

Policing Jury Discrimination in North Carolina: What's Happening and What's at Stake?

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For over three decades, claims of race-based juror discrimination — commonly known as “*Batson* challenges” — were, without exception, rejected by the North Carolina Supreme Court.¹ That changed in the last three years, as the trajectory of our state’s jurisprudence shifted towards meaningful enforcement of the constitutional protections against such discrimination. With the change in the North Carolina Supreme Court’s composition in early 2023, some wonder if the *Batson* winds will shift once again. The resolution of four *Batson* cases argued before that court earlier this year will shed light on that question. Two of those cases were decided in April; two remain under review. The two released opinions, *State v. Hobbs (Hobbs II)* and *State v. Campbell*, do not reflect a wholesale rejection of the court’s recently expanded understanding of *Batson*, but do suggest a return to the era of superficial *Batson* enforcement in North Carolina appellate courts. While we await the court’s rulings in the other two *Batson* cases, it is timely to consider where *Batson* stands in North Carolina, how we got here, and where we might go from here.

In the landmark 1986 case of *Batson v. Kentucky*, the United State Supreme Court overhauled the framework for reviewing claims of juror discrimination. The *Batson* court held that the previous standard, which allowed juror discrimination unless the defendant could prove a historical pattern of discrimination, imposed a “crippling burden of proof, [rendering] prosecutors’ peremptory challenges [] largely immune from constitutional scrutiny.”² The *Batson* court recognized that under the Fourteenth Amendment’s Equal Protection Clause, a single discriminatory juror strike constitutes constitutional error, and consequently held that judges may find juror discrimination solely based on the evidence in the case before them. This bears repeating. Before 1986, our courts officially tolerated racial discrimination against citizens reporting for jury service unless it could be proven that such discrimination occurred en masse and over time. Imagine rejecting an employment or housing discrimination claim not based on the weakness of the plaintiff’s claim of discrimination, but because the discrimination affected too few victims for the court to be bothered. By recognizing this distortion of the equal protection guarantee, *Batson*, at least in theory, corrected an indefensible error of constitutional interpretation. While evidence of a historical pattern of discriminatory treatment remains

¹ During this time, two convictions were reversed by the North Carolina Court of Appeals on *Batson* grounds without substantive findings of discrimination against jurors of color. In both cases, the court held that, where the State does not offer a race neutral reason for each challenged peremptory strike, a new trial is warranted. *State v. Ruth*, 281 N.C. App. 304 (2022); *State v. Wright*, 189 N.C. App. 346 (2008). Additionally, in *State v. Hurd*, 246 N.C. App. 281 (2016) and *State v. Cofield*, 129 N.C. App. 268 (1998), the North Carolina Court of Appeals upheld prosecutors’ *Batson* allegations that the defendant engaged in purposeful discrimination against white potential jurors. See *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record*, 94 N.C.L. REV. 1957, 1963 (2016) (“In light of North Carolina’s history of racial discrimination in criminal justice, it is indeed disturbing that two ‘reverse *Batson*’ cases involving [B]lack defendants’ challenges of white jurors [were] the only cases in North Carolina appellate history finding substantive *Batson* violations where attorneys have provided reasons for strikes.”).

² *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986).

relevant and must be considered as part of the totality of the circumstances when presented, after *Batson*, it is no longer required to establish an unconstitutional strike of a juror.

In place of a standard that in practice was impossible to satisfy, the *Batson* court announced a three-part test: (1) the party opposing the strike states a prima facie case (“some evidence”) of discrimination; (2) the party defending the strike states their non-discriminatory reason(s) for the strike; and (3) the judge determines if there was intentional discrimination, in other words, whether the reason given at step two was false and pretextual. The ultimate question at step (3) is whether it is more likely than not that the challenged strike was motivated in substantial part by race or another unlawful factor.³ With this three-part test, *Batson* signaled a new era of policing juror discrimination. Though its flaws were immediately evident and not everyone expected it to be effective, many hoped that it would deter and at least slow the stubborn practice of jury discrimination in American courtrooms.⁴ But in North Carolina, for over thirty-five years, it did nothing of the sort.

Between 1986 and 2021, North Carolina appellate courts reviewed over 160 cases involving *Batson* challenges raised by criminal defendants and never found a single instance of juror discrimination.⁵ During those decades, every study to examine North Carolina jury data concluded that prosecutors were striking Black jurors at approximately twice the rate of their white counterparts. In North Carolina, it seemed that instead of signaling an end to juror discrimination, *Batson* became a judicial seal of approval: An elaborate framework intended to protect the constitutional rights of jurors and defendants that made no dent whatsoever in longstanding patterns of racial exclusion from jury service. *Batson* enforcement was so lax that, in a death penalty case, the North Carolina Court of Appeals found no *Batson* violation even though the prosecutor admitted to striking two Black women for reasons including their race and gender.⁶

NC Defendants Challenging Jury Discrimination Break Decades-Long Losing Streak

Given this history, one would be forgiven for assuming that *Batson* protections remain meaningless in this state. But in 2022, something surprising happened: The losing streak of *Batson* litigants challenging jury discrimination against jurors of color in the North Carolina Supreme Court came to an end. In *State v. Christopher Clegg*, the North Carolina Supreme Court reversed a 2016 armed-robbery conviction, concluding that prosecutors violated *Batson* when selecting Mr. Clegg’s jury. In that case, a Wake County prosecutor defended his strike of a Black woman, by (1) referencing a statement that she had not made; and (2) stating that the two Black women he struck from the jury exhibited objectionable

³ *State v. Hobbs*, 374 N.C. 345, 351, 353 (2020).

⁴ Justice Thurgood Marshall, while recognizing that the *Batson* framework was a “historic step toward eliminating the shameful practice of racial discrimination in the selection of juries,” nevertheless did not expect it to succeed. “The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.” *Batson*, 476 U.S. at 102-103 (Marshall, J., concurring).

⁵ *Thirty Years at 1986-1990*, Tables A-D. No other state in the region shared this appellate *Batson* record of zero reversals on the merits. See James E. Coleman, Jr. and David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, *The North Carolina State Bar Journal*, Fall 2017. (“Among other southern states, appellate courts in South Carolina have found a dozen *Batson* violations since 1989, and those in Virginia have found six. As of 2010, Alabama had over 80 appellate reversals because of racially-tainted jury selection, Florida had 33, Mississippi and Arkansas had ten each, Louisiana had 12, and Georgia had eight.”).

⁶ *State v. White*, 131 N.C. App. 734, 740 (1998).

body language and averted eye contact. The prosecutor did not distinguish between the two Black women's allegedly objectionable demeanor.⁷ The trial judge rejected both proffered reasons as unsupported by the record, but concluded that, under state and federal interpretations of *Batson*, that was not enough to establish a *Batson* violation. Because the judge found no smoking-gun evidence conclusively establishing the prosecutor's discriminatory intent, he concluded that Mr. Clegg had not met his ultimate burden of proving a *Batson* violation.

The North Carolina Supreme Court took a different view of the evidence and the law. Writing for the majority, Justice Hudson clarified that *Batson* doesn't require smoking-gun evidence of jury discrimination. By looking for egregious evidence of purposeful discrimination reminiscent of the evidence in U.S. Supreme Court cases like *Foster v. Chatman* (where "the focus on race in the prosecution's file plainly demonstrate[d] a concerted effort to keep black prospective jurors off the jury"), and *Flowers v. Mississippi* (where the prosecutor struck 41 out of 42 Black potential jurors), the trial court had held defendant to an improperly high burden.⁸ Along with three additional errors by the trial court in applying *Batson*, the state Supreme Court was left with the "definite and firm conviction that a mistake had been committed" and overturned the conviction.⁹ Thirty-seven years after *Batson* was decided, was this the beginning of a new era of more rigorous review of juror discrimination claims?

Before forecasting the future of *Batson* enforcement in North Carolina, let's pause to consider what it took to get to this point. As the Equal Justice Initiative has chronicled, "Black people have been excluded from jury service since America's founding."¹⁰ For most of United States history, both voting and jury service were restricted to discrete groups of white men.¹¹ Jury discrimination was banned by the Civil Rights Act of 1875 and declared unconstitutional by the United States Supreme Court in 1880 in *Strauder v. West Virginia*. However, as Justice Kavanaugh explained writing for the majority in *Flowers v. Mississippi*, between 1880 and 1980, "the freedom to exercise peremptory strikes for any reason meant that the problem of racial exclusion from jury service remained widespread and deeply entrenched."¹²

For most of North Carolina history, Black citizens were excluded even from the pool of potential jurors. Currently, citizens who are neither voters nor drivers are excluded from our jury lists, a practice that, in

⁷ *State v. Clegg*, 380 N.C. 127, 156 (2022) ("When placed within our well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination, this historical context cautions courts against accepting overly broad demeanor-based justifications without further inquiry or corroboration"); see also *State v. Alexander*, 274 N.C. App. 31, 44 (2020) (demeanor-based explanations for peremptory strikes are not "immune from scrutiny or implicit bias," and are "particularly susceptible to serving as pretexts for discrimination") (internal quotations omitted).

⁸ *Foster v. Chatman*, 578 U.S. 488, 514 (2016); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *State v. Clegg*, 380 N.C. 127, 157-58 (2022) ("After noting the glaring evidence of discrimination present in [other cases], the trial court found that '[t]his case is markedly distinguishable from the facts of this controlling authority.' While that may be true, it is not the facts of those decisions that make them controlling authority—it's the law. [Smoking-gun evidence is] not required for defendant to show that a peremptory was 'motivated in substantial part by discriminatory intent.'").

⁹ *State v. Clegg*, 380 N.C. 127, 162 (2022).

¹⁰ [Report: Race and the Jury: Illegal Discrimination in Jury Selection](#), Equal Justice Initiative, 2022.

¹¹ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 2* (Basic Books 2000).

¹² *Flowers v. Mississippi*, 139 S. Ct. 2228, 2240 (2019) (internal quotations omitted).

other places, has resulted in the underrepresentation of people of color.¹³ Because North Carolina doesn't collect and distribute jury data, historically, evidence of racial exclusion from North Carolina juries has been incomplete, anecdotal, and case specific. Passage of the North Carolina Racial Justice Act (RJA) in 2009 altered that landscape, as researchers led by two Michigan State law professors studied jury selection records of capital trials between 1990 and 2010 and determined that Prosecutors struck Black potential jurors from capital juries at a rate of over twice the rate of their white counterparts.¹⁴ These research findings were critical in the litigation of RJA claims, including four defendants' successful efforts to overturn their death sentences.¹⁵ A subsequent study conducted by Wake Forest Law professors uncovered similar patterns, concluding that in non-capital felony trials, Black jurors were struck at a rate of approximately twice their white counterparts, and that defense attorneys struck white jurors at higher rates than Black jurors.¹⁶ A study of North Carolina's appellate courts handling of *Batson* claims documented that those courts turned a blind eye to the complaints of *Batson* litigants, suggesting that many of the appellate decisions reflected an apparent misapplication of the standards established by the United States Supreme Court.¹⁷

Recognizing the disconnect between studies documenting the persistence of racialized jury selection and the apparent unenforceability of *Batson* in our courts, a network of North Carolina advocates launched an effort to breathe life into *Batson*. They developed trainings and materials for lawyers and judges, filed amicus briefs in cases with *Batson* issues, wrote articles chronicling the state of North Carolina's anemic *Batson* doctrine, studied *Batson* reform in other jurisdictions intended to strengthen the *Batson* framework, and presented proposals to governmental bodies studying the issue of jury discrimination.¹⁸

In this environment, the North Carolina Supreme Court's opinions began to reflect a more searching approach to juror discrimination cases and to acknowledge the failure of the *Batson* framework in our state. In a pair of 2020 opinions, the North Carolina Supreme Court articulated the constitutional protections against juror discrimination in more muscular terms, finding in two separate cases that trial judges' application of *Batson* had been insufficient, and remanding both cases for further hearings under the correct standard.¹⁹ These opinions clarified that judges must conduct a searching review of the evidence before issuing *Batson* rulings and that step one of the *Batson* three-step test is met by

¹³ For example, a 2018 study in federal system, which also relies only lists of drivers and voters, concluded that "underrepresentation of the Latino and African-American population is ubiquitous." Mary R. Rose, Raul S. Casarez, and Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts* (2018). The Inclusive Juries Project is currently partnering with UNC Professor Frank Baumgartner and the North Carolina Governor's Task Force for Racial Equity in Criminal Justice to assess the inclusivity of North Carolina jury pools.

¹⁴ Grosso, Catherine M. and O'Brien, Barbara and Woodworth, George G., *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, IOWA L. REV. (2012).

¹⁵ Paul Woolverton, [N.C. Supreme Court Pulls Racial Justice Act Murder Defendant off Death Row](#), Aug. 14, 2020, The Fayetteville Observer, Aug. 14, 2020.

¹⁶ Wright, Ron, Chavis, Kami, and Parks, Gregory, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1423 (2018).

¹⁷ *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C.L. REV. 1957, 1963 (2016); see also Emily Coward, *What Does It Take to Succeed on a Batson Claim in North Carolina?*, N.C. Crim. L. Blog (Feb. 18, 2020, 3:30 PM), <https://nccriminallaw.sog.unc.edu/whatdoes-it-take-to-succeed-on-a-batson-claim-in-north-carolina/>.

¹⁸ The new Duke Law Inclusive Juries Project aims to help organize and amplify these efforts moving forward.

¹⁹ *State v. Bennett*, 843 S.E.2d 222 (N.C. 2020); *State v. Hobbs*, 841 S.E.2d 492 (N.C. 2020).

evidence raising an inference of discrimination. Nevertheless, the first appellate *Batson* victory on the merits remained elusive until February of 2022 when *State v. Clegg* was decided.

“A Line in the Sand” Showing the Risk of Discrimination the Our Courts Will Tolerate

The *Clegg* victory was a major development in North Carolina *Batson* enforcement, not only because it was the first time that the North Carolina Supreme Court validated a criminal defendant’s claim of jury discrimination, but because the court did so in a case that, unlike some recent United States Supreme Court cases, did not involve blatant racial slurs or extreme statistical disparities. Instead, the North Carolina Supreme Court found the prosecutor’s defense of a challenged strike unsupported by the record, and that was enough. As the court put it,

“[T]he finding of a *Batson* violation does not amount to an absolutely certain determination that a peremptory strike was the product of racial discrimination. Rather, the *Batson* process represents our best, if imperfect, attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable. If a prosecutor provides legitimate race-neutral explanations for a peremptory strike, we deem that risk acceptably low. If not, we deem it unacceptably high. Here, that risk was unacceptably high.”

This watershed decision—particularly its embrace of a risk-based approach to analyzing *Batson* challenges—signaled a new understanding of the purpose and potential of *Batson* in North Carolina.

A major hurdle to *Batson* enforcement has been the apparently racially damning implications of a *Batson* finding of intentional discrimination by the prosecutor. Judges have been hesitant to declare not only that an officer of the court has engaged in intentional race discrimination, but that she or he has lied about it to cover it up.²⁰ When the *Batson* determination is formulated as a risk-based determination rather than a conclusive finding of intentional discrimination, judges are empowered to properly weigh the risk of discriminatory exclusion from jury service against the less significant, statutorily granted right to exercise peremptory challenges.

There can be no doubt that the harm caused by discriminatory exclusion from the critical civic duty of jury service—a harm that impacts the struck juror, the defendant, and the public at large, and one that is prohibited by both state and federal constitutions—substantially outweighs the harm caused by the denial of an attempted peremptory strike. As Justice Breyer explained, “the right to a jury free of discriminatory taint is constitutionally protected--the right to use peremptory challenges is not.” *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring).

Recognition of the grave harm caused by juror discrimination cuts across lines of political party and judicial philosophy. The U.S. Supreme Court, in an opinion written by Justice Alito, implicitly recognized the severity of this harm in reversing a conviction on *Batson* grounds without smoking gun evidence of discrimination, but where the prosecutor’s explanation for a strike was “unconvincing and suffice[d] for the determination that there was *Batson* error.”²¹ Justice Kavanaugh left no doubt as to the severity of

²⁰ See Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L.REV. 9, 11 (1997) (noting that one judge “had the uncomfortable feeling that she had just rendered an official ruling that the attorney was lying to the court”).

²¹ *Snyder v. Louisiana*, 552 U.S. 472, 478 (2018).

the harm caused by juror discrimination in *Flowers v. Mississippi*, observing the clash between the dictates of equal protection and the discretion of peremptory challenges, and describing with approval how *Batson* “sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system.”²² This is a pronounced concern in our state, where Chief Justice Mark Martin’s Commission on the Administration of Law and Justice reported that public confidence in our justice system is waning.²³ The *Clegg* majority restructured the balance and demonstrated that courts should err on the side of protecting the integrity and legitimacy of the justice system by disallowing strikes that are more likely than not motivated in substantial part by race or another unlawful factor.

Will the North Carolina Supreme Court Continue to Engage in More Searching *Batson* Enforcement?

Not all justices on the North Carolina Supreme Court would have found that Mr. Clegg met his burden of proving a *Batson* violation. Justice Berger, in a dissent joined by Chief Justice Newby and Justice Berringer, would have affirmed the lower courts’ rejection of Mr. Clegg’s *Batson* challenge. In the two 2020 cases discussed above where the North Carolina Supreme Court engaged in more searching *Batson* review and remanded for further *Batson* hearings, then Justice Newby also dissented (Justices Berger and Berringer were not yet serving on the NC Supreme Court when those cases were decided). The composition of the North Carolina Supreme Court shifted in early 2023. Justices Irvin and Hudson, both of whom joined or authored the majority opinions in *Clegg*, *Hobbs I*, and *Bennett*, were replaced by Justice Dietz and Justice Allen.

Hobbs II and *Campbell* were the first *Batson* opinions issued by the newly constituted North Carolina Supreme Court. In both opinions, the majority rejected *Batson* challenges raised by Black defendants. Notably, the court did not explicitly reject the holdings of *Hobbs I*, *Bennett*, and *Clegg*, but its focus returned to the importance of deferring to the trial court judge’s *Batson* determinations. Deference is indeed a central aspect of the *Batson* framework, but the deference *Batson* requires is not absolute, otherwise appellate review would be meaningless. In the *Batson* context, the U.S. Supreme Court has cautioned that “[d]eference does not by definition preclude relief.”²⁴ The difficult position occupied by trial judges tasked with ruling on the credibility of fellow court actors cautions against excessive deference.

As the *Clegg* majority recognized, “while the trial court’s firsthand ability to assess a prosecutor’s demeanor and credibility render this significant appellate deference appropriate, there are also human factors that render an appellate court’s removed consideration of a *Batson* challenge useful; namely, while a trial judge may feel understandably or unconsciously hesitant to imply that a prosecutor engaged in racial discrimination while that prosecutor is standing right in front of her, appellate judges enjoy a review of the written record further removed from such immediate interpersonal dynamics.”²⁵ And as the court pointed out in *Hobbs I*, the deference involved in appellate review of *Batson* challenges

²² *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019).

²³ North Carolina Commission on the Administration of Law and Justice, Public Trust and Confidence in North Carolina State Courts (Dec. 15, 2015) (reporting that confidence in North Carolina courts varied with race of person surveyed, “Black and Other race groups more critical of system fairness”).

²⁴ *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

²⁵ *State v. Clegg*, 380 N.C. 127, 144 fn 1 (2022).

relates to the trial judge's factual findings and assessments of credibility; it does not apply to the trial court's articulation and application of the legal standard itself.²⁶

Decades of deference to trial judges' *Batson* rejections resulted in a failure to enforce the constitutional protections against juror discrimination. We should be concerned about a return to this approach, which leaves consequential errors—errors that exacerbate racial injustice in our courtrooms—uncorrected. Just as “peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate,” overly deferential appellate *Batson* review allows judges to look away from racial discrimination who may be of a mind to look away.²⁷ The harm caused by unaddressed *Batson* errors becomes clear upon a closer look at *Hobbs II* and *Campbell*.

One way that courts in North Carolina have avoided parsing difficult evidence of racial discrimination is to reject cases at the first step of the *Batson* framework (whether there is a prima facie case of discrimination), which ends the analysis without considering the prosecutor's reason for the strike. For example, between 1986 and 2016, the North Carolina Supreme Court reviewed evidence at step one in 32 out of 106 published opinions.²⁸ The court found that the burden at step one was satisfied in only three of these 32 cases, even though governing North Carolina and United State case law clarifies that step one is “not intended to be a high hurdle.”²⁹

State v. Campbell is a great illustration of why some states have abandoned “step one” of the *Batson* framework. Appellate courts can use *Batson*'s first steps as a gatekeeping tool, preventing complete *Batson* hearings. In *State v. Campbell*, the defendant objected to the prosecutor's strikes against Black jurors. The trial court ruled that the defendant had not raised an inference of discrimination even though the prosecutor stated reasons for the strikes included that he struck one of the jurors, in part, because of her involvement in Black Lives Matter, clearly a race-related reason. But the North Carolina Supreme Court didn't consider whether removal of this Black juror for this reason amounted to race discrimination. Instead, the Court simply upheld the trial court's “step one” ruling that there was no

²⁶ *Hobbs I* held that the failure to explain how the court weighed the historical evidence, the failure to consider answers as well as questions when conducting comparative juror analysis, and the consideration of defense strikes were each legal errors and therefore reviewed them de novo rather than with the deferential clear error standard. While it is well established that issues of law generally are reviewed by appellate courts de novo, this distinction hadn't been articulated in North Carolina *Batson* jurisprudence before *Hobbs I*. The *Hobbs I* majority helpfully distinguished between (1) a trial judge's factual findings as to whether the *Batson* evidentiary standard has been met—a ruling that is treated with “great deference” and will be overturned only when “clearly erroneous”—and (2) the trial judge's articulation and application of the *Batson* standard itself—an issue of law that will be reviewed by appellate courts de novo. See, e.g., *State v. Smith*, 860 S.E.2d 51 (2021) (unpublished) (citing this framework from *Hobbs I*).

²⁷ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (internal quotations omitted).

²⁸ *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C.L. REV. 1957, 1986-89, Addendum Tables 1 and 3 (2016).

²⁹ *State v. Waring*, 364 N.C. 443, 478 (2010) (internal quotations omitted). In *State v. Bennett*, one of the two *Batson* cases from 2020 reflecting a more searching review of *Batson* claims, the majority held that step one was satisfied with evidence that “the prosecutor's strike rate was 40% for African American prospective jurors and 0% for white prospective jurors[,] 100% of the peremptory challenges that the prosecutor exercised were utilized to excuse African American prospective jurors[,]” and there was no obvious race-neutral justifications for the prosecutors strikes of the two African American potential jurors. The Bennett court emphasized that the burden at step one is one of production rather than persuasion, prioritizing proceeding to a merits analysis over disposing of the *Batson* challenge without substantive review.

inference of discrimination *at the time of the objection*, and relied on this as justification for ignoring evidence of discrimination that arose *after* the objection. Thus, by ending the *Batson* inquiry at step one, the Court avoided evaluating evidence of a racialized strike.

In states like Washington, California, and Connecticut, where there is no longer a requirement to present a prima facie case, courts conduct a merits analysis of jury discrimination challenges each time one is raised, ensuring that claims alleging the race-related removal of potential jurors receive their day in court. It seems that the most effective way to ensure that the prima facie case doesn't impede substantive review of *Batson* claims would be to follow the lead of these states and abandon step one altogether.

The *Hobbs II* majority did not disturb the key holdings of *Hobbs I*: most significantly, that trial judges must show their work when reviewing evidence relevant to a *Batson* challenge, that historical evidence and comparative juror analysis are important, and that strikes by the objecting party are irrelevant. However, the *Hobbs II* majority displayed a higher level of deference to the trial court's findings than the majority in *Hobbs I*, *Bennett*, and *Clegg*. For example, they affirmed the trial court's conclusion that the *Hobbs* case was not susceptible to racial discrimination, even though Mr. Hobbs is Black and four of the people he is accused of killing are white. The susceptibility of a case to racial discrimination must be weighed in the totality of the circumstances when ruling on a *Batson* challenge. Both the United States Supreme Court and the North Carolina Supreme Court have held that cases involving interracial crimes of violence are particularly susceptible to racial discrimination, but because of the majority's deferential review of the trial judge's determination, this erroneous interpretation of the facts stands uncorrected.³⁰

Other than the two remaining North Carolina Supreme Court Justices who joined the *Clegg* majority, none of the current members of the North Carolina Supreme Court have ever ruled in favor of a *Batson* appeal brought by a criminal defendant. In the coming weeks, this court will likely issue rulings on the *Batson* challenges raised in the *State v. Tucker* and *State v. Richardson*. In *State v. Tucker*—involving a Black defendant sentenced to death by an all-white jury in Forsyth County after prosecutors struck all five (100%) of eligible Black potential jurors and 20% of eligible potential white jurors—the defendant has argued that prosecutors used a list of explanations preidentified on a training handout found in the prosecutor's file to explain their strikes of Black citizens. This handout was described with skepticism as a “cheat sheet” by the *Clegg* court, which found the document appeared to provide prosecutors stock suggestions for evading *Batson* scrutiny. But despite the court's past characterization of the training handout as a “cheat sheet,” the newly constituted court may see the issue differently.³¹

³⁰ *Hobbs II*, 884 S.E.2d 639, 650 (N.C. 2023) (“In reaching its conclusion, the trial court ignored our own Court's precedent as well as Supreme Court precedent[;] . . . discounted pertinent facts in this case, namely Mr. Hobbs's race, his victims' races, and the fact that he was being tried capitally for crimes against victims who were a different race than him. Taking this information together, the trial court should have found Mr. Hobbs's case was susceptible to racial discrimination.”) (Earls, J., dissenting).

³¹ Michael Hewlitt, *A Jury of One's Peers*, The Assembly, March 7, 2023 (noting that, during oral arguments, Justice Berger was skeptical of the allegedly unlawful use of the cheat sheet, “There's nothing in the record where the prosecutor stated, ‘I read directly from this handout.’”); see also Ian A. Mance, *Cheat Sheets and Capital Juries: In State v. Tucker, North Carolina's Attorney General and Supreme Court Contend with Evidence of Prosecutors' Efforts to Circumvent Batson v. Kentucky*, 44 CAMPBELL L. REV. 3 (2021).

If the court retreats from its recent *Batson* holdings, it will not necessarily come as a great surprise. In one of this new court's first opinions, it reversed a ruling it had issued just a few months prior for no reason other than the new composition of the court, declaring the legislature's gerrymandering constitutionally protected rather than discriminatory. Ultimately, despite the hopeful development signaled by *State v. Clegg* and the pair of *Batson* cases that preceded it, this court's first rulings indicate that we may be in for an unfortunate return to the laissez faire era of superficial *Batson* enforcement. This would be a grave error. We should follow the lead of other states that are proactively strengthening *Batson* protections rather than rolling them back. In the past five years, five states have adopted a stronger *Batson* framework, others are considering doing so, and one has abandoned the use of peremptory strikes altogether.³² North Carolina may move in the opposite direction under its new judicial leadership, but another way is possible.

Beyond *Batson*

North Carolina, one of the states where *Batson* has been least effective, could lead the way in rejecting jury discrimination and strengthening protections against this insidious practice, as called for by the Governor's Task Force for Racial Equity in Criminal Justice.³³ Alongside our history of lax *Batson* enforcement, there has been a parallel history in this state of pushing for and recognizing the critical importance of inclusive juries. We are the only state with a specific constitutional provision declaring that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin."³⁴ This provision recognizes that the harm caused by juror discrimination "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."³⁵ Not only does such discrimination undermine confidence in our system of justice, it results in more homogenous and error-prone juries, whose decisions are less likely to be accepted by the community, both members of color who are unlawfully excluded and members more generally who see the practice as undemocratic.³⁶

At a minimum, our courts should rigorously enforce existing constitutional protections against juror discrimination to safeguard the integrity of the justice system and ensure that all citizens have an opportunity to participate in our system of justice. In *Clegg, Bennett, and Hobbs I*, the North Carolina Supreme Court shifted away from near-total deference to *Batson* rejections by trial courts and embraced a risk-based analysis that properly recognizes the harm of juror discrimination as more significant than an improperly denied peremptory strike. Appellate courts should continue to engage in stronger *Batson* enforcement, which will happen only if lawyers raise strong, well-supported objections to apparent juror discrimination, fight to seat improperly stricken jurors, and preserve *Batson* issues for appellate review by ensuring that jury selection is transcribed in every single case.³⁷

³² Frampton, Thomas and Osowski, Brandon, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform* (April 15, 2023). COLUMBIA L. REV., 2024 Forthcoming.

³³ N.C. TASK FORCE FOR RACIAL EQUITY IN CRIM.JUST., REPORT 2020 1 (2020), Recommendation 92 (calling for the broadening of protections against jury discrimination).

³⁴ "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. CONST. Art. I Sec. 26.

³⁵ *Batson*, 476 U.S. at 87.

³⁶ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 608 (2006).

³⁷ "Defendants are entitled to have their *Batson* claims and the trial court's rulings thereon subjected to appellate scrutiny. To do so, it is incumbent on counsel to preserve a record from which the reviewing court can analyze the

Finally, beyond simply enforcing the existing *Batson* framework, North Carolina should erect more powerful guardrails against underinclusive and discriminatory jury composition, such as diversifying our jury pool, increasing juror pay, and strengthening the *Batson* standard. While some of these changes would require legislative action, there are several practices local actors can adopt to address both jury pool diversity and juror discrimination, such as updating juror lists more regularly and requiring potential jurors to self-identify race and gender to enable effective *Batson* enforcement.³⁸ “If we are to give more than lip service to the principle of equal justice under the law, we should not bury our heads in the sand and pretend that thirty-five years of experience with *Batson* will magically change. There are a variety of tools at our disposal, we urgently need to use them.”³⁹

[relevant factors]. Thus, we urgently suggest that all criminal defense counsel []request verbatim transcription of jury selection if they believe a *Batson* challenge might be forthcoming.” *State v. Campbell*, 272 N.C. App. 554, *affirmed*, 884 S.E.2d 674, ___ N.C. ___, (2023).

³⁸ See Suggested Jury Practices for Superior and District Court Judges, North Carolina Governor’s Task Force for Racial Equity in Criminal Justice, available at <https://ncdoj.gov/wp-content/uploads/2022/08/Suggested-Jury-Practices.pdf>.

³⁹ *State v. Clegg*, 380 N.C. 127 (N.C. 2022) (Earls, J., concurring).