No. 263PA18-2 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	No. 10-CRS-63629
CEDRIC THEODIS HOBBS, JR.	)	
Petitioner	)	
	)	

BRIEF OF *AMICI CURIAE* SOCIAL SCIENTISTS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are social scientists (many of whom teach in leading law schools) who have spent many years conducting empirical research relevant to legal issues.

Frank R. Baumgartner is the Richard J. Richardson Distinguished Professor of Political Science at The University of North Carolina at Chapel Hill. He received his PhD from the University of Michigan (Ann Arbor) in 1986. He has regularly taught courses and published academic works using statistical methods for over three decades. He has published over 100 academic journal articles, book chapters, and law review articles, 10 books, and 4 edited books. Several of his works relate specifically to the death penalty, including numerous articles and two books: *The Decline of the Death Penalty and the Discovery of Innocence* (Cambridge, 2008) and *Deadly Justice: A Statistical Portrait of the Death Penalty* (Oxford, 2018). In 2017, he was elected to the American Academy of Arts and Sciences. Dr. Baumgartner is a member of the Data Consultation Team assisting the North Carolina Task Force for Racial Equity in Criminal Justice.

Eugene Borgida is Professor of Psychology and Law, and the Morse-Alumni Distinguished Professor of Psychology, at the University of Minnesota (Twin Cities) where he has been on the faculty since 1976. He holds a Ph.D. in social psychology from the University of Michigan. Dr. Borgida has taught scientific

evidence and, more recently, a seminar on *Law, Race, and Social Psychology* at the University of Minnesota Law School, in addition to graduate-level courses in social and political psychology. Dr. Borgida has published extensively on a variety of research topics at the intersection of law and social science, including papers on the use of scientific evidence by the courts. Borgida has published over 150 journal articles and book chapters, has had his work supported by the National Science Foundation and others, and is the co-author of five edited volumes including, *Beyond Common Sense: Psychological Science in the Courtroom* (2008) (co-edited with Susan T. Fiske). Dr. Borgida is a Fellow of both the Association for Psychological Science and the American Psychological Association, and has served on the Board of Directors for the Association of Psychological Science and the Social Science Research Council.

John M. Conley is the William Rand Kenan, Jr. Professor at the University of North Carolina School of Law, where he teaches civil procedure, intellectual property, scientific evidence, and a variety of law and social science courses. He has also regularly taught scientific evidence to both judges and lawyers. For more than 30 years, he has conducted both qualitative and quantitative empirical research on the legal system, the legal profession, and the world of business and finance. His books include *Statistical Evidence in Litigation* (1986, with David W. Barnes) and *Scientific and Expert Evidence* (2007, with Jane Campbell Moriarty).

Ann M. Eisenberg is Associate Professor of Law at the South Carolina School of Law, where she teaches and directs South Carolina's transactional Environmental Law Clinic. Professor Eisenberg earned her B.A. and her J.D., *cum laude*, from Cornell University. Her research focuses on environmental and criminal decision-making processes, including racial bias in jury selection. Her articles have been published or are forthcoming in the *Southern California Law*, *Harvard Law and Policy Review*, *Environmental Law*, and *Northeastern Law Review*. Prior to teaching, Eisenberg also worked as a staff attorney for the United States Court of Appeals for the Eighth Circuit.

Brandon Garrett is the L. Neil Williams Professor of Law at Duke University School of Law, where he has taught since 2018. He was previously the Justice Thurgood Marshall Distinguished Professor of Law and White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law. His research and teaching interests include criminal procedure, wrongful convictions, habeas corpus, corporate crime, scientific evidence, civil rights, and constitutional law. Garrett's work, including several books, has been widely cited by courts, including the U.S. Supreme Court, lower federal courts, state supreme courts, and courts in other countries. Garrett also frequently speaks about criminal justice matters before legislative and policymaking bodies, groups of practicing lawyers, law enforcement, and to local and national media. Garrett attended

Columbia Law School, where he was an articles editor of the Columbia Law Review and a Kent Scholar. After graduating, he clerked for the Hon. Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit. He then worked as an associate at Neufeld, Scheck & Brustin LLP in New York City. Garrett is the founder and Director of the Wilson Center for Science and Justice at Duke.

Valerie P. Hans is Professor of Law at Cornell Law School, where she teaches torts, social science and law, and a seminar on the contemporary American jury. She holds a Ph.D. in Psychology from the University of Toronto. She conducts empirical studies of law and is one of the nation's leading authorities on the jury system. She has carried out extensive research and lectured and written widely about the jury and jury selection. Her books on the jury include *American Juries: The Verdict* (2007, co-authored with Neil Vidmar); *The Jury System: Contemporary Scholarship* (2006); *Business on Trial: The Civil Jury and Corporate Responsibility* (2000); and *Judging the Jury* (1986, co-authored with Neil Vidmar). She served as a member of the New York Jury Demographics Working Group sponsored by the Office of Court Research, State of New York.

Herbert M. Kritzer is the Marvin J. Sonosky Chair of Law and Public Policy at the University of Minnesota Law School. Prior to this appointment, he was Professor of Political Science and Law at the University of Wisconsin-Madison (1977-2007). He holds a Ph.D. in Political Science from the University of North

Carolina at Chapel Hill, and has taught courses on research methods and statistical analysis for approaching 50 years. He has conducted extensive empirical research on a range of law-related topics including the civil justice system, the legal profession, judicial selection, and judicial decision-making. He is the author or co-author of eleven books and more than 100 articles or book chapters. He is the editor of *Legal Systems of the World* (ABC-CLIO, 2002) and co-editor of the *Oxford Handbook of Empirical Legal Research* (2010).

Steven Penrod is Distinguished Professor of Psychology at the John Jay College of Criminal Justice—City University of New York. Dr. Penrod holds a Ph.D. in Psychology from Harvard University and a J.D. from Harvard Law School. He has served as a professor on the law and psychology faculties at the University of Nebraska, on the law faculty at the University of Minnesota and the psychology faculty at the University of Wisconsin. Dr. Penrod has published extensively on jury and eyewitness issues and has had nearly continuous support from the Law and Social Sciences program at the National Science Foundation for more than thirty years.

James T. Richardson, J.D., Ph.D., is Professor Emeritus of Sociology and Judicial Studies at the University of Nevada, Reno, and was director of the Judicial Studies graduate degree program for trial judges, co-sponsored by the National Judicial College and the National Council of Juvenile and Family Court Judges,

both of which are headquartered at the University of Nevada, Reno. He teaches a seminar in the program entitled "Social and Behavioral Sciences and the Law," and has done considerable research on various aspects of the justice system, in the United States and elsewhere.

Isaac Unah is Associate Professor of Political Science at the University of North Carolina at Chapel Hill. He received his Ph.D. in Political Science from SUNY-Stony Brook in 1995. He has published several articles in leading peer-reviewed journals and law reviews. He is a former director of the Law and Social Sciences Program at the National Science Foundation and the principal author of the North Carolina Death Penalty Study (2001).

Ronald Wright serves as the Needham Y. Gulley Professor of Criminal Law at Wake Forest University, where he teaches and researches about topics in criminal procedure and the law of criminal sentencing. His empirical research concentrates on the work of attorneys and organizations that operate the criminal courts, including criminal prosecutors, public defender offices, judicial administrators, and pretrial service agencies. He is co-author of *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, which engages the issue of race discrimination in jury selection in North Carolina. Professor Wright is a board member of the Institute for Innovation in Prosecution at the John Jay College and serves on advisory boards for organizations that collect data to promote better

management and greater transparency in prosecutor offices. Prior to joining the faculty at Wake Forest, he was a trial attorney with the U.S. Department of Justice, prosecuting antitrust and other white-collar criminal cases.

I. SUMMARY OF ARGUMENT[1]

This case is about the capital-qualified jury selection in the murder trial of Mr. Cedric Theodis Hobbs, Jr., a Black man accused of killing a white victim, and whether the State's peremptory challenges of three African American veniremembers were motivated by purposeful racial discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). On May 1, 2020, the North Carolina Supreme Court remanded this case to the Superior Court of Cumberland County, with instructions to reconsider the third stage of the *Batson* analysis as to these three peremptory strikes, directing the Superior Court to determine whether Mr. Hobbs had proven purposeful discrimination. *State v. Hobbs*, 841 S.E.2d 492 (2020) (*Hobbs I*). On July 22, 2020, the Honorable Robert Frank Floyd, presiding, conducted a hearing on this issue. On August 18, 2020, Judge Floyd signed the State's proposed order, denying the *Batson* motion as to all three prospective jurors, and concluding that Mr. Hobbs had not proved purposeful discrimination.

[1] Pursuant to N.C. R. App. P. 28(i)(2), Amici state that, in addition to their members and counsel of record, the following attorneys contributed to the writing of this brief: David Weiss, Elizabeth Hambourger, and Gretchen Engel.

In so doing, the Superior Court failed to properly evaluate strong historical evidence showing state- and county-wide patterns of racial disparities in the use of peremptory strikes exhibited in research by Barbara O'Brien and Catherine M. Grosso, which demonstrates that, between 1990 and 2010, North Carolina (and Cumberland County) prosecutors in capital cases were more than twice as likely to strike eligible African-American jurors as they were to strike similarly qualified white jurors. *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012) [hereafter "MSU Study"]. The Superior Court accomplished this by ignoring the unadjusted numbers reported in the MSU study's analysis of more than 7,000 jurors in more than 170 capital proceedings, and by offering weak and unsubstantiated criticism of the methodology of a rigorous piece of social science research.

The MSU Study is a model of outstanding, rigorous social science research. It carefully analyzes the impact of race on the use of peremptory strikes by North Carolina prosecutors in capital cases, including in Cumberland County, and uses advanced statistical methodology to account for alternative explanations for the observed pattern of racial exclusion. The research demonstrates that African Americans were significantly more likely than similarly-qualified whites to be peremptorily excluded by North Carolina prosecutors trying capital cases in

Cumberland County and across the State. These results are consistent with prior and subsequent research demonstrating that African Americans generally are treated uniquely by prosecutors in criminal cases. The end result is troubling and undeniable: Over a twenty-year period, Cumberland County prosecutors used peremptory strikes against eligible, death-qualified African-American veniremembers 2.6 times as often as they struck similarly qualified veniremembers who were white or members of other ethnic groups. 3rd RSp 274 (Robinson MAR Order) ¶ 61.

II. ARGUMENT

A. The Role of Observational Studies to Evaluate Complex Decision Making

Empirical research, such as that exemplified in the MSU Study, uses direct and indirect observation to acquire knowledge of complex relationships. Knowledge acquired through empirical observation and analysis has broad application. In the medical sciences, epidemiologists analyze data to evaluate the relationship between the distribution and determinants of disease. Michael D. Green et al., *Reference Guide on Epidemiology*, in Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 549, 551 (3d ed. 2011). In so doing, epidemiologists, much like the MSU researchers, identify a particular outcome they desire to study and then seek to identify and analyze which variables are associated with that outcome. Such research has been key to identifying many of

the causal relationships that we now take for granted: the relationship between passive exposure to cigarette smoke and heart disease and lung cancer; asbestos exposure and lung cancer; obesity and diabetes, and countless other health issues. *See*, *e.g.*, Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 3 Cornell L. Rev. 469, 513 (1988) (discussing studies from the 1960s and the 1970s establishing relationship between asbestos exposure and lung cancer); Allan K. Hackshaw, *Lung Cancer and Passive Smoking*, 7 Stat. Methods Med. Res. 119 (1998) (relationship between risk of lung cancer and exposure to environmental tobacco smoke); Aviva Must et al., *The Disease Burden Associated with Overweight and Obesity*, 282 JAMA 1523 (1999); Kyle Steenland, *Exposure to Environmental Tobacco Smoke and Risk Factors for Heart Disease Among Never Smokers in the Third National Health and Nutrition Examination Survey*, 147 Am. J. Epidemiology 932 (1998) (reporting link between exposure to environmental tobacco smoke and heart disease among those who have never smoked).

Indeed, the role of epidemiologists has taken renewed prominence in 2020, with the extensive study of the novel coronavirus. By examining patterns of public health prevention measures, epidemiologists were able to ascertain that wearing masks in public results in significantly reduced COVID-19 infections. *See* Zeng,

Nianyi et al., "Epidemiology reveals mask wearing by the public is crucial for COVID-19 control," *Medicine in Microecology* vol. 4 (2020): 100015.

Similarly, empirical researchers in the behavioral sciences have used observational tools to form and confirm hypotheses about complex cognitive processes. Experimental, case-control, and retrospective cohort studies have all proved useful in identifying efficacious psychological interventions. *See* Dianne L. Chambless & Thomas H. Ollendick, *Empirically Supported Psychological Interventions: Controversies and Evidence*, 52 Annual Rev. Psychol. 685 (2001). Consider one example from sociology: observational empirical data have been used to assess the disputed relationship between socioeconomic class and criminal behavior. *See*, *e.g.*, R. Gregory Dunaway, Francis T. Cullen, Velmer S. Burton & T. David Evans, *The Myth of Social Class and Crime Revisited: An Examination of Class and Adult Criminality*, 38 Criminology 589 (2000). Cognitive scientists have taken advantage of rapid technological advances to observe empirically the relationship between activity in particular regions of the brain and higher order cognitive functions. *See*, *e.g.*, Roberto Cabeza & Lars Nyberg, *Imaging Cognition: An Empirical Review of PET Studies With Normal Subjects*, 9 J. Cognitive Neuroscience 1 (1997).

Finally, within the law, quantitative observational research has long been deemed relevant, including when used to assess the presence of racial bias in legal

decision making. *See, e.g.*, Samuel Sommers & Michael Norton, *Race-based Judgments, Race-neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 Law & Hum. Behav. 261 (2007); Jerry Kang, Nat'l Ctr. for State Courts, *Implicit Bias: A Primer for Courts* (2009), http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf; *see also* Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson, & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012). Perhaps the earliest example of this type of evidence being deployed is the seminal case *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in which the United States Supreme Court determined, based on the pattern of enforcement of a law regulating laundries, that racial discrimination was the only explanation for the differential treatment of whites and Chinese. *Id.* at 374 (noting that 200 Chinese applicants had been denied permits while 80 others "are permitted to carry on the same business under similar conditions"). Almost a century later, the United States Supreme Court decided another famous race discrimination case, also utilizing statistical evidence. *See, e.g.*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (statistical disparity establishes discrimination under the Fourteenth

Amendment when it shows "a clear pattern, unexplainable on grounds other than race.").

Indeed, the United States Supreme Court routinely utilizes social science and empirical data in constitutional decision making, whether to ascertain racial bias or other observable phenomena. Over the course of the years 2001 – 2015, 39.9% of United States Supreme Court criminal procedure decisions implicating the Fourth, Fifth, Sixth, Eighth, or Fourteenth Amendment cited social science research. *See* Michele Bisaccia Meitl, Nicole Leeper Piquero & Alex Piquero, "The Gradual Warm-Up: The United States Supreme Court's Reliance on Social Science Research in Constitutional Criminal Law and Procedure Opinions, 2001-2015," Deviant Behavior, 41:12, 1575-1584 (2020).

What unites each of these modes of inquiry with the MSU Study is the recognition that the processes that inform daily living (e.g., disease; behavior; cognition) are complex but not mystical. One need not disregard the concept of free will to recognize that human behavior is influenced by independent variables and that these variables can be isolated, studied, and analyzed. Moreover, while well-controlled experimental research has certain advantages over observational studies, a retrospective analysis such as that used in the MSU Study can reveal important associations so long as the proper methodology and analytical tools are used. And where experimental data cannot ethically be obtained, such as in the

area of criminal justice, the design used in the MSU Study is extremely reliable and widely accepted in the social, medical and economics communities, not to mention in many areas of the physical sciences.

B. The MSU Study Is a Reliable and Relevant Analysis of Prosecutorial Decision Making

The MSU Study comprehensively examined the jury selection process for each prisoner held on North Carolina's death row as of July 1, 2010. *See* Grosso & O'Brien, *MSU Study*, *supra*. After detailed multivariate analysis, the MSU Study concluded that African Americans were 2.57 times as likely as whites to be excluded from a venire by a prosecutor's peremptory strike in Cumberland County. 3rd RSp 277-78 (Robinson MAR Order ¶ 67).

These results are as unsurprising as they are disconcerting because they are broadly consistent with other studies of the relationship between race and prosecutors' use of peremptory strikes, both within and outside North Carolina. Observational studies have long suggested that race has a significant influence on decisions by prosecutors (and defense counsel) to use peremptory strikes in both capital and noncapital cases. *See* David C. Baldus, George Woodworth, David Zuckerman, Neil A. Weiner, & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 69 (2001) (reporting that Philadelphia prosecutors were more than four times as likely to use a peremptory challenge on Black veniremembers as on

non-Black veniremembers and that the only variable that better predicted a prosecutorial peremptory challenge was a juror's expression of discomfort with imposing a death sentence); *see also* Richard Bourke & Joe Hingston, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office* 7–8 (2003) (studying 390 jury trials involving 13,662 prospective jurors and finding that state struck Black prospective jurors at more than three times the rate of white jurors in both six- and twelve-person juries); John Clark, Marcus T. Boccaccini, Beth Caillouet & William F. Chaplin, *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 Crim. Just. & Behav. 641, 651 (2007) (studying eleven criminal trials in two adjacent counties and concluding that the state struck disproportionally more Black potential jurors while the defense struck disproportionally fewer); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695, 699 (1999) (studying thirteen noncapital trials in Durham County, North Carolina and finding that prosecutors disproportionately struck Black veniremembers and defense counsel disproportionately struck non-Black veniremembers); Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 14–37 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf

(identifying and discussing reasons for continuing disparate treatment of Black people in jury selection in Alabama, Arkansas, Florida, Georgia, Mississippi, Louisiana, South Carolina, and Tennessee); *see also* Steve McGonigle, Holly Becka, Jennifer LaFleur & Tim Wyatt, *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, but Analysis Shows They Are More Likely To Reject Black Jurors*, Dall. Morning News, Aug. 21, 2005, at 1A (conducting an analysis similar to Baldus et al.'s study in 108 noncapital felony trials in 2002 and finding that state exercised peremptory strike against Black jurors at more than twice the rate of whites).

Research modeled on the MSU Study has reached similar conclusions regarding the prevalence in race discrimination in South Carolina capital jury selection. *See* Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 Ne. U. L. Rev. 299, 339–342 (2017) (applying methods similar to those of the MSU Study to South Carolina capital cases, and observing that 35% of Black potential jurors were struck as compared with 12% of whites, with the result that Black people were only 2/3 as likely as whites to be seated).

Experimental research also confirms that prosecutors and attorneys take race into account in using peremptory strikes. *See* George Hayden, Joseph Senna & Larry Siegel, *Prosecutorial Discretion in Peremptory Challenges: An Empirical*

Investigation of Information Use in the Massachusetts Jury Selection Process, 13 New Eng. L. Rev. 768, 784–85 & tbl. II, 787 (1978) (in an experimental study involving 20 Massachusetts prosecutors, finding that race of juror was considered more important in a hypothetical case involving Black defendant); Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll & James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 Am. U. L. Rev. 665, 692 (1991) (reporting that attorneys assigned the role of prosecutor in mock proceedings were five times more likely to strike Black prospective jurors as compared with jurors of other races); Samuel R. Sommers, *Race and the decision making of juries*, 12 Legal and Criminological Psychology 171 (2007) (review of experimental and archival literature concluding that race has the potential to impact trial outcomes, and that racial bias on the part of judges, attorneys, and jurors is well-documented). The two most rigorous of the observational studies used multivariate analysis like the MSU Study and collectively found that race was the most reliable predictor of a prosecutors' use of peremptory strikes in noncapital cases and second only to a juror's attitude regarding the death penalty in capital cases. Baldus et al., *supra,* at 69; McGonigle et al., *supra*, at 1A.

Not only is the MSU Study broadly consistent with the results of prior published studies regarding the role of race in prosecutors' peremptory strikes, but

it is one of the most rigorous to date. The MSU Study analyzed jury selection in at least one proceeding for every prisoner who was on North Carolina's death row as of July 1, 2010. Out of these 173 proceedings, all but one of which transpired between 1990 and 2010, the researchers created a database of 7,421 strike decisions statewide. Grosso & O'Brien, *MSU Study*, *supra*, at 1543. Of these, 471 strike decisions came from Cumberland County. 3rd RSp 277 (Robinson MAR Order ¶ 67).

The MSU Study's focus on current death row prisoners—it excluded cases in which a prisoner had been executed prior to July 1, 2010 or released from death row for another reason—does not create selection bias with respect to the relationship of interest in the study.[2] There is no reason to think that the strike decisions by prosecutors in the subset of cases excluded by the MSU Study would have been markedly different than the strike decisions in the included cases. After all, at the time the prosecutor in a capital case decides to use a peremptory strike, she cannot know the future course of the prosecution, including whether a defendant will be executed or released from death row for some other reason.

The exclusion of noncapital cases from the MSU Study does not call its conclusions into question. Including noncapital cases would offer researchers

[2] Selection bias is an "[e]rror due to systematic differences in characteristics between those who are selected for study and those who are not." *A Dictionary of Epidemiology* 153 (John M. Last ed., 3d ed. 1995).

nothing of significance to the question at issue, namely whether persons sentenced to death during the 1990 through 2010 period were sentenced by juries in which race played a role in the selection of juries.[3] Moreover, subsequent studies of jury selection in North Carolina that address noncapital cases have reached results regarding the presence of racial bias that accord with those of the MSU Study. *See* Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue,* 2018 U. Ill. L. Rev. (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994288 (analyzing jury data for 1,306 trials in North Carolina in 2011 and finding that judges and prosecutors were more likely to remove Black jurors); Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina* (2017), http://ipl.econ.duke.edu/seminars/system/files/seminars/1872.pdf (analyzing jury data from 737 non-capital felony trials that resulted in a verdict in North Carolina from 2010–2012 and finding that each State peremptory challenge is correlated with a 2.2–2.4% increase in the conviction rate when the defendant is Black).

After identifying the 7,421 strike decisions made in the 173 proceedings discussed above, the MSU Study carefully collected racial information for every potential juror using three sources: juror questionnaires, voir dire transcripts, and

[3] It certainly would offer little solace if race were just as influential or more influential in noncapital cases. And were race less influential in noncapital cases it would only lend further support to Mr. Hobbs' claim.

public records found in electronic databases. Grosso & O'Brien, *MSU Study*, *supra*, at 1544–45. The study performed a quality control check to verify the accuracy of identifying race through public records and found that these records were highly reliable sources of racial identification. *Id*. at 1546. In total, the researchers were able to document the racial identity of 99.9% of the 7,421 eligible venire members. *Id*. at 1547. Within these strike decisions, the MSU Study reported that prosecutors were twice as likely to strike Black venire members as white ones.[4] This finding was robust and statistically significant. *Id*. at 1547. Similarly, in the 11 cases studied in Cumberland County, prosecutors struck an average of 52.7% of eligible Black venire members, compared to only 20.5% of all other eligible venire members, a statistically significant difference, with a probability of occurring in a race-neutral process of less than one in 1,000. 3rd RSp 277 (Robinson MAR Order ¶ 67).

Recognizing that simply reporting strike rates among the 7,421 venire members might obscure more complex phenomena, the MSU researchers created a randomized sample of 25% of the strike decisions that they subjected to detailed analysis in order to ascertain any alternative explanations that might provide non-racial reasons for prosecutors' peremptory challenges. Randomized sampling is an accepted and common practice in the social sciences, including psychology,

[4] The study population was almost entirely Black or white, with only 2.0% of the venire composed of members of other races. Grosso & O'Brien, *MSU Study*, *supra*, at 1548.

sociology, political science, and economics as well as in medical fields such as epidemiology. *See, e.g.,* Shari S. Diamond, *Reference Guide on Survey Research*, in Fed. Judicial Ctr., *Reference Manual on Scientific Evidence* 376–383 (3d ed. 2011); Paul Giannelli et al., *Scientific Evidence,* ch. 15 (5th ed. 2012); David Faigman et al., *Science in the Law: Standards, Statistics and Research Issues*, chs. 4 and 5, and at 127 (2002). In addition, the MSU research coded and performed the 65-variable analysis for a second subsample consisting of all 474 venire members from the eleven Cumberland County proceedings resulting in a death sentence ("the Cumberland County sample").

For the Cumberland County and random samples, the MSU Study identified and coded approximately sixty-five additional variables, including factors that would predictably influence a prosecutor's decision to strike, such as views on capital punishment, familiarity with parties or witnesses, education, marital and employment status, religious affiliation, experience with crime, asserted hardship of jury service, exposure to information about the particular case, relevant expertise, and any stated difficulty in following the law. Grosso & O'Brien, *MSU Study*, *supra*, at 1547 & Appx. A, pt. C. They selected these variables after examining the strike explanations offered by prosecutors in published opinions, by reviewing data collection instruments used in similar previous studies, and by interviewing capital lawyers.

The data collected by the MSU researchers for the Cumberland County and statewide random samples allowed them to go beyond the unadjusted analysis discussed above, which reflected the fact that prosecutors struck African-American venire members twice as often as white venire members.[5] First, the researchers analyzed strike rates within various subsets of the study population. This analysis was consistent with the unadjusted analyses: to wit, among four different subsets of the study population, Black venire members remained twice as likely to be subject to peremptory strikes as white members. This result was consistent and statistically significant[6] among veniremembers with reservations about the death penalty, unemployed veniremembers, veniremembers who were themselves or those close to them who were accused of a crime, veniremembers who knew a trial participant, and veniremembers who had any of these characteristics. *See* Grosso

[5] When an estimate controls for the presence of multiple variables, it is referred to as an "adjusted" estimate of the relationship between variable X on outcome Y.

[6] Statistical method permits researchers to calculate the likelihood that any observed association is actually consistent with the null hypothesis (i.e., that there is no true association between variable X and outcome Y). When a result is sufficiently unlikely to be consistent with the null hypothesis, it is referred to as "statistically significant." Usually, the figure used to calculate statistical significance is typically expressed as a p-value – it ranges from 0 to 1 and is a calculation of the likelihood that the observed association is consistent with the null hypothesis. The MSU Study found that the association between African-American race and a prosecutor's use of a peremptory strike was statistically significant with a p-value of less than .001. In other words, there is less than a 1 in 1000 likelihood that the MSU Study's results are consistent with the null hypothesis; there is a 99.9% likelihood that the MSU Study reports a true association between race and a prosecutor's use of a peremptory strike.

& O'Brien, *MSU Study*, *supra,* at 1552, tbl.4 (reporting a strike rate ratio of between 2.0 and 2.1 for each of these sub-groups).

Second, and more importantly, the MSU Study moved beyond this analysis to apply multiple logistic regression techniques to analyze the effect of race when controlling for multiple variables, including those which might be both associated with race and with differential striking decisions.[7] This analysis revealed many factors that were correlated, positively or negatively, with a prosecutor's use of a peremptory strike. For example, the analysis suggested that prosecutors were less likely to use peremptory strikes against veniremembers who expressed views favorable to the state (e.g., difficulty accepting the presumption of innocence) and more likely to use peremptory strikes against jurors who knew the defendant. Grosso & O'Brien, *MSU Study*, *supra*, at 1556, tbl.5. Although there were many factors associated with the decision to use a peremptory strike, none of them accounted for the increased use of peremptory strikes against African-American

[7] Multiple regression permits analysis of the impact of variable X on outcome Y, while controlling for the presence of other variables that may or may not also be associated with outcome Y. For instance, attitudes towards the death penalty are correlated with race and also are rational bases for prosecutors to exercise peremptory strikes. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277, 279 (2001). Multiple regression analysis permits a researcher to estimate the influence of each of these variables independently of each other. *See* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, in Fed. Judicial Ctr., *Reference Manual On Scientific Evidence* 306 (3d ed. 2011) ("More generally, multiple regression may be useful (1) in determining whether a particular effect is present; (2) in measuring the magnitude of a particular effect; and (3) in forecasting what a particular effect would be, but for an intervening event.").

veniremembers. After controlling for every relevant variable in the model, the researchers concluded that the odds that an African-American juror in North Carolina would be peremptorily struck was 2.5 times greater than a white member being struck. *Id.* The strike rate ratio in Cumberland County was 2.57. 3rd RSp 277 (Robinson MAR Order ¶ 67).

This Court should not discount the MSU regression analysis because it did not gather data about every possible idiosyncratic explanation. To focus too much on such individualized explanations risks "miss[ing] the forest in carefully surveying the many trees." *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied*, *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399 (2017) (mem.). Statistics allow researchers to investigate relationships that may be common across cases. A statistical model examining a group of cases is designed to capture or describe what is common across cases—not what is unique to each case. If every jury selection process were truly independent and unique, with no common factors, we would expect the regression model to find no explanatory variables of statistical significance. Instead, what the MSU Study found was that the model detected commonalities among the very same variables that prosecutors often mention: such as the veniremember's death penalty views, or criminal history. Race was also found to be a common factor across different jurors.

C. The Superior Court Rejected the MSU Study on Unsound Bases

The Superior Court made no findings to undermine the unadjusted numbers regarding racial disparities in jury selection in Cumberland County. These raw numbers--demonstrating that prosecutors struck an average of 51.5% of eligible Black venire members, cmpared to 25.1% of all other eligible members--are a powerful demonstration of racial discrimination. The United States Supreme Court has not made regression analysis a requirement for a defendant to prevail under *Batson*. *See Miller-El v. Dretke*, 545 U.S. 231 (2005); *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019). Furthermore, in the *Robinson* MAR hearing, the State's expert, Dr. Katz, conceded that the raw numbers in the MSU Study do constitute *prima facie* evidence of race discrimination. 3rd RSp 256 (Robinson MAR Order ¶ 5). While the attorneys who prosecuted Mr. Robinson were different individuals than the ones who prosecuted Mr. Hobbs, the Robinson prosecutors were senior members of the District Attorney's office, who must have provided training, mentorship, and acculturation to younger lawyers.

The Superior Court Order ostensibly rejected the MSU Study for four reasons: (1) all of the cases evaluated in the MSU Study had been through direct appeal in our appellate courts, where they were determined to be "free of prejudicial error;" (2) the characteristics which a prosecutor would find attractive and unattractive were "developed without input from qualified current or former

prosecutors," (3) the recent "law students" who evaluated "attractive and unattractive juror characteristics" were "unqualified," and (4) the evaluators were not able to assess a prospective juror's "non-verbal communication." Order at 12-13.

First, the central power of the MSU Study is that it reveals patterns that expose phenomena that are difficult or impossible to discern through individual cases. This Court has recognized that *Batson* has been ineffective in the State of North Carolina, and that this Court has *never* held that a prosecutor intentionally discriminated against a juror of color. *State v. Robinson*, 846 S.E.2d 711, 716 (August 14, 2020); *see also* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957 (2016). Thus, the fact that our appellate courts have upheld the jury selection in all of the cases in the MSU Study demonstrates that traditional methods of analyzing the issue of race discrimination are consistently missing evidence of bias, and the MSU Study is probative and necessary evidence of larger systems at play that have not been evident to our courts' actors.

Second, the characteristics which were considered to be "attractive or unattractive" to prosecutors in the MSU Study were, in fact, developed with input from many qualified sources, including literature regarding jury selection, litigation manuals, treatises on jury selection, and Professor David Baldus, the

author of a prior jury selection study. 3rd RSp 264 (Robinson MAR Order ¶ 29). The characteristics are broadly consistent with the "attractive and unattractive" characteristics offered in the North Carolina prosecutor affidavits collected by Dr. Joseph Katz, the State's statistical expert, in the litigation of the *Robinson* MAR, as well as with *Batson* case law. 3rd RSp 285 (Robinson MAR Order ¶ 88). Moreover, they track several of the characteristics that the prosecutors in Mr. Hobbs' trial cited to explain their peremptory strikes in this case—including, young age, expressing reservations about the death penalty, and history of being accused of a crime. Thus, while the Superior Court expressed concern that not all potentially relevant juror characteristics were captured by the MSU Study, the lower court failed to actually identify any such characteristic that the study missed.

Third, the coding decisions and data entry for the MSU Study were made and completed by staff attorneys, not law students, all of whom received detailed and lengthy training on each step of the coding and data entry process and worked under the direct supervision of O'Brien and Grosso. The staff attorneys did not design the study; rather, they were trained to code data based on rigorous pre-selected criteria, a task that does not require the competence to prosecute a capital trial. A coding log was maintained to document any coding decisions that involved differences in judgment, enhancing intercoder reliability. 3rd RSp 267 (Robinson MAR Order ¶ 39).

Fourth, there is no race-neutral reason to believe that jurors' "non-verbal communication" would explain systematic and pervasive bias against African American venire members. The suggestion that Black prospective jurors are somewhere on the order of 2.6 times more likely to display unspecified "non-verbal communication" that would merit a prosecutor exercising a peremptory strike constitutes racial bias, in and of itself.

In short, the MSU Study unequivocally documented a systematic pattern in Cumberland County of prosecutors systematically excluding qualified African Americans from service as jurors in trials resulting in death sentences. Specifically, it found that in 11 capital cases from 1990 – 2010, prosecutors struck an average of 52.7% of eligible Black venire members, compared to only 20.5% of all other eligible venire members. The probability of this disparity occurring in a race-neutral jury selection process is less than one in 1,000. 3rd RSp 277 (Robinson MAR Order ¶ 67).

III. CONCLUSION

The MSU Study is characterized by exceptional rigor and demonstrates a clear pattern of racial discrimination in the selection of jurors in capitally-tried cases within the State of North Carolina overall, within particular time periods, and within Cumberland County.

Respectfully submitted this the 13th day of November, 2020.

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CERTIFICATE OF SERVICE

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