Penalty Case?*, THE APPEAL (Sept. 4, 2018), https://theappeal.org/did-prosecutors-use-a-cheat-sheet-to-strike-black-jurors-in-north-carolina-death-penalty-case/ [https://perma.cc/9ZMG-HFA5].

3. *Top Gun II*, Batson *Justifications: Articulating Juror Negatives*, https://www.ncids.org/wp-content/uploads/2021/05/BatsonJustification.pdf [https://perma.cc/UK38-TT8Z].

4. *See* Defendant-Appellant's Brief at 2–3, 16–19, 34–35, State v. Tucker, No. 113A96-4 (N.C. July 15, 2021), *cert. granted*, 856 S.E.2d 103 (N.C. 2021) (mem.) (comparing the document with the *voir dire* transcript).

the grounds that prosecutors engaged in race-based juror discrimination. While study after study has identified the issue as an enduring problem in the state, remedies for defendants impacted by the practice have remained elusive. The strong evidence of pretextual, race-based challenges in Russell Tucker's case at once offers the court an opportunity to breathe life into *Batson* in North Carolina and to rebuke the use of unethical practices in jury selection.

Factual similarities to other capital cases on appeal suggest the upcoming decision could have consequences beyond those to Russell Tucker. The prosecutors involved in Tucker's case have tried multiple capital cases in Forsyth County, and the document in question was distributed at a seminar attended by approximately two dozen of their colleagues. One judge who examined the cheat sheet issue in the context of the short-lived Racial Justice Act litigation concluded it had been used to circumvent *Batson* in the Cumberland County case of Tilmon Golphin.[5] Evidence suggests it was also used in the case of Robbie Lyons, a Black man convicted of murder and sentenced in Forsyth County by a jury from which prosecutors struck the majority of the prospective Black jurors.[6] Lyons was represented at trial by a real estate lawyer and was executed in 2003.

I. PROSECUTORS' USE OF A CHEAT SHEET DESIGNED TO CIRCUMVENT *BATSON V. KENTUCKY* CONSTITUTES EVIDENCE OF THEIR INTENT TO DISCRIMINATE AGAINST RUSSELL TUCKER AND THE BLACK PROSPECTIVE JURORS ON HIS PANEL

Recognizing that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice,"[7] the U.S. Supreme Court, in the landmark case *Batson v. Kentucky*, "sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system."[8] *Batson* held that a defendant who is a member of a cognizable racial group can establish a *prima facie* case of racial discrimination in his or her jury selection process by showing that a prosecutor exercised a peremptory challenge against a venire member of the defendant's race, and that facts and circumstances raise an inference that the prospective jurors were

5. State v. Golphin, No. 97 CRS 47314-15, at 73–77 (N.C. Super. Ct. Dec. 13, 2012) (order granting mots. for appropriate relief).

6. Defendant-Appellant's Brief, *supra* note 4, at 11; Hewlett, *Prosecutors Excluded Black Jurors*, *supra* note 1.

7. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

8. State v. Ramseur, 843 S.E.2d 106, 117 (N.C. 2020) (quoting Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019)).

"exclude[d] . . . from the petit jury on account of their race."[9] If the trial court finds that the defendant has made the requisite showing, the burden shifts to the prosecutor to "articulate a [race] neutral explanation related to the particular case to be tried," after which the trial court must "determine if the defendant has established purposeful discrimination."[10] Crucially, *Batson* obligates prosecutors to be *subjectively honest* about their reasons for striking prospective jurors.[11] When responding to a *Batson* challenge during *voir dire*, prosecutors are expected to give a truthful answer as to why they moved to strike a prospective juror.[12]

As Professor Pamela Karlan has explained, "the *Batson* rule is to a great extent hortatory in the same way that the ban on selective enforcement is: much of its effectiveness in the real world depends . . . on its internalization by the relevant actors."[13] In Russell Tucker's case, there is little mystery about what prosecutors thought of their responsibilities vis-à-vis *Batson*: the record indicates they recited prewritten excuses from the "*Batson* justifications" document to obscure their actual motivations.[14] The nature of what the document implies about their intentions, as well as the context in which it was used and the racial stereotypes it recalls, all amount to evidence that prosecutors acted consciously to deny Tucker his right to a constitutionally-drawn jury.

As Tucker's appellate attorneys at the Center for Death Penalty Litigation explained in their main brief to the court:

> The all-white jury that tried Mr. Tucker for his life in 1996 was selected by Forsyth County Assistant District Attorneys Rob Lang and David Spence, both white men. A few months before the trial, Lang attended a CLE for North Carolina prosecutors, where he was given a handout titled "*Batson* Justifications: Articulating Juror Negatives" . . . During jury selection, Mr. Tucker's prosecutors exercised peremptory strikes against all five of the

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9. *Batson*, 476 U.S. at 96.

10. *Id.* at 98.

11. *See* Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9, 36 (1997) (observing that the U.S. Supreme Court has "concentrated its determination of discriminatory intent on the prosecutor's subjective state of mind," and that "the ultimate question is one of subjective honesty, not objective sensibility").

12. *See* State v. Hobbs, 841 S.E.2d 492, 503 (N.C. 2020) (remanding for further consideration of prosecutor's motive for striking prospective juror where the "Court of Appeals . . . bas[ed] its conclusion on the fact that the reasons articulated by the State have, in other cases, been accepted as race-neutral").

13. Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2023 (1998).

14. *Cf.* State v. Robinson, 846 S.E.2d 711, 717 (N.C. 2020) ("The trial court noted that . . . 'North Carolina prosecutors received training in 1995 and 2011 about how to circumvent *Batson*.'").

> qualified Black venire members, leaving Mr. Tucker, who is Black, to be tried by an all-white jury. When confronted with repeated *Batson* objections, the prosecutors used [the] list of prefabricated, racially offensive reasons to defend these strikes. They gave other reasons that were either false or applied equally to white jurors they accepted. For example, Mr. Tucker's prosecutors struck one Black juror for "lacking a stake in the community" even though she lived, raised children, and worked in Forsyth County her entire life. They claimed they struck Black jurors for being unregistered to vote, but accepted numerous white jurors who were likewise not registered. They offered absurd reasons for striking Black jurors, for example, complaining that a Black juror was "monosyllabic" when answering mostly yes-or-no questions . . . . Finally, the prosecutors deliberately destroyed their copies of the jury questionnaires, and they admitted on the record that their aim was to prevent Mr. Tucker from ever knowing the content of their notes.[15]

Bryan Stevenson, Executive Director of the Equal Justice Initiative, explained in an affidavit affixed to Tucker's Motion for Appropriate Relief why he regards the cheat sheet as compelling evidence of an intent to discriminate:

> On its face, the *Batson* Justifications handout is not a document that is intended to help prosecutors pick a jury in a race-neutral way. The title says it all. Prosecutors must provide "*Batson* justifications" and "articulate juror negatives," not when making strike decisions, but only at *Batson*'s second step, once an objection has been lodged and typically, once the judge has found a *prima facie* case of discrimination. Thus, the document is a list of reasons to be used once an inference of discrimination has been raised to prevent the judge from making a finding of purposeful discrimination. This purpose is at odds with the proper function of *Batson*'s second step, which is for the prosecutor to provide her true subjective reasons for striking the juror. If a prosecutor chooses instead to give reasons suggested by the handout, this is the very definition of pretext and strong evidence that her unspoken, subjective reasons were impermissibly race-conscious.[16]

Others have observed that the document, although written to sound race-neutral, is steeped in racial stereotypes. In a separate affidavit offered in support of Russell Tucker, Dr. Ibram X. Kendi, a prominent historian on race in America, explained that the document echoes historic characterizations of Blacks as unintelligent, defiant or hostile, unwilling to make eye

15. Defendant-Appellant's Brief, *supra* note 4, at 8, 14–15.

16. Amend. to Mot. for Appropriate Relief Based on Newly Discovered Evid. & Second Amend. to Mot. for Appropriate Relief Pursuant to the Racial Justice Act at 17, ¶ 11, State v. Tucker, No. 94-CRS-40465 (N.C. Super. Ct. Forsyth Cnty. June 4, 2019) (Affidavit of Bryan Stevenson) [hereinafter Stevenson Affidavit].

contact, and physically unattractive.[17] Mr. Stevenson, too, has noted that "phrases like those in the North Carolina handout are rooted in historically derogatory labels applied to African Americans who did not show adequate deference to the prevailing racial order[,]" and that "[a]s such, these justifications are not truly race-neutral, in that they have a much different and more insidious meaning when applied to African Americans."[18]

When viewed in the context in which it was employed, the document amounts to evidence of racial discrimination in Tucker's jury selection process.[19] The transcripts from *voir dire* and the fact that the document was discovered in the prosecutors' case file indicate that the justifications offered to the trial court for striking the Black jurors were pretextual, something the U.S. Supreme Court has said "naturally gives rise to an inference of discriminatory intent."[20] This inference appears to be confirmed by statistics that indicate Forsyth County prosecutors, between 1990 and 2010, were more than twice as likely to strike eligible venirepersons if they were Black,[21] and that Tucker's prosecutor, David Spence, had a strike rate "disparity much higher than the state or county average."[22]

II. THE N.C. ATTORNEY GENERAL'S DEFENSE OF THE *BATSON* CHEAT SHEET COINCIDES WITH HIS LEADERSHIP ON A TASK FORCE THAT IDENTIFIED RACIAL DISCRIMINATION IN JURY SELECTION AS AN OBSTACLE TO RACIAL EQUITY IN THE STATE'S CRIMINAL JUSTICE SYSTEM

Russell Tucker asked the Supreme Court of North Carolina for review of his *Batson* claims in the fall of 2020. His petition coincided with a national reckoning on race and criminal justice, spurred by the murder of George Floyd by a police officer in Minneapolis, that brought 20 million people into the streets in the largest public demonstrations for racial justice

17. Amend. to Mot. for Appropriate Relief Based on Newly Discovered Evid. and Second Amend. to Mot. for Appropriate Relief Pursuant to the Racial Justice Act at 20–25, ¶¶ 6–22, State v. Tucker, No. 94-CRS-40465 (N.C. Super. Ct. Forsyth Cnty. June 4, 2019) (Affidavit of Ibram X. Kendi).

18. Stevenson Affidavit, *supra* note 16, at 18, ¶ 13.

19. *Cf.* Miller-El v. Dretke, 545 U.S. 231, 240–253 (2005) (concluding that prosecutors violated *Batson* where, *inter alia*, training materials advocated racially based strikes).

20. Snyder v. Louisiana, 552 U.S. 472, 485 (2008).

21. Defendant-Appellant's Brief at App. 215, 223 ¶ 31, State v. Tucker, No. 113A96-4 (N.C. July 15, 2021), *cert. granted*, 856 S.E.2d 103 (N.C. 2021) (Affidavit of Catherine Grosso and Barbara O'Brien) [hereinafter Grosso & O'Brien Affidavit].

22. Defendant-Appellant's Brief, *supra* note 4, at 12; *see* Grosso & O'Brien Affidavit, *supra* note 21, at App. 237, tbl.10.

in American history.[23] The protests, which gripped North Carolina's capital city of Raleigh for more than a month, prompted the state's Governor to convene a task force charged with addressing racial inequities in the state's criminal justice system.[24] Josh Stein, N.C.'s Democratic Attorney General, and Anita Earls, a former civil rights attorney and current Associate Justice on the state's Supreme Court, were named as its co-chairs.[25]

In December 2020, the task force issued its final report, identifying and making recommendations on a variety of issues, including eliminating racial disparities in the courts and promoting racial equity post-conviction. One of its key takeaways was that "the discretion that prosecutors have can be a powerful tool to promote a more equitable criminal justice system."[26] Many of the report's proposals centered on equity and fairness of process as a core prosecutorial value, as opposed to maximizing convictions.[27] Among other things, the task force identified race-based exclusion from jury service as a key obstacle to equity in the criminal system.[28] Enforcement of the prohibition against it remains elusive even today, the group wrote, because of "covert traditions and practices of discriminatory exclusion" by prosecutors.[29] The report argued for the "continued need to pursue representative juries in North Carolina," made recommendations to "strengthen the *Batson* standard" in the state, and cautioned that a failure to act risked degrading public trust in the criminal justice system.[30]

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23. Anna Nawaz & Saher Khan, *How This Year's Antiracism Protests Differ from Past Social Justice Movements*, PBS NEWS HOUR (Oct. 28, 2020), https://www.pbs.org/newshour/show/what-is-unprecedented-about-this-years-racial-justice-protests [https://perma.cc/N252-L4YS].

24. Danielle Battaglia, *Cooper Signs 3 Laws Focused on Police Accountability, but Says NC Needs to Go Further*, NEWS & OBSERVER (Sept. 3, 2021), https://www.newsobserver.com/news/politics-government/article253945323.html [https://perma.cc/K4ZJ-8264].

25. N.C. TASK FORCE FOR RACIAL EQUITY IN CRIM. JUST., REPORT 2020 1 (2020).

26. *Id.* at 97.

27. In this respect, the report embodied the oft-quoted maxim that a State's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935); *see also* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2001) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). Justice Sotomayor, herself a former prosecutor, recently expounded on this idea, writing that States' attorneys fall short of this responsibility and "do a grave disservice to the people in whose name they litigate, when they permit themselves to enjoy unfair trial advantages at defendants' expense." Kaur v. Maryland, No. 19-1045, slip op. at 5 (U.S. Oct. 5, 2020) (Sotomayor, J., statement respecting the denial of cert.).

28. N.C. TASK FORCE, *supra* note 25, at 100.

29. *Id.*

30. *Id.* at 100–01.

Perhaps most surprisingly, given the efforts of the Attorney General and his attorneys outside of the task force to defeat claims brought by death row prisoners under the now-repealed Racial Justice Act,[31] the report called for the legislature to reinstate the law.[32] Casting the matter in stark and moral terms, it characterized North Carolina's death penalty as racist and argued that the State "prioritizes executions for cases with white victims and relies on the sentencing verdicts of juries, many of which have been all-white, that violate constitutional rules regarding jury selection."[33]

A. The Attorney General's Response to the Grant of Certiorari in Tucker *Exposes Limitations of his Office's Commitment to Addressing the Issues Identified by the Racial Equity Task Force*

Five months after the report was issued, a grant of certiorari put one "covert practice of discriminatory exclusion" squarely before the state's supreme court: Forsyth prosecutors' use of the *Batson* cheat sheet during the *voir dire* that produced the all-white jury that sentenced Russell Tucker to death. The Office of the N.C. Attorney General, responsible for "defend[ing] all actions in the appellate division in which the State shall be interested," including "any cause or matter, civil or criminal, in which the State may be a party,"[34] soon made clear it intended to defend trial prosecutors' use of the document.

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31. *See, e.g.*, Bobby Allyn, *N.C. Supreme Court Hears Arguments on Racial Bias in Death Penalty Cases*, NPR (Aug. 26, 2019, 5:35 PM), https://www.npr.org/2019/08/26/754410571/n-c-supreme-court-hears-arguments-on-racial-bias-in-death-penalty-cases [https://perma.cc/2GH3-ZC8T] ("In legal filings to the state's high court, the North Carolina Attorney General's Office argued that a lower court acted appropriately when all of the claims under the Racial Justice Act were voided following the law's repeal."). The Racial Justice Act (RJA), passed by North Carolina's General Assembly in 2009 and repealed in 2013, allowed death row prisoners to be sentenced to life imprisonment if, *inter alia*, a court found evidence that race played a significant role in the jury selection process through the prosecution's use of peremptory strikes. Following the law's repeal, the Supreme Court of North Carolina held that retroactive application of the RJA repeal violated the prohibition on *ex post facto* laws and thus those who had filed claims when the RJA was on the books were entitled to pursue them despite its repeal. *See generally In Landmark Decision, North Carolina Supreme Court Strikes Down Retroactive Application of Racial Justice Act Repeal*, A.B.A. (July 23, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/north-carolina-strikes-retro-application-of-rja-repeal/ [https://perma.cc/P48H-FPVX].

32. N.C. TASK FORCE, *supra* note 25, at 110. Justice Anita Earls, who co-chaired the task force with Attorney General Stein, "took no part in the discussion or vote on this recommendation." *Id.* at 110 n.105.

33. *Id.* at 110.

34. N.C. GEN. STAT. ANN. § 114-2(1) (West 2021).

In legal filings, the office has aligned itself with the position of the N.C. Conference of District Attorneys, which maintains that defense lawyers have misrepresented the document as a cheat sheet meant to circumvent *Batson*.[35] While many of the arguments on paper have focused on persuading the court that consideration of the matter should be procedurally barred,[36] the office has also offered a substantive defense, asserting that, rather than "establishing any sort of intent to discriminate on the basis of race," the document simply "establishes that the prosecutors in Tucker's case were aware . . . that all peremptory challenges should appropriately be based on non-racial reasons."[37] Given what is known both about Tucker's trial prosecutors,[38] and the extent to which prosecutors in general have worked to distance themselves from the document,[39] this is difficult to credit as a good faith argument.[40] The Attorney General's decision to make it in a capital case involving a Black defendant and an all-white jury suggests real limitations to his office's professed commitment to racial justice.

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35. *See* Elizabeth Weill-Greenberg, *The Persistent History of Excluding Black Jurors in North Carolina*, THE APPEAL (Aug. 26, 2019), https://theappeal.org/north-carolina-black-jury-selection/ [https://perma.cc/BB77-G4SH].

36. *See generally* Part III, Section A, *infra*, for a discussion of procedural bars in cases involving racial discrimination.

37. Answer to Successive M.A.R. and State's Mot. for Summ. Denial at 13, *State v. Tucker*, No. 94 CRS 40465 (N.C. Super. Ct. Forsyth Cnty. May 25, 2018); Biba, *supra* note 2. Shortly before this article went to publication, the Office of the Attorney General filed its final brief in the case.

38. A study conducted by researchers at Michigan State University concluded that "on average, Forsyth prosecutors struck Black venire members at 2.25 times the rate of other prospective jurors and that across four Forsyth County capital trials, Mr. Tucker's trial prosecutor [David] Spence struck Black jurors with even greater disparity: 3.1 times the rate of whites." Defendant-Appellant's Brief, *supra* note 4, at 43; *see also* Hewlett, *supra* note 1 ("The N.C. Court of Appeals found that [Tucker's prosecutor David] Spence discriminated against potential black jurors [in a separate] case[.]").

39. One North Carolina court concluded that a prosecutor who testified that she had not attended the "Top Gun II" training, where the "*Batson* justifications" document was distributed, had in fact attended. The court described the prosecutor as "insolent" when questioned about her attendance. It also determined that the transcripts from her *voir dire* in a series of cases amounted to "very convincing evidence that [she] used the . . . handout when addressing the trial judge" in "a calculated—and largely successful—effort to circumvent *Batson*." State v. Golphin, No. 97 CRS 47314-15, at 73–77 (N.C. Super. Ct. Dec. 13, 2012) (order granting mots. for appropriate relief); *see also* discussion *infra* note 104.

40. *See* Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 617 (2015) ("[G]ood faith requires honesty in fact, which would presumably preclude someone from arguing that an action was intended to advance the goal of racial equality when it was actually intended to undermine that goal." (footnote omitted)).

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Given his recent stewardship of a report about the continued salience of race in jury selection,[41] it had seemed conceivable that North Carolina could join a growing list of jurisdictions where officials have stipulated to prosecutorial wrongdoing and the need for a new trial in cases in which a *Batson* violation was evident from the record.[42] In interviews, Stein described 2020 as "a critical moment," one where there was "widespread recognition that Black people and White people have not been treated the same by our criminal justice system."[43] The task force identified many inequities, he said, but also solutions, and as its co-chair, he bore a responsibility "to get these things put into operation."[44] So far, however, that has largely meant lending his support to the handful of legislative reforms identified by the task force that are capable of gaining majority support in North Carolina's conservative General Assembly,[45] a result that has left advocates underwhelmed.[46]

Stein's response to *Tucker* also suggests an unwillingness to retrospectively address issues identified in the report. *Tucker* is not the first time this term that the Attorney General's office has offered a substantive defense of

41. *See generally* N.C. TASK FORCE, *supra* note 25, at 100.

42. *See, e.g.*, People v. Morant, No. 4904/1995, slip op. at *1 (N.Y. Sup. Ct. Dec. 10, 2020) ("Over 20 years after defendants . . . were convicted in separate trials, the same jury discrimination 'cheat sheet' . . . was discovered in the People's files for both cases . . . . As a result of these disturbing revelations, the People, represented by the Conviction Integrity Unit . . . , and the defense jointly move[d] to vacate both defendants' judgments of conviction."); State's Stipulations in Response to Defendant's Presentation of Evidence of Discrimination in Jury Selection on Remand from the Louisiana Supreme Court at 2, State v. Williams, No. 508-604 E (La. Crim. Dist. Ct. June 15, 2017) (stipulating that "the Defendant is entitled to a new trial due to the State's use of peremptory strikes against African-American prospective jurors" and highlighting the District Attorney's Office recognition of "the need to redress instances of racial discrimination in the criminal legal system," including the necessity of "correct[ing] past harms and injustices the office has caused").

43. Jonathan Limehouse, *Can Racial Bias Be Rooted Out of the State's Criminal Justice System? A Conversation with N.C. Attorney General Josh Stein*, QCITYMETRO (Jan. 26, 2021), https://qcitymetro.com/2021/01/26/a-conversation-with-n-c-attorney-general-josh-stein-about-racial-bias-in-courts-and-law-enforcement/ [https://perma.cc/34G5-4WWY].

44. *Id.*

45. *See* Press Release, Roy Cooper, Governor of North Carolina, Governor Cooper Signs Criminal Justice Reform Bills Into Law (Sept. 2, 2021), https://governor.nc.gov/news/press-releases/20210/09/02/governor-cooper-signscriminal-justice-reform-bills-law [https://perma.cc/FFX6-TAY7].

46. *See, e.g.*, Travis Fain, *Governor Signs Police Reforms Into Law*, WRAL (Sept. 2, 2021, 4:38 PM) https://www.wral.com/governor-signs-police-reforms-into-law/19855489/ [https://perma.cc/P4C7-4PS6] ("Dawn Blagrove, head of Emancipate NC, called the bill 'a very, very small step,' and she credited activists and protestors for creating a political climate that made it clear politicians couldn't ignore these issues.").

a practice that the task force criticized as racially discriminatory.[47] Activists have continued to press him to support remedies for those convicted in trials tainted by racial discrimination,[48] noting he has shown a willingness to act boldly on a variety of environmental, consumer, and health issues.[49] Their efforts have thus far been largely unavailing, although a curious September 2021 filing in *State v. White*, a non-capital homicide case of some notoriety, may provide some indication that the office is listening.[50]

47. In a series of cases argued on November 10, 2021, the Office asked the court to overturn an opinion from the N.C. Court of Appeals that held unconstitutional the imposition of *de facto* life without parole sentences for juveniles who courts have determined to be redeemable. *See generally* State v. Kelliher, 854 S.E.2d 586 (N.C. 2021) (order granting discretionary review); State v. Anderson, 853 S.E.2d 445 (N.C. 2021) (order granting writ of supersedeas); State v. Conner, 853 S.E.2d 824 (N.C. Ct. App. Dec. 31, 2020), *notice of appeal filed*, No. 64A21 (N.C. Feb. 4, 2021). The task force characterized such sentences as "concentrated in a small number of North Carolina counties and . . . plagued by racial disparities." N.C. TASK FORCE, *supra* note 25, at 80.

48. *See, e.g.*, Virginia Bridges, *"Make Your Deeds Match Your Words," Racial Justice Group Tells N.C. Attorney General Stein*, NEWS & OBSERVER (Mar. 31, 2021), https://www.newsobserver.com/news/local/crime/article250307119.html.

49. Elaine S. Povich, *When a State Attorney General Takes On a National Fight, What's He Gunning For?*, PEW CHARITABLE TRUSTS: STATELINE (Nov. 11, 2019), https://www.pewtrusts.org/nb/research-and-analysis/blogs/stateline/2019/11/11when-a-state-attorney-general-takes-on-a-national-fight-whats-he-gunning-for [https://perma.cc/ZJP7-NJHV] (highlighting that national publications have noted Stein's willingness to speak out on issues on which others have demurred and described him as "emblematic of a new kind of state attorney general," one "whose activism stands out, even among his peers").

50. In *State v. White*, the N.C. Court of Appeals determined that while it was "apparent that race was a predominant factor in [the prosecutor's] decision to strike [two people] from the venire," the defendant was not entitled to relief, because the "[d]efense counsel's failure to raise the issue of pretext . . . stymied [the] inquiry, and . . . left . . . the narrow question of whether the trial court was patently wrong[.]" State v. White, 509 S.E.2d 462, 466 (N.C. Ct. App. 1998). The court concluded it was not and that, on appeal, it was "bound by the tremendous deference accorded the trial court's determination regarding racial neutrality and purposeful discrimination." *Id.* at 467. In a September 2021 brief to the court, filed in response to a petition for writ of certiorari from White, the Attorney General's office conceded his "petition should be granted for the limited purpose of remanding the case to the Superior Court, Forsyth County for an evidentiary hearing on the merits of Petitioner's *Batson* argument." State's Response to Petition for Writ of Cert. at 6, State v. White, No. P21-244 (N.C. App. Sept. 13, 2021). The office further wrote that, "[a]lthough the trial court correctly found that the procedural bars N.C. Gen. Stat. § 15A-1419(a)(1) and (a)(2) applied, the State concludes that under the unique factual and procedural circumstances presented, application of the bar in this specific case would result in a fundamental miscarriage of justice." *Id.* It noted the State had "considered its position carefully, and [did] not lightly request remand for a new hearing of an otherwise procedurally barred MAR claim." *Id.* at 11.

B. Ending Racial Discrimination in Jury Selection in North Carolina Will Require the Office of the Attorney General to Demonstrate That There Are Limits to the Conduct It Will Defend on Appeal

When asked about the seeming inconsistency between criticizing prosecutorial practices in the report and then later asking courts to excuse those practices on appeal, Stein said that his "statutory duty is to defend the State."[51] However, the public record suggests this duty to defend is much more apt to be invoked in the context of criminal cases. The Attorney General pointedly refused to pursue appeals in defense of voting laws and general statutes that he regarded as discriminatory.[52] Although he has leveled strong critiques against "the grotesque racial disparities that manifest in so many ways in our criminal justice system,"[53] a survey of attorneys handling criminal appeals throughout his first term did not uncover any examples of his office stipulating to prosecutorial wrongdoing, or the appropriateness of judicial review, in a case that raised a claim of racial discrimination.[54]

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51. *Tested: Racial Injustice and Law Enforcement*, WUNC N.C. PUB. RADIO (Apr. 20, 2021), https://www.wunc.org/podcast/tested-podcast/2021-04-20/racial-injustice-and-law-enforcement-attorney-general-josh-stein-dawn-blagrove [https://perma.cc/F4L3-JJH5].

52. The Attorney General regarded North Carolina's infamous, omnibus voter law as racially discriminatory and declined to pursue an appeal that could have resurrected it. *See generally* Michael Hewlett, *Voter ID Case: Gov. Cooper, Attorney General Stein Withdrawing from Appeal to U.S. Supreme Court*, WINSTON-SALEM J. (Feb. 21, 2017), https://journalnow.com/news/local/voter-id-case-gov-cooper-attorney-general-stein-withdrawing-from-appeal-to-u-s-supreme/article_278cd95a-db59-544f-b4b6-d362991ff8ea.html [https://perma.cc/ES6W-UA5F]. In 2021, the General Assembly relieved him as counsel on a separate voting rights case because of his refusal to appeal an order striking down disenfranchisement laws that were held to be racially discriminatory. *See generally* Gary D. Robertson, *GOP Lawmakers Hire Private Lawyer for Voting Rights Suit*, ASSOCIATED PRESS (Aug. 24, 2021), https://apnews.com/article/voting-voting-rights-ace6e2a80d1742b0ba534e4c218a4276 [https://perma.cc/2KZ5-EZJH]. He similarly refused to defend a statutory prohibition on same-sex domestic violence protection orders that he considered to be unconstitutional. *Tested: Racial Injustice and Law Enforcement*, *supra* note 51. These decisions invited considerable attention and scorn from the legislators who passed the laws. They also implicated the majority of North Carolina's General Assembly in acts of discrimination, something the Attorney General's criminal division has seemed reticent to do when the ethics of District Attorneys have been called into question.

53. N.C. TASK FORCE, *supra* note 25, at 1.

54. *See* Emancipate N.C., *Open Letter to Josh Stein* (Mar. 30, 2021), https://emancipatenc.org/open-letter-to-josh-stein/ [https://perma.cc/HHZ8-Y4H9] ("An informal survey of North Carolina attorneys who do criminal appeals did not uncover any examples during Stein's tenure of his criminal division supporting the dismissal of charges on account of police or prosecutorial misconduct, although it did identify a few cases where the office felt judges or defense attorneys had dropped the ball in a way that might warrant relief."). The recent filing in *State v. White*, discussed *supra* note 50, stipulated to the need for an

These stipulations can be necessary for courts to even have the opportunity to review unpreserved issues.[55]

In *Tucker*, Stein's decision to defend the actions of the trial prosecutors stands in contrast to decisions of officials elsewhere who have stipulated to the existence of wrongdoing and the necessity of a new trial when prosecutors clearly relied on unethical practices to circumvent *Batson*.[56] It also comes at a time when a number of states are taking action to address the kind of dishonest practices in jury selection at issue in Tucker's case.[57] Among them is California, where a survey of materials used to train prosecutors recently determined that many had been taught tactics designed to make the courts' task of identifying racial discrimination in jury selection more difficult.[58] In response, the California legislature passed, and the Governor signed, a series of reforms aimed at limiting the reach of discrimination in the use of peremptory challenges.[59] During floor debate, the bill's sponsors introduced studies on the racialized use of peremptory challenges on capital juries in North Carolina to buttress support for the measure.[60]

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evidentiary hearing on *Batson* issues, but not to prosecutorial wrongdoing. The defendant in *White* was prosecuted by David Spence, who also prosecuted Russell Tucker.

55. *Cf.* State v. Ricks, 862 S.E.2d 835, at ¶ 9 (N.C. 2021) (reversing Court of Appeals' decision to vacate trial court's orders imposing satellite-based monitoring, concluding appellate court "abused its discretion when it allowed defendant's petition for writ of certiorari and invoked Rule 2 to reach the merits of defendant's unpreserved challenge," distinguishing the case upon which the lower court had relied as "rest[ing] heavily upon the State's concession that the trial court committed error," and finding it notable that "[t]he State in the present case . . . has made no such concession").

56. *See, e.g.*, cases discussed, *supra* note 42.

57. *See, e.g.*, WASH. CT. GEN. R. 37 (2018) (codifying a judicially imposed rule by the Washington Supreme Court that the party exercising a peremptory challenge must articulate the reasons for the challenge, and "[i]f the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied" and "[t]he court need not find purposeful discrimination to deny the peremptory challenge"); Brenna Goth, *Arizona Bans Use of Peremptory Strikes in State Jury Trials*, BLOOMBERG L. (Aug. 30, 2021, 7:01 PM), https://news.bloomberglaw.com/us-law-week/arizona-bans-use-of-peremptory-strikes-in-state-jury-trials [https://perma.cc/DC34-ZL6D] ("'Eliminating peremptory strikes of jurors will reduce the opportunity for misuse of the jury selection process and will improve jury participation and fairness,' Chief Justice Robert Brutinel said in a statement.").

58. ELISABETH SEMEL ET AL., BERKELEY LAW DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS 49 (June 2020).

59. *See* CAL. CIV. PROC. CODE § 231.7 (West 2021) (enumerating presumptively invalid reasons for exercising a challenge and establishing that a court need not find purposeful discrimination to sustain an objection).

60. *See* Assemb. B. Analysis, AB-3070, at 3 (Cal. 2020).

Despite the existence of such evidence and the attention that has been brought to its disappointing *Batson* record,[61] the type of legislative reform that garnered support in California seems unlikely to occur in North Carolina, where officials who repealed the state's Racial Justice Act continue to control the General Assembly. In the courts, remands for an evidentiary hearing generally remain the high-water mark for success.[62] Many places have struggled with fidelity to *Batson*, but perhaps none have done a worse job than the Tar Heel state.[63] Thirty-four years removed from the decision, the Supreme Court of North Carolina observed that it had still "*never* held that a prosecutor intentionally discriminated against a juror of color."[64] The state has one of the higher percentages of Black residents in the country, but nearly half of the 135 people on its death row were put there by all-white juries or juries that included just one person of color.[65]

The failure of the courts to provide a remedy, even in instances in which racial discrimination has been obvious from the record,[66] has helped cultivate a climate in North Carolina where something as dubious as a cheat sheet can be defended as fair play by its highest law enforcement official. Because of this, prosecutorial practices of jury discrimination will likely endure even if the court grants Russell Tucker a new trial. A reversal of his conviction on *Batson* grounds would be legally significant, but just as necessary is a change of culture among prosecutors, too many of whom see a strategic advantage in the exercise of race-based challenges.[67] The Conference of District Attorneys, a powerful and nebulous body created to

61. *See, e.g.*, Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957 (2016).

62. *See* State v. Bennett, 843 S.E.2d 222 (N.C. 2020); State v. Hobbs, 841 S.E.2d 492 (N.C. 2020).

63. *See, e.g.*, Emily Coward, *What Does It Take to Succeed on a* Batson *Claim in North Carolina?*, N.C. CRIM. L. (Feb. 18, 2020, 3:30 PM), https://nccriminallaw.sog.unc.edu/what-does-it-take-to-succeed-on-a-batson-claim-in-north-carolina/ [https://perma.cc/M3HT-9C5W] (noting that "Alabama courts have reversed approximately 80 convictions on *Batson* grounds" since the case was decided in 1986).

64. State v. Robinson, 846 S.E.2d 711, 716 (N.C. 2020).

65. Henderson Hill, *Racist Roots: Origins of North Carolina's Death Penalty*, N.C. POL'Y WATCH (Oct. 5, 2020), http://www.ncpolicywatch.com/2020/10/05/racist-roots-origins-of-north-carolinas-death-penalty/ [https://perma.cc/K2T9-NTLN].

66. *See, e.g.*, State v. White, 509 S.E.2d 462, 465–66 (N.C. Ct. App. 1998) and discussion *supra*, note 50.

67. For a discussion of how North Carolina's demographics function to incentivize the exercise of race-based challenges and caution in favor of close judicial scrutiny in homicide cases involving Black defendants, *see generally infra*, Part III, Section C.

coordinate the interests of prosecutors,[68] has signaled this change is unlikely to come from them.[69]

As the official charged with representing the State in criminal appeals, it is the Attorney General who ultimately bears the responsibility of demonstrating that there are limits to the conduct his office will defend. His office can put the state on a different path, but it will require more than issuing reports and lending his endorsement to bills supported by conservative lawmakers. In some cases, it will require stipulating to the need for post-conviction relief. As one superior court judge noted, racial discrimination in North Carolina's jury selection process remains "a significant problem that will not be corrected without a conscious and overt commitment to change."[70]

III. THE COURT SHOULD CONFRONT TRIAL PROSECUTORS' USE OF A DEVICE DESIGNED TO CIRCUMVENT *BATSON* AND HOLD THAT IT VIOLATES EQUAL PROTECTION

In recent terms, the Supreme Court of North Carolina has acknowledged the state's dismal *Batson* record and remanded several cases for additional evidentiary hearings. In these cases, the court has expounded on the *Batson* standard more than it has in the past and indicated that it is error for trial courts to effectively fail to show their work.[71] The court has emphasized that a *prima facie* showing of racial discrimination, at the initial stage, "is not intended to be a high hurdle."[72] These developments could

68. N.C. GEN. STAT. ANN. § 7A-411 (West 2021).

69. Weill-Greenberg, *supra* note 35 ("When asked if she thought there was an issue of Black people being unfairly excluded from juries in North Carolina, [the organization's director] replied, 'No, I don't.' 'We teach the law and we teach appropriate application of the law,' she said. 'We always have.'").

70. *Race and the Jury: Illegal Racial Discrimination in Jury Selection,* EQUAL JUSTICE INITIATIVE (2021), https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf [https://perma.cc/XG27-27WW] (quoting Order Granting Mot. for Appropriate Relief at 115, ¶ 236, State v. Robinson, No. 91 CRS 23143 (N.C. Super. Ct. Cumberland Cnty. Apr. 20, 2012)).

71. *See, e.g.*, State v. Hobbs, 841 S.E.2d 492, 502–04 (N.C. 2020) (remanding case to trial court for a *Batson* hearing and instructing it "to make findings of fact and conclusions of law," where "trial court did not explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges, including the historical evidence . . . brought to [its] attention," and rejecting argument from dissenting Justice that the holding amounted to "a new legal standard").

72. State v. Bennett, 843 S.E.2d 222, 234 (N.C. 2020); *see also id.* at 235–36 (holding that a "careful review of the numerical disparity between the relative acceptance rates for African American and white prospective jurors, coupled with other inferences that can be

indicate that the court is moving closer towards the day when it is no longer the only southern high court to have never reversed a conviction for jury discrimination. In *Tucker*, the Office of the Attorney General, perhaps sensing the court's newfound openness to scrutinizing the actions of trial prosecutors during *voir dire*, has devoted much of its attention to arguing that consideration of the "*Batson* Justifications" document is procedurally barred.[73]

Arguments that defendants are procedurally barred from raising claims are a regular feature of the state's criminal appellate docket. In another recent capital case, *State v. Allen*, the court rejected the Attorney General's reading of the procedural bar rule, calling it "extra-textual," and stating that, if adopted, it "would . . . effectively prevent post-conviction review of *all* claims" that were not preserved at trial.[74] Russell Tucker's contention that his claims are not barred is supported by a growing body of law, discussed below, that recognizes an exception to traditional bars for claims involving racial discrimination and criminal juries. If the court rejects the State's argument about the purported procedural bar, fidelity to *Batson* and the equal protection doctrine, coupled with the scrutiny and enhanced procedural protections owed to capital defendants,[75] should lead it to conclude that Tucker is entitled to relief.

A. A Growing Body of Law Supports the Conclusion That Courts Should Not Be Deemed Procedurally Barred from Considering Evidence of Racial Discrimination in the Jury Selection Process

As a matter of public policy and institutional integrity, courts are increasingly resisting the invocation of procedural bars in cases that raise credible evidence of state-based racial discrimination. This may reflect a recognition that, historically, such bars have too often been employed to avoid addressing issues of critical importance to racial justice, including discrimination in jury selection.[76] The U.S. Supreme Court recently

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derived from the record," leads to conclusion that defendant made a *prima facie* showing of racial discrimination).

73. *See, e.g.*, Brief for the State (Appellee) at 39, State v. Tucker, No. 113A96-4 (N.C. Sept. 16, 2021), *cert. granted*, 856 S.E.2d 103 (N.C. 2021) (mem.).

74. State v. Allen, No. 115A04-3, slip op. at ¶ 60 (N.C. Aug. 13, 2021) (emphasis added).

75. *See generally* Williams v. Lynaugh, 484 U.S. 935, 939 (1987) (Marshall, J., dissenting from denial of cert.) (citing Eddings v. Oklahoma, 455 U.S. 104, 117–18 (1982) (O'Connor, J., concurring); Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring)).

76. *See, e.g.*, Carrie Leonetti, *Smoking Guns: The Supreme Court's Willingness to Lower Procedural Barriers to Merits Review in Cases Involving Egregious Racial Bias in the Criminal Justice System*, 101 MARQ. L. REV. 205, 210–11 (2017) (discussing the Court's

concluded that the necessity of addressing claims involving racial bias and criminal juries outweighed the import of procedural rules that would have otherwise barred their consideration.[77] As its decision in *Pena-Rodriguez v. Colorado* noted, many state appellate courts have also adopted race exceptions to rules that would otherwise bar consideration of such issues on the merits.[78] *Pena-Rodriguez* created a racial bias exception to the no-impeachment rule,[79] which had previously been regarded as unassailable and of much greater public policy import[80] than the procedural bars the State has asserted against Russell Tucker.[81] North Carolina's appellate courts also recently held, and the Attorney General has previously stipulated, that a *judge*'s "interjection of race . . . [into] the jury selection process" presents "one of the narrow circumstances in which it is appropriate . . . to invoke

past "use of 'analytic and regulatory techniques' to segregate racial-bias challenges to criminal procedure from the rest of its equal protection jurisprudence" (quoting Karlan, *supra* note 13, at 2002)); *cf.* Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1311–14 (1991).

77. *E.g.*, Pena-Rodriguez v. Colorado, 580 U.S. 1, 21 (2017); Buck v. Davis, 137 S. Ct. 759, 780 (2017); Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016); *see generally* Leonetti, *supra* note 76.

78. *Pena-Rodriguez*, 580 U.S. at 9. Examples include State v. Brown, 62 A.3d 1099, 1110 (R.I. 2013); Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 87–90 (Mo. 2010) (en banc); State v. Hidanovic, 747 N.W.2d 463, 472–74 (N.D. 2008); State v. Santiago, 715 A.2d 1, 14–22 (Conn. 1998); Fisher v. State, 690 A.2d 917, 919–21 (Del. 1996); State v. Jackson, 912 P.2d 71, 80–81 (Haw. 1996); State v. Hunter, 463 S.E.2d 314, 316 (S.C. 1995); Powell v. Allstate Ins. Co., 652 So.2d 354, 357–58 (Fla. 1995); Commonwealth v. Laguer, 571 N.E.2d 371, 376 (Mass. 1991); Spencer v. State, 398 S.E.2d 179, 184–85 (Ga. 1990); People v. Rukaj, 506 N.Y.S.2d 677, 679–80 (1986); State v. Callender, 297 N.W.2d 744, 746 (Minn. 1980); Seattle v. Jackson, 425 P.2d 385, 389 (Wash. 1967); State v. Levitt, 176 A.2d 465, 467–68 (N.J. 1961).

79. The no-impeachment rule, which the Court recognized as "centuries old," is designed "to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations." *Pena-Rodriguez*, 580 U.S. at 2.

80. *See, e.g.*, Cummings v. Ortega, 716 S.E.2d 235, 239 (N.C. 2011) (discussing the "[p]olicy considerations [that] were critical to the [U.S. Supreme] Court's decision in *Tanner v. United States*, 483 U.S. 107 (1987)]," in which the Court rejected the admissibility of evidence that jurors consumed cocaine and alcohol during the trial to impeach their verdict).

81. The statute the State has invoked against Tucker recognizes a number of exceptions to the procedural bar. *See* N.C. GEN. STAT. ANN. § 15A-1419(b)(1)–(2) (West 2021) (providing that a defendant may overcome a procedural bar by showing either (1) "good cause" and "actual prejudice" or (2) that procedurally barring the claim would result in a "fundamental miscarriage of justice").

Rule 2,"[82] a device that permits the suspension of the rules of appellate procedure "[t]o prevent manifest injustice to a party."[83]

Pena-Rodriguez was one in a series of recent cases in which the U.S. Supreme Court has granted relief to criminal defendants on account of the pernicious influence of race in the criminal process and in spite of procedural and jurisdictional obstacles. In *Buck v. Davis*, the Court found that a capital defendant made the rare showing of "extraordinary circumstances" that warranted reopening his judgment under Rule 60(b)(6), and reversed a lower court's ruling that references to the defendant's race "during the penalty phase w[ere] '*de minimis*'" in light of "the crime's brutal nature and [his] lack of remorse."[84] The Court reasoned the prejudice to the defendant "was exacerbated because it concerned race," which it said "'poison[ed] public confidence' in the judicial process" that produced the sentence.[85] In *Foster v. Chatman*, the Court "overlook[ed] a possible jurisdictional barrier to reaching the merits of [a] racial discrimination claim" before reversing a Georgia court's holding that prosecutors did not violate *Batson* during a defendant's capital jury selection process.[86]

These cases have come as welcome developments to those concerned about the continued influence of racial bias in the criminal process. Each implicitly recognizes that the promise of equal justice rings hollow when courts are presented with evidence of racial discrimination against a criminal defendant, and an opportunity to address it, but they fail to take remedial action because of a procedural issue. Moreover, the decisions reflect the operation of a new "constitutional rule that racial bias in the justice system must be addressed . . . to prevent a systemic loss of confidence in jury verdicts[.]"[87] This rule recognizes that jury service represents most people's closest connection to the criminal process,[88] that it informs their understanding of it, and that the failure of courts to intervene when racial discrimination infects the proceedings risks undermining the legitimacy of the court as an institution.

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82. State v. Campbell, slip op. at ¶¶ 7, 10 (N.C. Ct. App. Oct. 19, 2021) (second quotation quoting State's brief).

83. N.C. R. App. P. 2 (2021).

84. Buck v. Davis, 137 S. Ct. 759, 766–69 (2017).

85. *Id.* at 778 (quoting Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015)).

86. Leonetti, *supra* note 76, at 216 (discussing Foster v. Chatman, 136 S. Ct. 1737, 1745–47 (2016)).

87. State v. Crump, 851 S.E.2d 904, 910–11 (N.C. 2020) (quoting Pena-Rodriguez v. Colorado, 580 U.S. 1, 3 (2017)).

88. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 407 (1991) ("[F]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

Applying these principles to the facts of *Tucker* suggests the court should not permit a procedural bar—if one exists at all[89]—to keep it from addressing the issue of the *Batson* cheat sheet. That trial prosecutors were intent on securing a death-qualified, all-white jury seems clear, and it undermines the ability to have confidence in both the jury's impartiality and the process that produced Tucker's death sentence.[90] The possibility that prosecutors succeeded in keeping Black people off of his jury because of deception directed towards the trial court itself is all the more reason for the Supreme Court to reach the issue.[91]

Commentators have written that "[r]eviving the promise of *Batson* in North Carolina . . . is a critical component of the appellate courts' role in safeguarding the integrity of the criminal justice system,"[92] noting they have reviewed more than one hundred cases raising claims of jury discrimination under the *Batson* standard without once reversing a conviction.[93] There are some indications the court is aware of this criticism,[94] and that it knows its continued failure to act when presented with evidence of race-based challenges to jury service risks undermining public confidence[95] in the system and casting doubt on its own commitment "to adhere to the law."[96]

89. *See* N.C. GEN. STAT. ANN. § 15A-1419(b)(1)–(2) (West 2021) (detailing exceptions to the procedural bar); *see also* State v. Burke, 843 S.E.2d 246, 248–49 (N.C. 2020) (concluding that "trial court erred in ruling that [a capital] defendant's claims . . . were procedurally barred" because the "amended [Racial Justice Act], enacted in 2012, can only be applied to defendant insofar as it affects the procedural aspects of the adjudication of his claims").

90. *See* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 134 (1994) (stating that the imperative of maintaining the "diverse and representative character of the jury" serves, among other things, the critical purpose of providing "'assurance of [the jury's] diffused impartiality'") (quoting Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975)).

91. *Cf.* Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 397 (2019) ("At a time when the Black Lives Matter movement has raised increasing concerns about the fairness of law enforcement and criminal justice decision making, courts should not tolerate practices that compound distrust and undermine the legitimacy of legal processes.").

92. James E. Coleman, Jr., *The Persistence of Discrimination in Jury Selection: Lessons from North Carolina and Beyond*, THE CHAMPION (June 2018), https://www.nacdl.org/Article/June2018-ThePersistenceofDiscrimination [https://perma.cc/D32G-PR4T].

93. Coward, *supra* note 63.

94. *See generally* State v. Bennett, 843 S.E.2d 222 (N.C. 2020); State v. Hobbs, 841 S.E.2d 492 (N.C. 2020) (discussed *infra*, Part III, Section B).

95. Georgia v. McCollum, 505 U.S. 42, 49 (1992).

96. Powers v. Ohio, 499 U.S. 400, 412 (1991).

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B. The Equal Protection Doctrine Does Not Permit Prosecutors to Employ Devices Designed to Undermine the Operation of Mechanisms Imposed by Courts to Guard Against Racial Discrimination

If it does reach the issue, the court should find that prosecutors do not need the assistance of written aids to communicate with a court about their own subjective motivations for a decision they made moments before. It defies common sense to believe the cheat sheet was created to aid prosecutors in effecting the promise of *Batson*, when the obvious explanation is that it was created to undermine that promise.[97] As a matter of institutional integrity, the court should reject the State's characterization of the document as some kind of benign written reminder to prosecutors "that all peremptory challenges should appropriately be based on non-racial reasons."[98] Accepting such a specious explanation would send "a message . . . that the exclusion of minority jurors is generally not going to be taken very seriously or scrutinized very carefully."[99]

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97. *See, e.g.*, Br. of Joseph DiGenova et al. as Amici Curiae Supp. Pet'r at 8, Foster v. Chatman, 136 S. Ct. 1737 (2016) (No. 14-8349) (stating that N.C. Conference of D.A.s' 1995 "Top Gun II" course, where the cheat sheet was distributed, "train[ed] . . . prosecutors to deceive judges as to their true motivations"). The State advanced a similarly dubious argument in Mr. Tucker's case when it asserted that "the reference to [people who like] 'rap music' . . . in a short list which appears to be an outline of characteristics the prosecution was seeking to avoid" in jurors somehow "refutes an allegation that indicates a motivation to racially discriminate." Answer to Successive M.A.R. & State's Mot. for Summ. Denial at 14, State v. Tucker, No. 94 CRS 40465 (N.C. Super. Ct. Forsyth Cnty. May 25, 2018); *see also* Brief for the State (Appellee) at 46–47, State v. Tucker, No. 113A96-4 (N.C. Sept. 16, 2021), *cert. granted*, 856 S.E.2d 103 (N.C. 2021) (mem.). The facts of the case have nothing to do with rap music, suggesting that prosecutors may have intended to ask questions about rap music as a proxy for either assessing prospective jurors' attitudes about Black people, to prime jurors' minds with stereotypical imagery of Black people, or both. *See* Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 631–32 (2009) (discussing the "implicit association between the death penalty and race that becomes activated during the supposedly race-neutral death qualification process," as well as studies that show rap music can operate as a "racial stereotype prime[r]" and that "activating racial stereotypes at trial will likely affect juror decision making"); *see generally* Christine Reyna et al., *Blame it on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice*, 12 GROUP PROCESSES & INTERGROUP RELATIONS 361 (2009).

98. Answer to Successive M.A.R. and State's Mot. For Summ. Denial at 13, State v. Tucker, No. 94 CRS 40465 (N.C. Super. Ct. Forsyth Cnty. May 25, 2018).

99. Karlan, *supra* note 13, at 2023; *see also* Jackson v. Commonwealth, 380 S.E.2d 1, 6 (Va. Ct. App. 1989) ("Rubber stamp approval of all nonracial explanations will not satisfy the command of *Batson*. . . . If this were sufficient, the *Batson* inquiry would amount to little more than a charade."); Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 318 (2007) ("Toleration of intentional misconduct is inconsistent with *Batson*'s basic premises.").

Until a pair of recent opinions, *State v. Bennett* and *State v. Hobbs*,[100] this was the general lesson most people took from the case law in North Carolina. In contrast to the other southern states, each of whose appellate courts have long made some effort to police the issue, North Carolina's highest court "has *never* held that a prosecutor intentionally discriminated against a juror of color."[101] Remands in *Bennett* and *Hobbs* signaled the court's attentiveness to the inadequacy of *Batson* enforcement in North Carolina, but prior to those decisions, there was little a trial attorney could direct a judge to as evidence that appellate courts would apply scrutiny to a suspicious juror challenge.

In capital cases, the consequences for many defendants were dramatic, as exemplified by the facts in *Tucker*. For at least twenty years, and likely many more, state prosecutors in capital trials "struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black"—a disparity that endured well into the 2000s and after the passage of the now-repealed Racial Justice Act.[102] While the Supreme Court has since begun to grapple with "*Batson*'s ineffectiveness in this state,"[103] the North Carolina Conference of District Attorneys has not. Its position continues to be that "Black people being unfairly excluded from juries in North Carolina" is not a problem and that it has never encouraged prosecutors to circumvent *Batson*.[104]

Even in those jurisdictions where *Batson* has been given real effect, large scale surveys of its application demonstrate "that in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race."[105] In other words, *Batson*

100. State v. Bennett, 843 S.E.2d 222 (N.C. 2020); State v. Hobbs, 841 S.E.2d 492 (N.C. 2020).

101. State v. Robinson, 846 S.E.2d 711, 716 (N.C. 2020); *see also* Pollitt & Warren, *supra* note 61.

102. 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, 1533–34 (2012).

103. *Robinson*, 846 S.E.2d at 716.

104. *See* Weill-Greenberg, *supra* note 35.

105. Michael J. Raphael & Edward Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J. L. REFORM 229, 236 (1993); *see also* Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 213 (2003) ("[N]otwithstanding its necessity and propriety, the Court's ban on the discriminatory use of peremptory challenges has, in practice, been decidedly ineffective in achieving its original goals"); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 459 (1996) ("The number of prosecutors who have been determined to

is already a somewhat poor match for remedying the discrimination that actually occurs.[106] The case stands no chance of doing the work it was intended to do if prosecutors understand there will be no penalty for circumventing the process it prescribes.[107]

In Tucker's case, this act of circumvention—reading from the cheat sheet when asked for a non-racial explanation for the exercise of peremptory challenges[108]—distorted the court's ability to identify the discrimination that was occurring.[109] Cases like *People v. Morant* and, more famously, *Miller-El v. Dretke*, have considered—and held unlawful—prosecutors' surreptitious reliance on materials during *voir dire* that emphasized race as a reason for the exercise of peremptory strikes.[110] However, no appellate courts appear to have considered materials quite like the document at issue in North Carolina. One of the only trial courts to have done so referred to it as a "cheat sheet" and said it, along with the corresponding pattern of

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have acted in violation of the law as set down in *Batson* is a dismal report card on this particular aspect of this obligation.").

106. People v. Bolling, 591 N.E.2d 1136, 1145 (N.Y. 1992) (Bellacosa, J., concurring) ("Unfortunately, the *Batson* procedural hurdles have become 'less obstacles to racial discrimination than they are road maps' to disguised discrimination." (citation omitted)).

107. *See, e.g.*, Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors [https://perma.cc/D793-7ETN]. ("[Justice] Marshall's skepticism was quickly vindicated. As soon as *Batson* was decided, prosecutors started coming up with tactics to evade it. . . . A consensus soon formed that the *Batson* remedy was toothless. In a 1996 opinion, an Illinois appellate judge, exasperated by 'the charade that has become the *Batson* process,' catalogued some of the flimsy reasons for striking jurors that judges had accepted as 'race-neutral'. . . . The judge joked, '[n]ew prosecutors are given a manual, probably entitled, "Handy Race-Neutral Explanations" or "20 Time-Tested Race-Neutral Explanations."' As it turns out, that really happens.").

108. Brief for the State (Appellee) at 39, State v. Tucker, No. 113A96-4 (N.C. Sept. 16, 2021), *cert. granted*, 856 S.E.2d 103 (N.C. 2021) (mem.) (acknowledging that "it may be true that the prosecutors in this case articulated some justifications similar to the 'Top Gun' [*Batson* Justifications] training document as part of their rationale for particular juror strikes").

109. David Spence, who prosecuted Russell Tucker and is now a prosecutor in the eastern part of the state, has repeatedly declined opportunities to dispute this characterization and to offer an alternative explanation. *See, e.g.*, Michael Hewlett, *Motion: Prosecutors Used Race in Jury Selection in Winston-Salem Murder Trial Involving Killing of Kmart Security Guard*, WINSTON-SALEM J. (July 30, 2018), https://journalnow.com/news/crime/motion-prosecutors-used-race-in-jury-selection-in-winston-salem-murder-trial-involving-killing-of/article_07f7d0e-547b-5582-ada7-452a9428de65.html [https://perma.cc/NSG5-SM27].

110. Miller-El v. Dretke, 545 U.S. 231, 266 (2005); People v. Morant, No. 4904/1995, slip op. at *7 (N.Y. Sup. Ct. Dec. 10, 2020).

strikes, amounted to "convincing evidence" of a prosecutor's "calculated . . . effort to circumvent *Batson*."[111]

Whether the Supreme Court of North Carolina will reach a similar conclusion in Russell Tucker's case remains to be determined. It would seem, for a number of reasons, that a defendant who can show the document was used in his or her case has established a violation of their own and excluded jurors' rights under the Fourteenth Amendment's equal protection clause and its analog in Article I, Section 19 of the N.C. Constitution.[112] A prosecutor who recites a justification written before an interaction with a challenged juror is likely misrepresenting the true reason for having made the strike,[113] something that lends "support [to] a claim that a prosecutor's peremptory strikes were made on the basis of race."[114]

In the civil rights context, courts have long rejected, as violative of equal protection, attempts by government officials to undermine the effect of court decisions, laws, rules, and consent decrees that affirm the right to be free of racial discrimination.[115] In *Hibbs v. Winn*, for example, the U.S. Supreme Court observed that federal courts properly intervened for decades to enjoin officials' efforts to fashion "tuition grants and tax credits . . . to circumvent *Brown v. Board of Education*," its landmark decision prohibiting racial segregation in public schools.[116] In the voting rights context, the Court has held that municipalities cannot "circumvent the preclearance requirement [of the Voting Rights Act] . . . by annexing vacant land intended for white developments," because to do so "would . . . 'have the effect of denying citizens their right to vote because of their race.'"[117] Even before

111. State v. Golphin, No. 97 CRS 47314-15, at 73–77 (N.C. Super. Ct. Dec. 13, 2012) (order granting mots. for appropriate relief).

112. Racially-based strikes of jurors cause constitutional injury to both the defendant and the excluded jurors. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 140 (1994); Carter v. Jury Comm'n, 396 U.S. 320, 329 (1970). They also violate Article I, section 26 of the North Carolina Constitution, which prohibits "exclu[sion] from jury service on account of . . . race." N.C. CONST. art. I, § 26; *see generally* State v. Hood, 848 S.E.2d 515, 520 (N.C. Ct. App. 2020).

113. *See generally* Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9, 36 (1997).

114. State v. Hobbs, 841 S.E.2d 492, 501 (N.C. 2020) (quoting Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019)).

115. *See, e.g.*, Alexander v. Chattahoochee Valley Cmty. Coll., 325 F. Supp. 2d 1274, 1281–83 (M.D. Ala. 2004) (holding that a Black community college clerk stated a *prima facie* case of race discrimination when the school followed a procedure that appeared to be designed to circumvent hiring practices mandated by an earlier consent decree).

116. Hibbs v. Winn, 542 U.S. 88, 93 (2004).

117. City of Pleasant Grove v. United States, 479 U.S. 462, 468 (1987) (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969)). As of the date of this publication, section

it embraced a more modern conception of civil rights in the 1960s, the Court, in a series of cases spanning from the 1920s to 1950s, found an "anti-circumvention norm justified abrogating the First Amendment rights" of private associations that states had employed "to circumvent the protections of the Fourteenth . . . Amendment."[118]

This anti-discrimination, anti-circumvention norm applies with equal force in criminal cases. The equal protection clause, from which it comes, "reach[es] every exercise of state authority."[119] Instances of officials failing to abide by rules or orders intended to identify state-based racial discrimination may arise less-frequently in the criminal context, but they do exist.[120] *Tucker* presents one of the clearer examples of the phenomenon by way of prosecutors' misrepresentation of their motives for exercising peremptory strikes.

These misrepresentations are especially prejudicial in a capital case, which is "qualitatively different" and requires the use of practices calculated to produce reliable results.[121] North Carolina's recent history is replete with cases that give reason to doubt the reliability of its system for administering the death penalty. Twelve people have been exonerated and released from state's death row, all but one of them Black.[122] They include Henry

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Five's preclearance requirement remains the law, but it is unenforceable following the Court's holding in *Shelby County v. Holder*, 570 U.S. 529 (2013), that the coverage formula adopted by Congress during the Voting Rights Act's last reauthorization was not responsive to current conditions.

118. Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 429 (2014) (discussing Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935), *overruled in part by Allwright*, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); and Nixon v. Herndon, 273 U.S. 536 (1927)).

119. Plyler v. Doe, 457 U.S. 202, 212 (1982).

120. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 458 (1996) (reviewing the propriety of a court order that prosecutors refused to comply with, which granted discovery to criminal defendants who alleged that they were singled out for prosecution due to their race); *see also* FRANK R. BAUMGARTNER, ET AL., SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE 1–2 (2018) (recounting the trial of Carlos Riley Jr., who was acquitted in 2015 of shooting a Durham police officer, and observing that "the jury likely concluded that [the officer] had conducted a legally suspect search following a racial profiling incident" and that the defense introduced evidence of the officer's failure to record traffic stops in a police database used to identify racially discriminatory stop and search practices).

121. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

122. Elizabeth Hambourger, *Virginia Just Abolished its Deeply Racist Death Penalty; North Carolina Must Follow Suit*, N.C. POLICY WATCH (Apr. 1, 2021), http://www.ncpolicywatch.com/2021/04/01/virginia-just-abolished-its-deeply-racist-death-penalty-north-carolina-must-follow-suit/ [https://perma.cc/UT48-RMTP].

McCollum, whose conviction was upheld by both the North Carolina and United States Supreme Courts,[123] and who was once "held out, to the collective members of the Supreme Court, as the very worst of the worst."[124] Even after DNA evidence proved McCollum's innocence and identified the actual killer, the District Attorney who charged him, Joe Freeman Britt, refused to acknowledge his error and criticized the state's failure to execute him.[125] Britt's unrivaled ability to obtain death sentences, likely aided by state courts' lax approach to *Batson*,[126] earned him the title of "America's

123. State v. McCollum, 433 S.E.2d 144, 164 (N.C. 1993); McCollum v. North Carolina, 512 U.S. 1254, 1254 (1994), *denying cert. to* State v. McCollum, 433 S.E.2d 144 (N.C. 1993); *see also* Callins v. Collins, 510 U.S. 1141, 1143 (1994) (order denying cert.) (Scalia, J., concurring) (discussing the *McCollum* case). As *McCollum* illustrates, the risk of executing an innocent person is very real. In 2015, former U.S. Supreme Court Justice John Paul Stevens said that one of his former clerks had convinced him "beyond a shadow of doubt" that Texas had executed an innocent man, 27-year-old Carlos DeLuna. *See* Columbia Law News, *Professor James Liebman Proves Innocent Man Executed, Retired Supreme Court Justice Says*, COLUMBIA L. SCH. (Jan. 26, 2015), https://www.law.columbia.edu/news/archive/professor-james-liebman-proves-innocent-man-executed-retired-supreme-court-justice-says [https://perma.cc/U9DL-7EGS]; *see generally* THE PHANTOM (Oxford Films 2021) (documentary about the DeLuna case). It has become clear that, in some instances, prosecutors' zeal to win in death penalty cases has eclipsed their sense of responsibility to do justice. The Supreme Court of Arizona, for example, disbarred a capital prosecutor for using false testimony to obtain multiple convictions and death sentences, a decision that came only after the prosecutor had "conducted approximately sixty death penalty trials," "won national awards[,] and twice won the Arizona prosecutor-of-the-year award while being 'personally responsible for a tenth of the prisoners on Arizona's death row.'" Jeffrey L. Kirchmeier et al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1363 (2009) (quoting Jeffrey Toobin, *Killer Instincts*, THE NEW YORKER (Jan. 9, 2015), https://www.newyorker.com/magazine/2005/01/17/killer-instincts [https://perma.cc/6AH3-D9AT]).

124. Michael L. Perlin, *"Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1513–16 (2016) (quoting Dahlia Lithwick, *A Horrifying Miscarriage of Justice in North Carolina*, SLATE (Sept. 5, 2014), https://slate.com/news-and-politics/2014/09/henry-lee-mccollum-cleared-by-dna-evidence-in-north-carolina-after-spending-30-years-on-death-row.html [https://perma.cc/NK5M-C2KK]).

125. *See generally* Richard A. Oppel, Jr., *As Two Men Go Free, a Dogged Ex-Prosecutor Digs In*, N.Y. TIMES (Sept. 8, 2014), https://www.nytimes.com/2014/09/08/us/as-2-go-free-joe-freeman-britt-a-dogged-ex-prosecutor-digs-in.html [https://perma.cc/BR3A-FJ5M].

126. *See, e.g.*, *McCollum*, 433 S.E.2d at 159 (finding no error when the "trial court . . . concluded that a *Batson* violation had occurred" when the prosecutor struck three Black jurors because of their race but then denied a defense motion to seat the jurors and instead opted to begin the selection process anew).

Deadliest Prosecutor" from the *Guinness Book of World Records*.[127] He sat on the Executive Committee of the N.C. Conference of District Attorneys, the group which organized the "Top Gun II" training at which the cheat sheet was distributed,[128] and a body that has resisted inquiry into jury discrimination in capital cases and quietly opposed the assignment of Black judges to hear such claims.[129]

The Attorney General's decision to align his office with the Conference in resisting such inquiries suggests hard medicine may be necessary to end the abuse of peremptory challenges in the state. The remedy for state action that has undermined a defendant's right to a jury selection process free of racial discrimination is to vacate the conviction. On four occasions since 2005, the U.S. Supreme Court has reversed murder convictions because of trial courts' failure to abide by *Batson*.[130] Three of the cases involved prisoners, like Tucker, who had been sentenced to death. In each case, the defendants had to overcome the doubly-deferential standard that applies in federal habeas proceedings.[131] That each managed to prevail reflects the weight the Court accords to the constitutional prohibition on race-based peremptory challenges. Although the cheat sheet may represent a new spin on the traditional *Batson* appeal, these cases suggest the Supreme Court of North Carolina should award Russell Tucker a new trial, one free

127. Alan Blinder, *Joe Freeman Britt, Called America's 'Deadliest D.A.,' Dies at 80*, N.Y. TIMES (Apr. 12, 2016), https://www.nytimes.com/2016/04/13/us/joe-freeman-britt-called-americas-deadliest-da-dies-at-80.html [https://perma.cc/S8P4-PMNN].

128. Tonya Maxwell, *Black Juror's Dismissal, Death Penalty Revisited in Double Homicide*, CITIZEN-TIMES (Nov. 3, 2016, 5:26 PM), https://www.citizen-times.com/story/news/local/2016/11/03/black-jurors-dismissal-death-penalty-revisited-double-homicide/93168824/ [https://perma.cc/3ECW-LZBJ].

129. *See*, *e.g.*, Defendant-Appellant's Brief at App. 286, State v. Golphin, 847 S.E.2d 400 (N.C. 2020) (No. 441A98-4) (discussing message to the Conference's Executive Director from an A.D.A. in Forsyth County who "suggested there may be a judicial standards complaint" filed if a Black judge chose to appoint another Black judge to hear a Racial Justice Act claim); *see also* E-mail from Seth Edwards, Dist. Att'y, 2nd Prosecutorial Dist. of N.C., to William R. West, Dist. Att'y, 14th Prosecutorial Dist. of N.C., and Peg Dorer, Director, N.C. Conf. of Dist. Att'ys (Nov. 3, 2011, 10:10 AM) (quoting former Conference President statement to Executive Director that Judge Sumner would be his choice "[i]f I had to pick an African American to hear an RJA motion").

130. Flowers v. Mississippi, 139 S. Ct. 2228 (2019); Foster v. Chatman, 578 U.S. 488 (2016); Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005).

131. *See, e.g.*, Messiah v. Duncan, 435 F.3d 186, 196–98 (2d Cir. 2006) (explaining that pursuant to *Hernandez v. New York*, 500 U.S. 352 (1991), appellate courts "afford 'great deference' to the state court's credibility assessment of a prosecutor's proffered race-neutral explanation for striking a juror," and that the Antiterrorism and Effective Death Penalty Act of 1996 "reconfigured [the] standard of review in *habeas* cases . . . by requiring 'more deferential' review" (citations omitted)).

of racial discrimination, and hold that the attempt to undermine the operation of *Batson* by prosecutors will compromise any ensuing conviction.

C. In North Carolina, Unique Considerations Regarding the Adjudication of Homicide Cases Involving Black Defendants Suggest That Courts Should Closely Scrutinize Claims of Racial Discrimination in the Jury Selection Process

Although post-conviction relief in a capital case comes at the expense of considerable prosecutorial resources, there is a strong public interest in having instances of racial discrimination in jury selection, including the kind of practices that were employed in Tucker's case, declared to be unacceptable.[132] Recognizing this, officials in other jurisdictions, rather than fighting to preserve a conviction, have agreed in some cases to stipulate "that [a] Defendant is entitled to a new trial due to the State's use of peremptory strikes against African-American prospective jurors"[133] or because a prosecutor made false or misleading statements during their trial.[134]

This has not occurred in North Carolina, and there is no indication that it will, given the state's fraught political climate and the divisive politics surrounding the death penalty.[135] Yet, courts' and prosecutors' adherence to *Batson* during the 1990s and early 2000s are known to have been particularly poor,[136] heightening the need for courts to apply close scrutiny to

132. *See, e.g.*, State v. Ramseur, 843 S.E.2d 106, 117 (N.C. 2020) ("[T]he harm from racial discrimination in criminal cases is not limited to an individual defendant, but rather it undermines the integrity of our judicial system."); Kirchmeier et al., *supra* note 123, at 1353 ("[S]tudies . . . indicate [that] the potential for an unethical prosecutor to commit misconduct by striking jurors for prohibited reasons while concealing that intent with neutral reasons is significant."); Melilli, *supra* note 105, at 501 ("[T]he exclusion from jury service because of group stereotyping . . . makes underrepresented groups less accepting of the court system and its results[ ] and injures society as a whole by frustrating the ideal of equal citizen participation in the jury process.").

133. *See, e.g.*, State's Stipulations in Response to Defendant's Presentation of Evidence of Discrimination in Jury Selection on Remand from the Louisiana Supreme Court at 2, State v. Williams, No. 508-604 E (La. Crim. Dist. Ct. June 15, 2017).

134. *See, e.g.*, PHILA. DIST. ATTY'S OFF., OVERTURNING CONVICTIONS—AND AN ERA: CONVICTION INTEGRITY UNIT REPORT 10 (June 2021) (reporting that the Philadelphia D.A.'s office recently worked to exonerate and secure the release of four prisoners who were convicted in cases in which prosecutors made false statements in court).

135. *Cf.* Jason Zengerle, *Is North Carolina the Future of American Politics?*, N.Y. TIMES MAG. (June 25, 2017), https://www.nytimes.com/2017/06/20/magazine/is-north-carolina-the-future-of-american-politics.html [https://perma.cc/Y8FR-NM9Q] ("Welcome to North Carolina . . . where all the passions and pathologies of American politics writ large are played out writ small—and with even more intensity.").

136. *See generally* State v. Robinson, 846 S.E.2d 711 (N.C. 2020); Pollitt & Warren, *supra* note 6161; Weill-Greenberg, *supra* note 35.

capital cases that advance credible claims of racial discrimination. In Tucker's case, the Attorney General may have chosen to take trial prosecutors at their word that race was not in play, but the circumstances strongly suggest otherwise.

Regrettably, some prosecutors recognize that, as an empirical matter, race-based peremptory challenges "are strategically rational[,]"[137] and they have pursued them for that reason—another factor militating for judicial vigilance. North Carolina data sets indicate that, "for every peremptory challenge that [a] prosecutor used, the conviction rate for black male defendants increased by 2–4%."[138] The state's demographics happen to be such that, "when the defendant is black, challenges by state prosecutors have an especially large positive impact on the conviction rate."[139]

CONCLUSION

Not long ago, the N.C. Office of the Attorney General appealed to the Supreme Court of North Carolina to permit the execution of Black and minority criminal defendants whom a lower court concluded were subjected to racial discrimination in their jury selection process.[140] In doing so, a Senior Deputy Attorney General, who Stein later appointed to oversee all criminal appeals in the state,[141] accused the Black superior court judge in Fayetteville, who entered the order, of being biased in favor of the

137. Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1431 (2018); *cf.* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1621–22 (1985) (observing that when Baltimore switched "from a juror selection method that yielded at least 70% white jurors to one that yielded between 34% and 47% black jurors, the jury trial conviction rate dropped from almost 84% to less than 70%[,]" and that a similar phenomenon occurred in Los Angeles).

138. Wright et al., *supra* note 137, at 1431 (citing Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J. L. & ECON. 189, 206–11 (2018)).

139. Flanagan, *supra* note 138, at 212.

140. Paul Woolverton, *N.C. Supreme Court Justices Hear Arguments About Racial Justice Act Used in Fayetteville Cases*, FAYETTEVILLE OBSERVER (Apr. 14, 2014), https://www.fayobserver.com/article/20140414/News/304149767 [https://perma.cc/H8NJ-MEYS]. Josh Stein would not be elected as Attorney General for two more years after this argument was heard.

141. The North Carolina Attorney General's Office does not make its organizational chart available online. However, according to a federal lawsuit accusing the deputy, Alana Danielle Marquis Elder, of racial discrimination in employment practices, filed in September 2021 by a Special Deputy Attorney General and nineteen-year veteran of the department, Stein appointed Elder in 2018 to lead the criminal division and to oversee all criminal appeals and post-conviction litigation. Complaint at 3–28, ¶¶ 8, 110, Calloway-Durham v. N.C. Dep't of Just., No. 5:21-CV-00371-BO (E.D.N.C. Sept. 15, 2021).

defendants.[142] In each case, the judge had commuted the defendants' sentences to life "primarily based on the words and deeds of the prosecutors themselves."[143]

In Russell Tucker's case, the office has argued that a procedural bar precludes the court from reaching the issue of whether a cheat sheet was employed by prosecutors to subvert *Batson* and obtain the all-white jury that sentenced him to death. This argument comes in the wake of the Attorney General's recent condemnation of "covert . . . practices of discriminatory exclusion" in jury selection[144] —an apt description for prosecutors' use of the document. While the state cannot be faulted for regarding the preservation of a homicide conviction as among its highest executive priorities, the preservation of defendants' constitutional right to trials and sentences untainted by racial discrimination should always take precedence.

North Carolina is still reconciling how to honor this responsibility, particularly for those who have been convicted. The state's high court ultimately determined that the defendants granted relief by the superior court in Fayetteville were entitled to maintain their life sentences. Some advocates have read those cases to suggest that North Carolina's appellate courts are prepared to take *Batson* more seriously than they traditionally have, although those cases were resolved on double jeopardy grounds and not *Batson*.[145]

Tucker, however, presents the court with an opportunity to do something it has never done: to find that the State engaged in improper race-based strikes of Black jurors.[146] Given the strong evidence of pretext and the resulting jury, such a finding would be appropriate based on the facts. It would also communicate a message to trial courts and attorneys, which the evidence suggests many need to receive, that the right to a constitutionally-drawn jury will be enforced, with close scrutiny applied in capital

142. Woolverton, *supra* note 140.

143. *Id.* (quoting defense attorney Jay Ferguson, who characterized the court's order); *see also* Dax-Devlon Ross, *Bias in the Box*, VA. Q. REV. (Oct. 6, 2014), https://www.vqronline.org/reporting-articles/2014/10/bias-box [https://perma.cc/DM27-8AW4] (observing that the judge endured heated "criticism from legislators, law enforcement, prosecutors, and victims' rights groups, some of whom detested . . . [him] for giving [the law] credence").

144. N.C. TASK FORCE, *supra* note 25, at 100.

145. *See generally* State v. Robinson, 846 S.E.2d 711 (N.C. 2020); State v. Walters, 847 S.E.2d 399 (N.C. 2020); State v. Golphin, 847 S.E.2d 887 (N.C. 2020); State v. Augustine, 847 S.E.2d 729 (N.C. 2020).

146. *See Robinson*, 846 S.E.2d at 717 n.6 ("Although this Court ultimately remanded [State v. Hobbs, 841 S.E.2d 492 (N.C. 2020) and State v. Bennett, 843 S.E.2d 222 (N.C. 2020)] for a new *Batson* hearing, we did not find that the State intentionally discriminated against a juror in violation of *Batson*.").

cases, and that the appellate courts will not hesitate to take action when the State has sought to evade its obligations under *Batson*.