STATE OF NORTH CAROLINA
COUNTY OF STANLY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 95 CRS 56

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
GUY TOBIAS LEGRANDE,	)
Defendant.	)

BRIEF OF THE NORTH CAROLINA STATE CONFERENCE OF THE NAACP AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION FOR APPROPRIATE RELIEF PURSUANT TO THE RACIAL JUSTICE ACT

Theresa A. Newman
N. C. State Bar No. 15865
Duke University School of Law
Center for Criminal Justice & Professional Responsibility
Box 90360
Durham, NC 27708
Telephone: (919) 613-7133

Irving Joyner
N.C. State Bar # 7830
P.O. Box 374
Cary, North Carolina 27512-0374
Telephone: (919)319-8353

Counsel for Amicus Curiae North Carolina State Conference of the NAACP

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The North Carolina State Conference of the National Association for the Advancement of Colored People ("NAACP") submits this brief as *Amicus Curiae,* in support of Defendant's Motion for Appropriate Relief pursuant to the North Carolina Racial Justice Act, N. C. GEN. STAT. §§ 15A-2010 to 15A-2012 (2009).

INTRODUCTION

The trial jury is "the cornerstone of our system of justice. If its composition is a sham, its judgment is a sham. And when that happens, justice itself is a fraud, casting off the blindfold and tipping the scales one way for whites and another way for [blacks]." *Johnson Pledges Negroes Jury Aid*, NY Times, Nov. 17, 1965, at 1, col. 4. These words, spoken by President Lyndon Baines Johnson in 1965, are equally relevant today; they explain why strenuous enforcement of the Racial Justice Act is critical if its purpose of helping to eliminate race as a continuing factor in the administration of the death penalty is to be realized.

There are 31 defendants currently on North Carolina's Death Row who were convicted and sentenced to death by all-white juries. There are an additional 38 defendants who were convicted and sentenced to death by juries composed of eleven white jurors and one black juror. In the trials of these 69 defendants, many different prosecutors in 30 different counties systematically used peremptory challenges to exclude qualified black jurors from jury service. Such a consistent pattern of behavior cannot credibly be attributed to mere chance. The trial of these men by all-white or nearly all-white juries could just as easily have taken place 150 years ago, when, "whether emancipated or not," the defendants would have "had no rights which the

white man was bound to respect." *Dred Scott v. Sanford*, 19 How. (60 U. S.) 393, 406-07 (1857). Or their trials could have taken place 100 years ago, in the shadow of *Plessy v. Ferguson,* 163 U.S. 537 (1896), when the all-white juries would have been the product of Jim Crow laws and custom. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United* States, 61 U. Chi. L. Rev. 867, 895-96 (1994) (*citing* Gilbert Thomas Stephenson, *Race Distinctions in American law,* 253-72 (AMS Press, 1969). During either era, justice in these defendants' cases likely would have been a fraud.

The cases pending before the Court were all tried within the last thirty years. The question that the Racial Justice Act requires the Court to answer is whether justice in these cases was a fraud, or is there an honest explanation for the all-white or nearly all-white juries that does not implicate race?

INTEREST OF THE NORTH CAROLINA STATE CONFERENCE OF THE NAACP AS *AMICUS CURIAE*

The NAACP was founded in 1909. It is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social, and economic equality of rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its more than 100-year history, the NAACP has been at the forefront of the struggle to eliminate racial disparities and discrimination in the criminal justice system, including in jury selection and composition. It participated as an *amicus*, or through its former affiliate, the NAACP Legal Defense and Education Fund, Inc., as counsel, in many of the seminal jury discrimination cases. As a result of this history, the NAACP's experience has yielded lessons that could be useful to the Court in resolving the pending claims under the Racial Justice Act.

The North Carolina State Conference of the NAACP ("the NC Conference") is a non-partisan, non-profit organization with 101 active branches throughout the state. The NC Conference, which is the oldest and largest civil rights organization in the state, was a strong advocate for passage of the Racial Justice Act when it was pending as a bill in the North Carolina General Assembly. On the occasion of Governor Beverly Purdue signing the bill into law, the President of the NC Conference said,

> This law does not assure racial justice, but it can help bring it about. The law is one of the most powerful legitimate weapons we can use to rid our state of the criminal justice practice of racial bias. It does not address the roots of the problem – stereotypes, fear and even racism – but it is a start.

Statement by Rev. Dr. William J. Barber II, at the Signing of the Racial Justice Act by Governor Perdue, http://carolinajustice.typepad.com/ncnaacp/racial-justice/.

ARGUMENT

I. Jury Service Is Supposed To Be One of the Cornerstones of Democratic Government

The trial jury plays a critical role in our democratic government, specifically in the criminal justice system. Aside from voting, jury service is the principal way many Americans participate in self-government. As the United States Supreme Court has noted, "[t]he petit jury has occupied a central position in our system of justice by safeguarding a person against the arbitrary exercise of power by the prosecutor or judge." *Batson v. Kentucky*, 476 U. S. 79, 86 (1986). Earlier, the Court called the jury "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U. S. 145, 156 (1968). When the Court reinstated the death penalty in 1976, it noted, "jury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system, a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Gregg v. Georgia,* 428 U. S. 153, 190 (1976).

We normally assume that the jury will *protect* criminal defendants from racial discrimination and bias, not that it will be a primary medium through which such discrimination is practiced. As the Supreme Court noted in *McCleskey v. Kemp,* "it is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' *Strauder v. West Virginia,* 100 U. S. 303, 309 (1880). Specifically, a capital sentencing jury representative of a criminal defendant's community assures a '"diffused impartiality, ' *Taylor v. Louisiana*, 419 U. S. 522, 530 (1975) . . . ." 481 U.S. 279, 310 (1987)(footnote omitted).

Race can distort the results of a criminal trial in ways too numerous and too complex to catalog. "It is by now clear that conscious and unconscious racism can affect the way white

jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." *Georgia v. McCollum*, 505 U. S. 42, 69 (O'Connor, J. dissenting).[1] There can be no doubt, therefore, that the systematic discretionary exclusion of qualified black jurors, because of their race, "'casts doubt on the integrity of the judicial process' and places the fairness of a criminal proceeding in doubt." *Powell v. Ohio*, 499 U. S. 400, 411 (1991) (internal citation omitted).

Rhetoric about the central role the criminal jury plays in our democracy or its role in protecting the defendant from racial discrimination and bias has not been true for African Americans generally or for African American defendants. Like the remarks of the Chief Justice of the North Carolina Supreme Court in a commencement address at St. Augustine's School in 1920, the rhetoric of democracy and fairness set out in jury discrimination decisions has often seemed empty and hypocritical, sometimes in the very cases in which it is memorialized:

> As to the administration of justice with which in some capacity I have been associated all my life, I told my friend that there was absolute equality. A colored man may have differences with a white man, as will happen between any two men, but when they go into the courthouse to have it settled every man knows that colored men are at no disadvantage. The white men on the jury, with the pride of the Anglo-Saxon race, will see that equal and exact justice is done, and if ever I have seen any partiality shown it is that if the juries and the judges have tipped the scales at all, it has been in favor of the colored men upon the innate belief that if any advantage has been taken it has been by the white man by reason of his advantages.

Chief Justice Walter McKenzie Clark, *The Negro in North Carolina and the South. His Fifty-five Years of Freedom and What He Has Done*, Commencement Address, St. Augustine's School, Raleigh, N.C. (May 26, 1920), available at *http://docsouth.unc.edu/nc/staugust/clark.html.*

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[1] Ignorance about or lack of familiarity with the culture of an insular minority community alone can lead to miscarriages of justice, wholly apart from racism, conscious or unconscious. *See, e.g., Hair Traits Proved Innocence*, The News & Observer (Raleigh) (May 28, 2010), available at *http://www.newsobserver.com/2010/05/28/504304/hair-traits-proved-innocence.html.*

A more honest reflection of the African American defendant's daily reality in the criminal justice system is captured by the candid words of Justice Antonin Scalia: "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof." Justice Antonin Scalia, Memorandum to the Conference, McCleskey v. Kemp (No. 84-6811) (discovered among Justice Thurgood Marshall's papers after his death). The cases now pending before the Court, from which prosecutors systematically excluded qualified African American jurors from participation, surely "cast doubt on the integrity of the judicial system" in North Carolina and "places the fairness of [the criminal proceedings in those cases] in doubt."

II. Throughout Our History, By Law or Subterfuge, Qualified Black Jurors Systematically Have Been Denied the Right To Serve on Juries.

A. Against the backdrop of slavery, race has always played a central role in determining who serves on juries in capital cases.

The legacy of slavery casts a shadow over the challenge to the all-white and nearly all-white juries in the pending cases. Prior to the Civil War, the universal exclusion of African Americans from juries was widely accepted and legally endorsed. *See* Christopher Waldrep, *Jury Discrimination* 235-39 (2010). Many state constitutions precluded African Americans from possessing any rights whatsoever. *See, e.g.*, Ala. Const. of 1819, art. III § 5; Va. Const. of 1830, art. III § 14. Legislators also passed racial jury statutes that often explicitly required that all individuals included on jury lists be white. *See, e.g., Codification of the Statute Law of Georgia* 578 (comp. by William A. Hotchkiss, 1845); *Revised Statutes of the State of Arkansas* 482-83 (rev. by William McK. Ball & Sam. C. Roane, 1838). Other state statutes used the less racial but equally transparent requirement that prospective jurymen be "freeholders" or "householders" to prevent almost all African Americans from qualifying. *See, e.g., Revised Code of the Statute*

Laws of the State of Mississippi 497 (1857); *Acts and Resolutions of the General Assembly of the State of Florida* 26 (1846). It was not until 1860 in Massachusetts that an African American first served as a juror in an American criminal case. Mass. Hist. Society, *Jury Duty: A Citizen's Right*, http://www.masshist.org/longroad ("Participation" link/"Jury Duty" link); *accord* Equal Justice Initiative, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 9 (Aug. 2010)(available on EJI website).

Though post-Civil War hopes of democratizing jury selection initially ran high, Southern states flouted what little progress there was during the brief Reconstruction period by developing facially race-neutral statutes that relied on the discretion of local officials to ensure that all-white juries remained a staple of the Southern justice system. After the Supreme Court's 1879-80 decisions that states' categorical exclusion of African Americans from jury service violated the Fourteenth Amendment, *see Strauder v. West Virginia*, 100 U.S. 303, 303 (1879); *Neal v. Delaware*, 103 U.S. 370, 370 (1880), the Jim Crow era witnessed a sharp shift from covertly racist jury statutes to a reliance on local custom to exclude African Americans from jury venires, a phenomenon that lasted well into the 1960s. *See, e.g.* Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* From Lynch Mobs to the Killing State 96, 100 (Charles J. Ogletree & Austin Sarat eds., 2006).

By using vague morality and intelligence requirements and the "key man" system, under which prominent local citizens, almost always white, created lists of suitable jurors for jury commissioners, white Southerners were able to control the racial composition of jury lists. *See Davis v. United States*, 411 U.S. 233, 244-45 (1973); *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 332 (1969); *Scales v. United States*, 367 U.S. 203, 259 (1961), *superseded by statute*, Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69. In some jurisdictions

where African Americans were included on jury lists, their names were written on different colored pieces of paper that were easily distinguishable when the names of potential jurors were drawn during the venire selection process. *See Avery v. State of Georgia*, 345 U.S. 559, 560-61 (1953).

Attempts to overcome even the most blatant jury discrimination were few and far between. First, most attorneys were unwilling to prosecute such claims for fear of backlash against themselves or their clients. *See* Randall Kennedy, *Race, Crime, and the Law* 174 (1997). In *United States ex rel Goldsby v. Harpole*, 263 F.2d 71, 82 (5th Cir. 1959), the court noted:

> [T]he very prejudice which causes the dominant race to exclude members of what it may assume to be an inferior race from jury service operates with multiplied intensity against one who resists such exclusion. Conscientious southern lawyers often reason that the prejudicial effects on their client of raising the issue far outweigh any practical consideration in the case. . . . [W]e think it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries.

Second, local judges often compounded this problem by overlooking jury discrimination and accepting as credible jury commissioners' statements of non-discrimination, even when the evidence strongly indicated otherwise. *See, e.g., Royals v. State*, 75 So. 199 (Fla. 1917); *Welch v. State*, 236 P. 68 (Okla. Crim. App. 1925). The Supreme Court's continued deference to state courts during this period further allowed jury discrimination to prosper. *See, e.g., Brown v. Allen*, 344 U.S. 443, 550-51 (1953) (Black, J., dissenting) (decrying the majority's endorsement of "continued [racial] disproportion" in jury venires that "falls short of a genuine abandonment of old discriminatory practices"). And when the Court did push back against flagrant instances of jury discrimination, *see, e.g., Smith v. Texas*, 311 U.S. 128, 129 (1940) (no African American served as a juror anywhere in the county during the year prior to the defendant's indictment); *Norris v. Alabama*, 294 U.S. 587, 592-93 (1935) (names of potential black jurors were added to

the jury list after the grand jury was selected), local officials resorted to tokenism, allowing only the absolute minimum number of African American jurors necessary to refute claims of total exclusion. See, *e.g.*, *Akins v. Texas*, 325 U.S. 398, 405-09 (1945) (upholding a defendant's conviction despite a jury commissioner's statement that he "did not have any intention of putting more than one negro on the panel").

Justice Murphy's dissent in *Akins v. Texas* resonates today:

> Clearer proof of intentional and deliberate limitation on the basis of color would be difficult to produce. . . . By limiting the number to one they thereby excluded the possibility that two or more Negroes might be among the persons qualified to serve. All those except the one Negro were required to be of white color. . . . They refused, in brief, to disregard the factor of color in selecting the jury personnel. . . . Our affirmance of this judgment thus tarnishes the fact that we of this nation are one people undivided in ability or freedom by differences in race, color or creed.

Id. at 410.

A survey of Southern county court clerks thirty years after *Strauder v. West Virginia,* 100 U. S. 303 (1880), showcases the perverse effects of Jim Crow laws in North Carolina. *See* Gilbert Thomas Stephenson, RACE DISTINCTIONS IN AMERICAN LAW 265-66 (1911). In one county, in which two-thirds of the residents were African American, the county clerk wrote that "Negroes do not serve on the jury in this county and have not since we, the white people, got the government in our hands." Id. at 265. Two other county clerks reported that African Americans were not permitted to serve on juries or vote. Id. at 266.[2] Identical results were found throughout the South. Id. at 253-71. This pattern continued well into the 1960s, until state and circuit court judges began to use their oversight to dismiss indictments that were obtained by disproportionately all-white or almost all-white juries. *See* Kennedy, *supra*, at 179.

[2] The remaining three counties reported that extremely limited numbers of African Americans were occasionally allowed on juries: "Sometimes it happens that a few are called as talisman, but not then until the sheriff has exhausted his best efforts to get white men." Stephenson, *supra*, at 265. All six counties were at least half African American. Id. at 265-66.

Once racial tampering with jury lists was rendered obsolete and nonwhite jurors were included in jury venires, prosecutors resorted to their discretionary peremptory challenges to ensure that *petit* juries excluded qualified black jurors. *See generally* id. at 194-204. For many years, although condemning the practice, the Supreme Court did little to prevent it; prosecutors enjoyed relatively unfettered discretion in their ability to use racially motivated peremptory strikes. *See Swain v. Alabama*, 380 U.S. 202, 223-24 (1965) (holding that defendants had to prove intentional racial discrimination in "case after case," without regard to whether the jury in his case was all-white, and that prosecutors could validly use race as a reason for striking a juror so long as striking the juror was somehow related to the outcome of the case). Not until *Batson v. Kentucky*, 476 U.S. 79 (1986), did the Supreme Court effectively limit prosecutorial discretion to exclude qualified black jurors, but only modestly. Since *Batson*, if defendants can show circumstances that permit an inference of discriminatory purpose, the prosecution must justify their peremptory strikes by providing a "permissible racially neutral selection criteria." *Batson*, 476 U.S. at 94; *see also Rice v. Collins*, 546 U.S. 333, 338 (2006).[3] This has not been much of a hurdle to clear.

Courts generally have applied the *Batson* standard very leniently, accepting as legitimate many transparently pretextual race-neutral explanations offered by prosecutors. "Although the prosecutor must present a comprehensible reason, '[t]he second step of [the *Batson*] process does not demand an explanation that is persuasive, or even plausible . . . ." *Rice*, 546 U.S. at 338 (first alteration in original) (quoting *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995)). Both unsupported allegations of jurors' low intelligence and misperceptions based on racial stereotypes have been

[3] A defendant is required to prove intentional racial discrimination if the prosecutor provides an acceptable explanation for his use of the peremptory challenge. *See Snyder v. Lousiana*, 552 U.S. 472, 485 (2008); *Batson*, 476 U.S. at 96-97.

deemed satisfactory justifications when prosecutors have used peremptory strikes to weed out black jurors. Equal Justice Initiative, *supra*, at 17-18. Although judges have acknowledged that low intelligence explanations are "particularly suspicious" due to the similarity to the vague intelligence criteria used to exclude African Americans from jury lists and venires during the Jim Crow era, *McGahee v. Allen*, 560 F.3d 1252, 1265 (11th Cir. 2009), intelligence-based justifications have been frequently upheld in many jurisdictions, *see, e.g.*, *State v. Crawford*, 873 So. 2d 768, 784 (La. Ct. App. 2004); *Dukes v. State*, 548 S.E.2d 328, 331 (Ga. 2001).

The lenient *Batson* standard has also led some prosecutors to aggressively question African American jurors, fishing for a "permissible racially neutral" reason to exclude them from jury service. In *Miller-El v. Dretke,* 545 U. S. 231 (2005), for example, the Supreme Court cataloged the many ways in which the prosecutors in that case subverted the Constitution in order to empanel an all-white jury. They used their peremptory challenges to strike 91% of the eligible black venire panelists, "a disparity unlikely to have been produced by happenstance." Id. at 231 (syllabus, citing *Miller-El v. Cockrell,* 537 U. S. 322, 342 (2003)). They offered reasons for striking black jurors that applied equally to white jurors who were seated. They posed voir dire questions to black jurors that were strikingly different and more challenging than the questions posed to white jurors. One example involved the graphic detail they used to describe the death penalty to black jurors compared to the bland description they provided to most white jurors. Another example involved asking black jurors who expressed any reservation about the death penalty how low a sentence they would consider if the death penalty was not imposed, but not asking the same question to most white jurors who expressed similar reservations about the death penalty. The Supreme Court concluded that, "when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but

discrimination." Id. at 265. Prosecutors all over the South, including in North Carolina, routinely use the tactics condemned in *Miller-El* to concoct rationales for removing qualified black jurors.

The Racial Justice Act requires, as the Supreme Court did in *Miller-El*, that courts call these tactics by their real name, "discrimination."

To our knowledge, no court in North Carolina, state or federal, has ever granted relief from racial discrimination under *Batson*.[4] The composition of capital juries has remained racially skewed, and, as demonstrated in the pending cases, African Americans are still being systematically excluded because of their race from service on capital juries in the State. It defies belief to call such unbroken consistency, in case after case, before the Civil War, after the Civil War, and in the last twenty years, merely coincidence – or "happenstance." Such systematic exclusion of qualified jurors, *in any case in which it occurs*, "tarnishes the fact that we of this [State] are one people undivided in ability or freedom by differences in race, color, or creed."

B. Prosecutors systematically excluded qualified Black jurors from the juries that convicted and sentenced the inmates currently on North Carolina's Death Row.

The defendants in these cases rely upon an extensive study of capital charging, sentencing, and jury selection in North Carolina. The study was conducted in 2009 and 2010 by Catherine Grosso and Barbara O'Brien, professors at Michigan State University's College of Law, in collaboration with George Woodworth, University of Iowa Professor of Statistics and

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[4] The North Carolina Court of Appeals apparently has granted relief in one case alleging a claim under *Batson*. *State v. Wright*, 189 N.C. App. 346 (2008). In that case, however, the Court did not find that the prosecutor in fact had exercised her peremptory challenges based on the race of jurors excluded. Rather, the Court found that the trial court had denied the defendant's claim without requiring the prosecutor to provide "a race-neutral explanation for each African American whom it had removed from the jury by peremptory challenge." Id. at 346-347. The prosecutor used peremptory challenges to remove seven African American jurors; "[a]t most the prosecutor offered a race-neutral explanation for five of the seven aforementioned jurors." Id. at 352. The Court noted that in all of the cases that previously had raised *Batson* claims, "unlike the case before us, the prosecutor provided a race-neutral explanation for each and every one of the challenged jurors." Id.

Actuarial Science. The results of the study for each of the districts in which relief is being sought are set out in the Affidavit of Professors Grasso and Obrien, which is attached as an exhibit to the various Motions for Appropriate Relief. Affidavit of Professors Catherine M. Grosso, J.D., and Barbara O'Brien, J.D., Ph.D. (July 30, 2010) (presenting their study's initial findings).

The study shows that, statewide for the past two decades, prosecutors have systematically struck qualified black and racial minority venire members at more than twice the rate at which they struck other venire members.[5] It also shows that prosecutors are even more race-conscious in cases involving black or racial minority defendants. In those cases, prosecutors struck qualified black and racial minority venire members at an even higher rate. Id. ¶ 16.

The study further demonstrates that, across the State of North Carolina, a person of color who could follow the law and was willing to impose the death penalty was more than twice as likely to be struck by prosecutors as a similarly-situated white juror. "Of the 166 [capital] cases that included qualified black venire members, prosecutors struck an average of 55.5% of qualified black venire members compared to only 24.8% of all other qualified venire members." Id. ¶ 15.

Of the 173 cases analyzed in the study, thirty-three had all-white juries. Id. ¶ 18. Another forty had juries from which all but one qualified African American juror was excluded. Id. ¶ 19. Thus, 73 defendants on Death Row were tried before juries that were all-white or nearly all-white. The study concluded that the "probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than .01." Id. ¶ 17.

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[5] The study defines "racial minority" as including black, Hispanic, Asian, and Native American persons, as well as persons of more than one race. "Qualified venire members" are those venire members who were not removed from the venire for cause or hardship and were thus eligible to serve on the jury.

These findings are consistent with the study released by the Equal Justice Initiative in June 2010, which found that across the South—in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee—prosecutors exclude qualified blacks from jury service at disproportionately high rates and, across states, use the same pretextual "race-neutral" explanations to mask their discrimination. Equal Justice Initiative, *supra*.

C. A jury from which qualified African-Americans jurors have been excluded because of their race undermines the integrity of the criminal justice system.

The recent remark of a prominent North Carolina District Attorney, suggesting that African Americans have only a limited legitimate interest in jury service in a capital case, may reflect a view shared by other prosecutors, and perhaps even judges. When asked about cases filed under the Racial Justice Act by white defendants who killed white victims or black defendants who killed black victims, the prosecutor said, "We're sort of surprised by some of the ones where there didn't appear to by anything racial about the case." Interview of Colon Willoughby, WRAL News (Aug. 4, 2010), available at http://www.wral.com/news/local/story/8086772/. Whether the Racial Justice Act is violated does not depend on whether there is "anything racial about the case," at least not as DA Willoughby seems to be suggesting. The mere fact that African American jurors are systematically excluded from jury service because of their race taints any case in which it occurs, whether or not there are other identifiable "racial issue[s]" in the case.

The Supreme Court has made that point plain:

> Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice." Specifically, a capital sentencing jury representative of a criminal defendant's community assures a "diffused impartiality."

> Individual jurors bring to their deliberations "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity, and flexibility into a legal system."

McCleskey v. Kemp, 481 U.S. 279, 310-11 (1987) (internal citations omitted).

When, on the basis of race, prosecutors use discretionary peremptory challenges to intentionally limit "the qualities of human nature and varieties of human experiences" informing the jury's deliberations by excluding qualified jurors likely to be "representative of the criminal defendant's community," they grotesquely undermine the role of the jury in capital sentencing.

In an essay to mark the fiftieth anniversary of *To Kill A Mockingbird*, Senior Federal Judge Royal Furgeson, writes that "juries get it right, so long as they are representative." Judge Royal Furgeson, *The Jury in To Kill A Mockingbird: What Went Wrong?*, 73 Texas Bar J. 488, 490 (June 2010). Quoting Professors Valerie Hans and Neil Vidmar, he continued:

> A key element contributing to jury competence is the deliberation process. A representative, diverse jury promotes vigorous debate. One of the most dramatic and important changes over the last half century is the increasing diversity of the American jury. Heterogeneous juries have an edge in fact finding, especially when matters at issue incorporate social norms and judgments as jury trials often do.

Id. (quoting Hans & Vidmar, *The Verdict on Juries*, 91 Judicature 226, 227 (Mar.-Apr. 2008)). Prosecutors who intentionally exclude qualified black jurors seek only to ensure a death sentence and subvert the law. They have no respect for justice or fairness.

The wholesale exclusion of qualified black jurors also "undermine[s] public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 88 (1986). This is especially true in the African American community, which effectively is told that it has no voice or experiences that an all-white jury is bound to respect. Leslie Ellis & Shari S. Diamond, *Race,*

Diversity, and Jury Composition: Battering and Bolstering Legitimacy, 78 Chi.-Kent L. Rev. 1033, 1038, 1049 (2003).

One case in North Carolina stands out: *State v. White*, 131 N. C. App. 734 (1998). Henry Jerome White was tried for capital murder in April 1997 in Forsyth County. The jury convicted him of murder, but sentenced him to life in prison without the possibility of parole. During jury selection, the prosecutor used peremptory challenges to exclude four African American jurors who had survived the death qualification process and were otherwise qualified to serve. The defense challenged the prosecutor's conduct under *Batson*. The North Carolina Court of Appeals found that the prosecutor's explanations for excluding two of the jurors "were supported by the record and were facially valid," even though the reasons cited included the jurors' body language, failure to make eye contact, and that one "appeared confused and addled." Id. at 739.

The prosecutor gave the following reasons for excluding the two other jurors, Carly Reynolds and Sonya Jeter:

> *Both black females, both 27 years old*, old enough. *Almost the same age as the defendant.* Sonya was personally opposed to the death penalty. *Carolyn [sic] Reynolds is living with her mother, doesn't have a stake in the community.* She's single, has an illegitimate child, *health care provider. State thinks that people who want to save lives don't want to take lives*. And she didn't think having her purse stolen was a serious crime.... And judge, on Miss Jeter, her cousin was convicted by Detective Rowe. Again, she's another health care provider.

Id. at 739-40 (emphasis added). Based on this explanation, the court found that "race was certainly a factor in the prosecutor's reasons for challenging Reynolds and Jeter . . . ." Id. at 740. That conclusion was inescapable; as the court noted,

> [f]rom the prosecutor's statements, it is apparent that race was a predominant factor in his decision to strike Jeter and Reynolds from the venire. It could be argued that the most telling evidence of the prosecutor's intent is the fact that the first words from his mouth as he addressed his reasons for striking Jeter and Reynolds was "[b]oth black females," not "both health care providers" or "both 27 years of age." The explanation, on its face,

> belies racial neutrality and manifests an intent to exclude these individual jurors based upon their membership in a distinct class.

Id. Despite that finding, the court upheld Mr. White's conviction and sentence to life without parole, in deference to the trial court's finding that race was not the *sole* reason for excluding the jurors and because the defense did not specifically argue that the other reasons proffered by the prosecutor were merely pretextual. Id. at 740-41.

Sonya Jeter Waddell, one of the then-27-year-old black women excluded from the White case, is now forty years-old. Affidavit of Sonya Waddell (Aug. 5, 2010). She is a native of Winston-Salem and is married with two children, who are both in high school. She has worked for half her life providing health care to the elderly. She is a member of the Greater Cleveland Church in Forsyth County and a United Way volunteer. She is not opposed to the death penalty, and she believes she "could have been a fair and impartial juror in [the White] case." As the Supreme Court noted about a juror in the *Miller-El* case, Ms. Waddell "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence." 545 U. S. 231, at 232. But Ms. Waddell is black, and so the prosecutor excused her.

Ms. Waddell does not "believe the reasons that the prosecutor later gave for dismissing [her] were legitimate." During the vior dire, the prosecutor "never looked at [her]." The process by which the prosecutor searched for reasons to strike Ms. Waddell mirrored what happened in *Miller-El*. According to Ms. Waddell, "[t]he prosecutor treated me as if I was on trial. . . . [H]e asked me more questions than he did other potential jurors. I felt intimidated by him." When Ms. Waddell learned that the prosecutor explicitly cited her race as reason for excluding her from jury service, she was "angry because I have always had faith in our criminal justice system and I feel like that faith has been abused." Ms. Waddell is left dismayed that "a part of [her] legacy will include this kind of discrimination."

Four inmates on Death Row were tried in Forsyth County by all-white juries. *State v. Murrell*, Motion for Appropriate Relief Pursuant to the Racial Justice Act ¶ 44 n. 13 (filed Aug. 3, 2010). Forsyth County has more defendants sentenced to death by all-white juries than any other county in the State. Id. ¶ 62. Two other defendants from that county were tried before juries from which all but one qualified African American were removed by the prosecutors. Prosecutors used their peremptory challenges to remove qualified black jurors at more than twice the rate at which they used their challenges to remove all other qualified jurors. Id. ¶ 60.

The conduct of these prosecutors brings to mind the testimony of the jury commissioner quoted in *Akins v. Texas*: "We had no intention of placing more than one negro on the panel. When we did that we had finished with the negro." 325 U.S. 398, 405 (1945). As Justice Murphy said in dissent, "[c]learer proof of intentional and deliberate limitation on the basis of color would be difficult to produce." Id. at 410.

In his closing argument in *To Kill a Mockingbird*, Atticus Fitch tells the jury, "A court is only as sound as its jury, and a jury is only as sound as the men who make it up." Harper Lee, TO KILL A MOCKINGBIRD 217-18 (1960). Federal District Judge Royal Furgeson, in his tribute to the book, observes, "Atticus pinpoints exactly how the *Mockingbird* jury got is wrong. A court is only as sound as its jury, but its jury must be selected free from discrimination." Furgeson, supra, at 490. That in turn pinpoints how prosecutors like those in Forsyth County who systematically use peremptory challenges to exclude qualified African American jurors from participating in the criminal justice system get it wrong. As the Supreme Court said in *Powers v. Ohio,* 499 U. S. 400, 412-13 (1991):

> A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the

parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.

* * *

A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections are not heard.

III. "It should come as no surprise that jurors selected through prejudice deliberated with prejudice."[6]

To condemn a jury from which qualified black jurors were excluded because of their race is not intended to condemn white jurors as racist. But a jury that is the product of racial discrimination has no independent claim to legitimacy because many, or even all, of the white jurors who serve are not racially biased. Jury deliberations are secret. However, the cases in which race has surfaced paint a disturbing picture of the sometimes hostile environment in which North Carolina capital cases can take place. Cases such as the one involving Guy LeGrande, who was sentenced to death by an all-white jury in Stanly County, are indelible stains on North Carolina's criminal justice system.

Guy LeGrande: "A Nigger from Wadesboro"

The Motion for Appropriate Relief Pursuant to the Racial Justice Act filed on behalf of Guy LeGrande sets out facts that should shame all North Carolinians. *State v. LeGrande*, Motion for Appropriate Relief, 96 CRS 567 (Sup. Ct. Div., Stanly County) (Aug. 5, 2010). Although Mr. LeGrande is under a death sentence, on June 27, 2008 the court found him incompetent to be executed, thus the current Motion was filed only to preserve his claims under the Racial Justice Act. The Motion alleges it is highly doubtful Mr. LeGrande will regain his capacity to proceed

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[6] Jeffrey Abramson, WE, THE JURY 110 (1995).

due to his severe mental illness. His case is thus frozen in time, perhaps forever beyond the reach of any court to change what was done in the name of the people of this State.

The LeGrande Motion details the sordid history of race and racism in Prosecutorial District 20, in which Mr. LeGrande was tried, convicted, and sentenced to death. Id. ¶¶ 37-69. At the time of Mr. LeGrande's trial, the District Attorney was Kenneth Honeycutt. Id. ¶¶ 60-69. Mr. Honeycutt is known for wearing a lapel pin in the shape of a noose, which as the Motion perhaps needlessly notes, "is a racially hostile system that is widely viewed as a direct link to the sordid role that lynching played throughout the South during the post-Reconstruction and Jim Crow eras." Id. ¶ 61. He wore the noose pin in court, when he appeared on behalf of the people of his District. Id. ¶ 60. He presented similar pins to his assistants after they secured death sentences in the cases they prosecuted. Id.

Race played a prominent role in Mr. LeGrande's case, from the decision to charge him with capital murder to his death sentence, and likely contributed to his mental illness and current mental incompetence. Mr. LeGrande is African American. He was convicted for the murder of Ellen Munford, a white woman. The primary evidence against Mr. LeGrande was the testimony of Howard Thomas Munford, the victim's husband, who testified that he recruited Mr. LeGrande to kill his wife and provided the murder weapon. To provide an alibi for himself, Mr. Munford took his two small children to Myrtle Beach on the day their mother was killed. Mr. Munford is white. The other principal witness against Mr. LeGrande was Mr. Munford's friend, Greg Laton, who provided the shotgun used to kill Ms. Munford, knowing the purpose for which Mr. Munford wanted the gun. Mr. Laton is white. Prosecutors allowed Mr. Munford to plead guilty to second degree murder, in exchange for his testimony against Mr. LeGrande. Mr. Laton was not charged with any crime.

Mr. Honeycutt used peremptory challenges to make sure no black jurors would sit on Mr. LeGrande's jury. At one point during the process, the court said, "Let the record show that only Caucasians are left in the jury pool." Id. ¶ 115. Mr. LeGrande, who was permitted to represent himself despite clear evidence of his mental illness, remarked, "But there are no African Americans left." When a black venire member was later added to the pool, the prosecutor used his peremptory challenge to exclude her. Mr. LeGrande did not know he could challenge the exclusion of African Americans from his jury. As a result of the prosecutor's actions, Mr. LeGrande was tried before an all-white jury.

During his opening statement to the all-white jury, Mr. Honeycutt used the metaphor of a "rope" to explain circumstantial evidence; in the context of Mr. LeGrande's trial, it was an unmistakable reference to a noose and lynching. He told the jury:

> And as the evidence mounted and became overwhelming, those strings [of evidence] were twisted and bound into a rope. A rope so strong that when this case is over, you will not have any reasonable doubt about this man's guilt.

Id. ¶ 63. The jury subsequently heard testimony from Mr. Munford and Mr. Laton about conversations in which they referred to Mr. LeGrande as a "nigger from Wadesboro."

Mr. LeGrande's mental condition became progressively worse as the trial proceeded. He wore a Superman t-shirt during some of the proceedings. He cursed jurors and called them "Antichrists." During the sentencing proceeding, when it was clear Mr. LeGrande was spinning out of control, the court tried to stop his delusional ranting. The prosecutor, as the LeGrande Motion states, "shamefully" took advantage of this mentally ill man: "State has no objection to a statement, Your Honor." Mr. LeGrande then made an offensive statement to the jurors, concluding, "But for right now, all of you so-called good folks can kiss my natural black ass in the showroom of Helig-Meyers. Pull the damn switch and shake that groove thing." In his

closing argument for his life, he told the jurors: "Pull the switch and let the good times roll. . . . Do what you got to do."

In his defense of Terry Nichols in the Oklahoma City bombing case, Michael Tigar, one of this country's most prominent defense attorneys, referred to the jury trial as a "sanctuary:"

> The overriding Nichols defense theme would have to be "sanctuary." The image of sanctuary is one of safety, reason, compassion, and redemption. Those were the human qualities on which Nichols' defense would rest. Sanctuary is a quiet place from which one could evaluate the evidence of Terry Nichols' alleged involvement, detached to the extent possible from the fear and anger that the bombing engendered. If he was convicted, this sanctuary would be a setting to consider the issue of punishment.

Michael E. Tigar & James E. Coleman, Jr., *A Sanctuary in the Jungle: Terry Lynn Nichols and His Oklahoma City Bombing Trial*, in Michael Tigar & Angela Davis, eds., TRIAL STORIES 151 (2008). The People of North Carolina, acting through prosecutors like Kenneth Honeycutt, denied Guy LeGrande and others on Death Row, such a sanctuary for their trials. Instead, by systematically removing African Americans from capital juries, these prosecutors intentionally created opportunities for racial prejudice, bias, anger, and a lack of compassion to flourish during jury deliberations.

The Racial Justice Act gives us a second chance to do better.

CONCLUSION

In 1987, an all-white jury in Onslow County convicted Robert Bacon, Jr., and sentenced him to death for killing the white husband of his white girl friend. A second all-white jury resentenced him to death in 1991. Bacon was scheduled to be executed on September 21, 2001. During the countdown to his execution, one of the white jurors who served on the jury that resentenced him in 1991 gave Bacon's defense lawyers a sworn declaration in which she described the role that race had played during the jury's deliberations. According to the juror, "some jurors felt that it was wrong for a black man to date a white woman. Jurors also felt that black people commit more crime and that it is typical of blacks to be involved in crime." Declaration of Pamela Bloom Smith ¶ 8 (May 10, 2001). In addition, "some jurors were adamant in their feeling that Bacon was a black man and he 'deserved what he got.'" Id. Her fellow jurors were impatient with her and another juror who initially wanted to sentence Bacon to life without parole; they "complained that this should be an easy decision and that we were taking too long." Id. ¶ 4. The juror concluded, "I do not believe Bacon got a fair shake." Id. ¶ 6.

The courts were powerless to do anything about the bias that surfaced during the jury's secret and largely unreviewable deliberations in the Bacon case. Faced with the prospect that Bacon would be executed, notwithstanding the undisputed evidence that race had played a role in his death sentence, Governor Michael Easley commuted Mr. Bacon's sentence to life without the possibility of parole.

Because of the Racial Justice Act, North Carolina courts are no longer powerless to act in the face of race discrimination in capital cases; nevertheless, they still must act. There must be

no tolerance for any exclusion of qualified jurors on the basis of their race. As the Supreme Court pointed out in *Powers v. Ohio*, 499 U. S. 409, 412 (1991),

> [t]he process of excluding racial minorities invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated if race is implicated in the trial, either in a direct way as with an alleged racial motivation of the defendant or a victim, or in some more subtle manner as by casting doubt upon the credibility or dignity of a witness, or even upon the standing or due regard of an attorney who appears in the cause.

Respectfully Submitted,

Theresa A. Newman
N. C. State Bar No. 15865
Duke University School of Law
Center for Criminal Justice & Professional Responsibility
Box 90360
Durham, NC 27708
Telephone: (919) 613-7133

Irving Joyner
N.C. State Bar # 7830
P.O. Box 374
Cary, North Carolina 27512-0374
Telephone: (919)319-8353

Counsel for Amicus Curiae North Carolina State Conference of the NAACP

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to N.C. Gen. Stat. § 15A-1420(b1)(1), I caused to be served a copy of the foregoing Brief of the North Carolina Conference of the NAACP as *Amicus Curiae* in Support of Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act, by first class mail upon:

Honorable Michael D. Parker
District Attorney
P.O. Box 1241
Albemarle, NC 28002

Ms. Sandra Wallace-Smith
Mr. Barry S. McNeill
N. C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

Jay H. Ferguson
James H. Monroe
Thomas, Ferguson & Mullins, LLP
119 East Main Street
Durham, North Carolina 27701

This the 25th day of August, 2010.

Theresa A. Newman