STATE OF NORTH CAROLINA COUNTY OF FORSYTH	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 94-CRS-40465

STATE OF NORTH CAROLINA	)
	)
V.	)
	)
RUSSELL WILLIAM TUCKER	)

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AMENDMENT TO
MOTION FOR APPROPRIATE RELIEF
BASED ON NEWLY DISCOVERED EVIDENCE
AND
SECOND AMENDMENT TO MOTION FOR APPROPRIATE RELIEF
PURSUANT TO THE RACIAL JUSTICE ACT

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On October 30, 2017 Defendant Russell William Tucker, through counsel, filed his Motion for Appropriate Relief Based on Newly Discovered Evidence and Second Amendment to Motion for Appropriate Relief Pursuant to the Racial Justice Act, in which he has shown that the prosecutor at his capital trial struck five of five African American venire members and justified those strikes using a training document called "*Batson* Justifications: Articulating Juror Negatives" which provided pre-packaged excuses for removing black jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The State filed a timely Answer on May 25, 2018, and Tucker replied on July 25, 2018. Pursuant to N.C. Gen. Stat. §15A-1415(g), Tucker hereby amends his Motion for Appropriate Relief Based on Newly Discovered Evidence and Second Amendment to Motion for Appropriate Relief Pursuant to the Racial Justice Act to include these additional arguments and amended request for relief. This amendment is intended to supplement, and not replace, any arguments made in that motion.

INTRODUCTION

1. This amendment presents additional substantive evidence of racially discriminatory jury selection practices in this case in the form of affidavits from two experts. Bryan Stevenson is a post-conviction attorney, founder and executive director of the Equal Justice Initiative, and professor at New York University School of Law. His work has focused on the intersection of race and the criminal justice system, and he spurred the founding of the National Lynching Memorial in Montgomery, Alabama. Dr. Ibram Kendi is a historian, professor, author, and director of the Antiracist Research and Policy Center American

University. His book *Stamped from the Beginning*, which traces the history of racist ideas in American history, won the 2016 National Book Award for Nonfiction.

2. Together, the opinions of these two experts underscore the central argument of Tucker's claim: that the State's improper use of the "Batson Justifications" handout to strike qualified black citizens from Tucker's jury irreparably tainted his trial. That taint is twofold.

3. First, the use of any pre-made list of justifications for removing black jurors is facially "at odds with the proper function of *Batson*," which is meant to suss out the prosecutor's "true subjective reasons for striking the juror." Ex. 71, Stevenson Affidavit, ¶ 11. As Stevenson explains, a prosecutor with a permissible motivation for striking a black juror would not need to rely on a list of reasons that was prepared for him months or years in advance.

4. Second, the specific reasons provided in the handout themselves evince racial bias. The reasons proposed by the handout are iterations of anti-black stereotypes that can be traced to the same justifications that upheld slavery and Jim Crow. The list of reasons, written with black jurors in mind, reflect loathsome caricatures of black Americans as hostile, unkempt, simple-minded, and generally unfit for the civilized work of jury service. Ex. 72, Kendi Affidavit. Given its inherently derogatory content, the handout itself is evidence of purposeful discrimination.

5. Furthermore, Defendant presents two additional procedural bases to his motion for relief: 1) that the prosecutor's racially discriminatory jury selection violates not only *Batson* and the United States Constitution, but also the North Carolina Constitution, Article 1, Sections 19 and 26; and 2) that he was not in a position to adequately raise a successful claim challenging this discrimination during his earlier MAR proceedings—but is now—because the North Carolina law has changed, affording him a new state right which is retroactively applicable.

RELEVANT PROCEDURAL HISTORY

6. Tucker's first set of state post-conviction attorneys were David B. Smith and W. Steven Allen. Smith and Allen filed a Motion for Appropriate Relief on October 6, 1998 and an amendment to that MAR on January 13, 2000. Smith and Allen were subsequently removed from the case after it was revealed that Mr. Smith "deliberately sabotaged" Tucker's petition for writ of certiorari to the North Carolina Supreme Court. *State v. Tucker*, 353 N.C. 277, 278 (2000).

7. Tucker was appointed new post-conviction counsel, John Bryson and Robert McClellan, who were allowed to file a new Motion for Appropriate Relief. They did so on June 15, 2001, titling that pleading the Second Amended Motion for Appropriate Relief. This Court

held an evidentiary hearing in February of 2004 and January of 2006.[1] On May 2, 2006, this Court denied the Second Amended Motion for Appropriate Relief. The North Carolina Supreme Court denied certiorari. *State v. Tucker*, 361 N.C. 575 (2007). No *Batson*-related claim was raised in Tucker's original MAR or subsequent amendments.

8. On February 21, 2008, Tucker filed a Petition for Writ of Habeas Corpus in federal district court. On August 5, 2010, while his federal habeas petition was pending, Tucker filed a Motion for Appropriate Relief pursuant to the Racial Justice Act ("RJA MAR") in this Court. The federal court placed Tucker's federal habeas proceedings in abeyance on September 2, 2010, pending resolution of Tucker's RJA claims. Tucker's Petition for Writ of Habeas Corpus remains pending.

9. The State has never filed an answer to Tucker's RJA MAR and no further litigation has taken place on Tucker's RJA pleadings. However, litigation did proceed on the RJA claims filed by another Forsyth County defendant, Errol Duke Moses. Pursuant to Moses' request for discovery, counsel for Moses were given access to the District Attorney's capital trial files in numerous cases, including Tucker's, and allowed to scan portions they wanted. Ex. 61, Kenney Affidavit, Ex. 57, Wallace Affidavit. On June 5, 2012, a paralegal working for the Moses team searched the *State v. Russell Tucker* prosecutor file for documents relevant to RJA litigation and scanned 40 pages of material from the file. *Id*. Counsel for Moses did not look closely at these materials and did not share this information with Tucker's post-conviction counsel. Ex. 61, Kenney Affidavit. In May 2013, the Forsyth RJA litigation was placed in abeyance and has yet to resume.[2]

10. On December 14, 2015, the federal court appointed undersigned counsel to represent Mr. Tucker. Both undersigned counsel and the attorneys who represent Errol Moses are employed by the Center for Death Penalty Litigation (CDPL). Soon after undersigned counsel accepted appointment in Tucker's case, counsel for Moses provided undersigned counsel with the portions of the District Attorney's *Tucker* file that were obtained as part of the discovery process in *Moses*. Ex. 61, Kenney Affidavit.

11. This work product included, among other items, a handout titled "*Batson* Justifications: Articulating Juror Negatives." On the basis of that prosecutorial work product, undersigned counsel filed Defendant's Motion for Appropriate Relief Based on Newly Discovered Evidence and Second Amendment to Motion for Appropriate Relief Pursuant to the

[1] The transcript of the February 2004 hearing suffered from serious defects, requiring a new hearing to be held on the same issues in January of 2006.

[2] Litigation of the Racial Justice Act proceeded in Cumberland County, and those cases continue to be litigated in the North Carolina Supreme Court.

Racial Justice Act, containing the claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), currently at issue here.

12. The State replied, arguing, *inter alia*, that the claim is procedurally barred. First, the State disputed whether the "*Batson* Justifications" handout and other prosecutorial work product are newly discovered, arguing that they were disclosed to Tucker's first set of post-conviction attorneys. Second, the State argued that Defendant's *Batson* claim is procedurally barred because, regardless of existence of the "*Batson* Justifications" handout, Defendant could have raised a *Batson* claim on direct appeal or in his Second Amended Motion for Appropriate Relief, simply on the basis of the trial record. In response, Defendant has argued that the *Batson* Justifications handout is both essential to his claim and not previously available to him because it was withheld from original post-conviction discovery.

EXPERT OPINION SUPPORTS THE CONCLUSION THAT THE PROSECUTOR'S USE OF THE *BATSON* JUSTIFICATIONS HANDOUT CONSTITUTES PURPOSEFUL DISCRIMINATION

13. Finally, Tucker hereby supplements his Motion for Appropriate Relief Based on Newly Discovered Evidence and Second Amendment to Motion for Appropriate Relief Pursuant to the Racial Justice Act with two expert affidavits supporting the conclusion that the prosecutor's use of the *Batson* Justifications handout is evidence of racial discrimination.

14. Bryan Stevenson is an attorney, professor, and author with expertise in the subjects of race in the criminal justice system, Eighth Amendment law, capital punishment law, and advanced criminal procedure. He has reviewed the *Batson* Justifications handout, and based on his expert knowledge of the history of racial discrimination in jury selection, it is his opinion that the handout is an "example of the common prosecutorial response to *Batson*," which was to "conceal racial bias and avoid findings of *Batson* violations, by developing 'reasons' that would likely be deemed race neutral and, therefore, acceptable to reviewing courts... This purpose is at odds with the proper function of *Batson*'s second step, which is for the prosecutor to provide her true subjective reasons for striking the juror. If a prosecutor chooses instead to give reasons suggested by the handout, this is the very definition of pretext and strong evidence that the unspoken, subjective reasons were impermissibly race-conscious." Ex. 71, Stevenson Affidavit, ¶ 11.

15. Dr. Ibram X. Kendi is a historian, professor, and National Book Award recipient whose expertise is the history of racism and racist ideas in the United States. He also reviewed the *Batson* Justifications handout and found that "many of the reasons listed on the… handout and offered to the court as 'race neutral' reasons to remove Blacks from Mr. Tucker's jury were not race neutral at all. Instead, many of the listed reasons are based on longstanding racist

stereotypes that have been used to deny rights to Blacks for centuries." Ex. 72 Kendi Affidavit, ¶ 6.

THE PROSECUTION'S RACIALLY DISCRIMINATORY JURY SELECTION PRACTICES IN THIS CASE VIOLATED THE NORTH CAROLINA CONSTITUTION

16. Mr. Tucker's conviction was obtained in violation of the Constitution of North Carolina, and therefore Mr. Tucker is entitled to a new trial.

17. The North Carolina constitution specifically commands: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Constitution, Article I, § 26; *see also* §19 ("No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.") In adherence to these principles, North Carolina courts have long held that racial discrimination in the exercise of peremptory strikes violates the North Carolina Constitution as much as the United States Constitution.[3] *See State v. Ross*, 338 N.C. 280, 284

[3] In the alternative, the State Constitution imposes a *stricter* standard for evaluating the role of racial discrimination in jury selection than its federal counterpart. "Article I, section 26 does more than protect individuals from unequal treatment." *State v. Cofield*, 320 N.C. 297, 302 (1987) (reversing conviction based on racial discrimination in the selection of grand jury foreperson). It prohibits even the appearance of racial discrimination: "a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be perceived to operate evenhandedly." *Id*. (emphasis in original); *id*. 304 ("Central to these protections, as we have already noted, is the perception of evenhandedness in the administration of justice."); but *cf. State v. Maness*, 363 N.C. 261, 271–72 (2009) (analysis of jury discrimination claims under Article 1, Section 26 is identical to analysis under *Batson*).

Thus, even if this Court find that Mr. Tucker has failed to show purposeful discrimination under the *Batson* standard, it should find the North Carolina Constitution violated by the undeniable *appearance* of racial discrimination in this case, given the prosecutor's reliance on the *Batson* Justifications handout and other disparities. The Supreme Court of Washington has promulgated one potential framework for defining an unacceptable *appearance* of discrimination, the "objecting observer" standard, which provides, in part: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge." Washington General Rule 37, available at https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr37.

The North Carolina Racial Justice Act (RJA) provides another means of determining where an appearance of discrimination exists. As Tucker has shown in his still-pending RJA MAR, statistical evidence shows a distinct pattern of racial disparities which strongly appear to indicate discrimination, even though the RJA does not require a showing of purposeful discrimination.

(1994) ("Article I, Section 26 of the North Carolina Constitution prohibits the exercise of peremptory challenges based solely on the race of the prospective juror. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution also prohibits such discrimination.") (internal citations omitted).

18. The North Carolina Constitution was thus violated by the prosecutor's conduct in this case, for all of the reasons outlined in Defendant's Motion for Appropriate Relief Based on Newly Discovered Evidence and Second Amendment to Motion for Appropriate Relief Pursuant to the Racial Justice Act and the attendant Reply in support of that motion, hereby incorporated by reference.

DEFENDANT'S CLAIM IS NOT PROCEDURALLY BARRED BECAUSE THERE HAS BEEN A RETROACTIVELY APPLICABLE CHANGE IN THE LAW

19. Under N.C. Gen. Stat. §15A-1419 (a)(1) and (3), an MAR is procedurally barred where "defendant was in a position to adequately raise the ground or issue underlying the present motion" upon a previous appeal or MAR. Tucker's direct appeal was decided in 1997, and his original state post-conviction litigation ended in 2007. Since that time, North Carolina's law regarding discrimination in jury selection has evolved considerably, and this change affords Tucker a right to relief that did not previously exist. Therefore he was not in a position to adequately raise the issue at the time of his direct appeal and Second Amended MAR, and the claim is not procedurally barred.

20. Moreover, where a procedural bar applies, a post-conviction claimant may show good cause to excuse a procedural default if his or her failure to raise the claim earlier was "the result of the recognition of a new federal or State right which is retroactively applicable." N.C. Gen. Stat. §15A-1419(c)(2). As shown below, new law adopted by the North Carolina Supreme Court since Tucker's first MAR is retroactively applicable. For these reasons, no procedural bar applies, and this Court must consider Tucker's claim on the merits.

A. <u>North Carolina's Law Has Changed</u>

21. Until at least 2008, the North Carolina Supreme Court required that defendants seeking to prove racial discrimination in jury selection show that race was the "sole" factor for the individual strike. *See State v. Davis*, 325 N.C. 607, 617 (1989); *State v. Robinson*, 330 N.C. 1, 15, (1991); *State v. Quick*, 341 N.C. 141, 144(1995); *State v. Locklear*, 349 N.C. 118, 136 (1998); *State v. Cofield*, 129 N.C. App. 268, 276 (1998); *State v. Mitchell*, 321 N.C. 650, 653 (1998); *State v. Matthews*, 162 N.C. App. 339, 342 (2004); *State v. Wright*, 189 N.C. App. 346, 350, 658 S.E.2d 60, 61 (2008).

22. *State v. White*, 131 N.C. App. 734 (1998), is a clear illustration of the application of this standard and the high burden it placed on defendants. In *White*, the Court of Appeals considered a jury discrimination claim under both the state and federal constitutions. *Id.* at 734. Even though the prosecutor, in open court, stated that he was striking the two jurors in part because "[b]oth [are] black females," [4] *id.* at 739, the court rejected the claim, noting, "while *race was certainly a factor* in the prosecutor's reasons for challenging Reynolds and Jeter, our courts, in applying the *Batson* decision, have required *more* to establish an equal protection violation, i.e., that *the challenge be based solely upon race*." *Id.* at 740 (emphasis added). Thus, under the "sole factor" test, a defendant could not prevail even if the prosecutor stated on the record that his decision was racially motivated and the reviewing court agreed that race was a factor in the strike.

23. In 2010, however, the Supreme Court of North Carolina rejected the "sole factor" test and adopted a new framework, whereby the operative question is whether race was a significant or motivating factor for the strike. The state supreme court held in *State v. Waring*, 364 N.C. 443 (2010), that the "question [is] whether the defendant has shown 'race was *significant* in determining who was challenged and who was not.'" 364 N.C. at 480 (emphasis in original), citing *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005). [5] The *Waring* court approved of the approach of the trial court, which was to ask whether the strike "was *motivated* by discriminatory purposes." *Id*. at 480 (emphasis in original). The state supreme court rejected the prior rule that, in order to show discrimination in the exercise of a peremptory strike, the defendant must show that race was "the sole reason for the State's peremptory challenge." *Id.* at 481. The *Waring* Court then went on to apply the new test, finding that "race was not a *significant* factor in the strike." *Id*. at 491 (emphasis added); *see also* Farb, Robert, North Carolina Superior Court Judges' Benchbook, UNC School of Government, 2015, p. 25 ("The party making the claim need not show that the other party used its peremptory challenge based solely or exclusively on the race or sex of the prospective juror. It is sufficient to show that the juror's race or sex was a "significant," *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005), or motivating factor, *State v. Waring*, 364 N.C. 443, 480-81 (2010), in striking the juror.")

24. In 1996, when the trial court considered Mr. Tucker's objections to the State's peremptory strikes, the court necessarily was applying the "sole factor" test in overruling those objections, because that was the controlling law in North Carolina at that time. As a result, the trial court found Mr. Tucker had not made even a *prima facie* showing of discrimination, even though the prosecutor struck every single African American from the jury. Furthermore, when

[4] The prosecutor in *White* was David Spence, who also prosecuted *Tucker*.
[5] The state supreme court's conclusion was guided by *dicta* in *Miller-El*, where the U.S. Supreme Court commented that the prosecutor's disparate treatment of similar black and white jurors showed "race was significant in determining who was challenged and who was not." 545 U.S. at 252.

Mr. Tucker's appellate and post-conviction counsel were reviewing his case for colorable claims, they were likewise assuming application of the "sole factor" test. Mr. Tucker's right to relief on grounds that race was a significant or motivating factor in the prosecutor's strikes did not yet exist. Indeed, as seen in *White*, where even an on-the-record admission by the prosecutor of race-based decision-making did not suffice, North Carolina law at the time of Tucker's MAR acted as a bar to such relief. Due to the law existing at the time, Mr. Tucker was not in a position to raise a successful jury discrimination claim.

25. Today, the law is that a court must grant relief if race was a *significant or motivating* factor in the strike. This is a remarkably less stringent standard than Tucker would have faced at the time his direct appeal and Second Amended Motion for Appropriate Relief were litigated, and as such represents a new state right under N.C. Gen. Stat. § 15A-1419.

B. The Change to State Law is Retroactively Applicable

26. As shown above, Mr. Tucker has a right under state law to a jury that was chosen without racial discrimination. Thus, the law regarding retroactivity of new *state* rules applies. "[S]tate law decisions . . . 'are generally presumed to operate retroactively' and 'are given solely prospective application only when there is a compelling reason to do so.'" *State v. Harwood*, 228 N.C. App. 478, 483 (2013) (quoting *State v. Rivens*, 299 N.C. 385, 390 (1980)); *see also State v. Zuniga*, 336 N.C. 508, 513 (1994) (explaining that "*Rivens* correctly states the retroactivity standard applicable to new state rules").[6]

27. *Waring*'s adoption of the significant factor standard is a retroactively effective change in state law controlling Tucker's jury discrimination claim. Accordingly, under § 15A-1415(b)(7), Tucker may pursue his claim despite not having previously raised it on direct appeal or in his first MAR proceedings.

1. Freedom from Racially Discriminatory Jury Selection is a State Right and Application of *Batson* is a Matter of State Law

28. When North Carolina courts analyze a claim of discrimination in jury selection, they do so under both *Batson* and Article 1 of the State Constitution, and apply the same standard to both questions. *Waring*, 364 N.C. at 474, citing *State v. Maness*, 363 N.C. 261, 271–72 (2009) ("Our review of race-based or gender-based claims of discrimination in petit jury selection has

[6] The standard for the retroactivity of a change in state law should not be confused with the standard for whether a change in federal law is retroactive. The latter is controlled by *Teague v. Lane*, 489 U.S. 288 (1989). Tucker is here arguing that state law has changed and is retroactively applicable to his case under *Rivens*. However, he hereby preserves, in the alternative, the argument that he has also met the criteria for *Teague* retroactivity to the extent there has also been a change in federal law.

been the same under the Constitution of the United States and the North Carolina Constitution."). Thus, when North Carolina switched from the sole factor test to a significant or motivating factor analysis, this was as much a matter of state law as federal law.

29. Furthermore, to the extent Mr. Tucker's federal rights were also violated by the prosecution's discriminatory actions, that determination is also governed in large part by *state* rules. From the outset, the United States Supreme Court recognized that application of *Batson* would be a matter of state law. The *Batson* Court gave states the power to apply *Batson* as they saw fit. The Court held that in order to prevail, the moving party must "establish[] purposeful discrimination." 476 U.S. at 79. But it has never mandated *how* a party must show purposeful discrimination in the use of a peremptory strike. Indeed, by "declin[ing] . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," *Batson*, 476 U.S. at 99, the U.S. Supreme Court expressly permitted states to develop state-specific rules within the *Batson* framework. *See State v. Saintcalle*, 178 Wash. 2d 51 (2013) ("The *Batson* framework anticipates that state procedures will vary, explicitly granting states flexibility to fulfill the promise of equal protection.").

30. Indeed, *Batson* is applied somewhat differently from jurisdiction to jurisdiction. *See People v. Douglas*, 22 Cal. App. 5th 1162, 1172-74 (Cal. Ct. App. 2018) (detailing some of the different approaches to the question of prosecutorial motivation). For instance, the same year the North Carolina Supreme Court denied relief in *State v. White*, 131 N.C. App. 734 (1998), the Alabama Court of Criminal Appeals came to a completely different conclusion, holding that *Batson* is violated *per se*, if any racially-motivated reason is offered. *See, e.g., McCray v. State*, 738 So. 2d 911, 914 (Ala. Crim. App. 1998) (holding that "a race-neutral reason for a peremptory strike will not 'cancel out' a race-based reason") (citations omitted).

31. The Supreme Court has recognized this diversity of approaches and has, notably, declined to weigh in. "Although many jurisdictions have considered whether to apply a *per se*, mixed-motive, or substantial motivating factor approach . . . the United States Supreme Court . . . has [not] done so." *Douglas*, 22 Cal. App. 5th at 1172 (Cal. Ct. App. 2018); *citing Snyder*, 552 U.S. at 485 ("We have not previously applied [the mixed-motive] rule in a *Batson* case, and we need not decide here whether that standard governs in this context.").

32. Thus, North Carolina's adoption of the significant or motivating factor test is a matter of state law.

2. There Is No Compelling Reason This Change in State Law Should Not Operate Retroactively.

33. "[S]tate law decisions . . . 'are generally presumed to operate retroactively' and 'are given solely prospective application only when there is a compelling reason to do so.'" *State*

v. Harwood, 228 N.C. App. 478, 483 (2013) (quoting *State v. Rivens*, 299 N.C. 385, 390 (1980)); *see also State v. Zuniga*, 336 N.C. 508, 513 (1994) (explaining that "*Rivens* correctly states the retroactivity standard applicable to new state rules"). The factors at play when considering whether to overcome the retroactivity presumption are "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Harwood*, 228 N.C. App. at 483 (quoting *State v. Harris*, 281 N.C. 542, 550 (1972).

34. Here, each factor supports the presumption that North Carolina's adoption of the significant factor test is retroactive. First, the new rule's purpose is to provide a means of determining whether a peremptory strike was motivated by discriminatory purpose. *Waring*, 356 N.C. at 480-81. That purpose is furthered, not hindered, by retroactive application. *See State v. Cooper*, 304 N.C. 701, 705 (1982) (holding that a new bright line rule governing police vehicle searches should be applied retroactively because the new rule was designed "to provide guidance . . . . [and] to provide a workable rule").

35. Second, to the extent the State argues it relied on pre-*Waring* law in striking jurors, such reliance should be assigned minimal, if any, value. The State should not be permitted to rely on a prior interpretation of the law that allows for racial bias in jury selection. Allowing the State to take this position would protect convictions obtained in part on the basis of race discrimination, and erode public confidence in the criminal justice system. *State v. Cofield*, 320 N.C. 297, 302 (1987) ("The people of North Carolina have declared in [Art. I, § 26 of the state constitution] that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice."); *see also Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons.").

36. Third, the effect on the administration of justice of a retroactive application of the new law would be favorable. "Exclusion of a racial group from jury service . . . entangles the courts in a web of prejudice and stigmatization. To single out blacks and deny them the opportunity to participate as jurors in the administration of justice – even though they are fully qualified – is to put the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law." *Cofield*, 320 N.C. at 303; *see also Pena-Rodriguez*, 137 S. Ct. at 868 ("Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State.") (internal citation and quotations omitted). By applying *Waring* retroactively and addressing Tucker's race discrimination claim on its merits, this Court will protect the fair administration of justice and its own institutional integrity.

37. In a different context, the Court of Appeals held that a new rule that adverse possession of property may occur by mistake—in contrast to the old rule, that required adverse possession to occur intentionally—should operate retroactively because the purpose of the new rule was "to avoid rewarding the thief." *Faucette v. Zimmerman*, 79 N.C. App. 265, 271 (1986). Likewise, the new rule rejecting the sole factor requirement should also be held to operate retroactively, because doing so will avoid rewarding the party who acted in bad faith, who in this instance is the State actor who gives force to racial biases when selecting jurors.

AMENDED REQUEST FOR RELIEF

38. Tucker previously requested an evidentiary hearing on the question of procedural bar. However, if this Court agrees with Tucker that his Motion for Appropriate Relief Based on Newly Discovered Evidence and Second Amendment to Motion for Appropriate Relief Pursuant to the Racial Justice Act is not subject to procedural bar as a matter of law for the reasons set out in this pleading, this Court should consider Tucker's claim on the merits and accordingly vacate Tucker's conviction and death sentence.

Respectfully submitted this 4th day of June, 2019.

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CERTIFICATE OF SERVICE

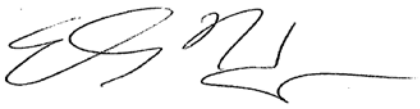
I hereby certify that on this day I sent the foregoing pleading by first class mail, postage pre-paid to:

James O'Neill
District Attorney
PO Box 20083
Winston-Salem, NC 27120

I further certify that on this day I electronically sent the forgoing pleading to:

Danielle Marquis Elder, Special Deputy Attorney General, North Carolina Department of Justice, at DMarquis@ncdoj.gov.

This the 4th day of June, 2019.



Elizabeth Hambourger

Affidavit of Bryan Stevenson

I, Bryan Stevenson, having been duly sworn, do hereby depose and state the following:

1. My name is Bryan Stevenson and I am a resident of Montgomery, Alabama. I give this statement of my own free will regarding facts within my personal knowledge.
2. I am the founder and executive director of the Equal Justice Initiative in Montgomery, Alabama. EJI is a nonprofit law organization providing legal services to people who have been illegally convicted, unfairly sentenced, or abused in state jails and prisons; and conducting research and policy work on criminal justice issues. I am also a professor of law at the New York University School of Law. I teach in the areas of race in the criminal justice system, Eighth Amendment law, capital punishment law, and advanced criminal procedure.
3. I received joint degrees in law and public policy from Harvard University. My studies at the Kennedy School of Government focused on the influence of race and poverty on the administration of criminal justice. I have been practicing criminal defense since I graduated from law school, and I have extensive experience litigating issues of racial bias in jury selection. I have authored training manuals and materials for addressing racial bias in jury selection, and I have lectured on the subject in training settings. I am familiar with legal, historical and social science research about bias in jury selection, and I have published a report on the subject. I have been qualified as an expert witness in the area of race in jury selection.
4. I am familiar with the attached document titled "*Batson* Justifications: Articulating Juror Negatives." It is my understanding that this document was the product of a 1995 training for North Carolina prosecutors called Top Gun II. I first reviewed this document in 2011

in preparation for my services as an expert witness in the 2012 evidentiary hearing in the case of *State of North Carolina v. Marcus Robinson.* In the Robinson case, I was qualified as an expert in race and the law and testified about this training document. I have been asked by attorneys for Russell William Tucker to give this affidavit providing my analysis and opinion of the *Batson* Justifications handout.

5. The handout must be understood in its historical context. For much of American history, African Americans were entirely excluded from participation in jury service. In 1880, the Supreme Court, in *Strauder v. West Virginia*, overturned a state statute that restricted jury service to whites. But in the Jim Crow era, the rule of *Strauder* was easily circumvented. States abandoned statutes that expressly restricted jury service to whites, but local officials achieved the same result by excluding African Americans from jury rolls and implementing ruses to exclude black citizens. Theoretically valid but vague requirements for jury service—such as intelligence, experience, or good moral character—were applied in practice to mean "no blacks allowed." On the rare occasions a defense attorney challenged the complete absence of African American jurors, courts almost invariably accepted local jury commissioners' assertions that the exclusion was based not on discrimination but on their inability to find any African Americans qualified for jury service.

6. In the infamous 1935 case of the "Scottsboro Boys," an Alabama jury commissioner testified he did "not know of any negro... who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment." This time, however, the Supreme Court found it "impossible to accept such a sweeping characterization." The Court reversed the conviction and went on to

reverse six other cases on similar grounds. This was a major shift: the Court would no longer tolerate the total exclusion of black citizens from jury rolls. Still, it was not until the 1960s and 70s, when the Court adopted a "fair cross-section" standard, that representation of African American citizens in jury pools improved.

7. But gains in minority inclusion on jury lists and venires were immediately counteracted by discrimination in the use of peremptory challenges. In 1965, the Supreme Court addressed this issue for the first time in *Swain v. Alabama*. Robert Swain, a black man was sentenced to death in 1962 by an all-white Alabama jury for the rape of a white woman. Although African Americans made up about a quarter of the county's population, only a few African Americans were included in the county's jury panels, and not one had served on a jury since 1950. The prosecutor in Swain's case used peremptory strikes to remove all six African American jurors. The Supreme Court held that it would be illegal to use peremptory challenges to intentionally exclude African Americans and held that a defendant could prove such discrimination by showing an extended pattern of intentional exclusion on the basis of race. However, the Court found Swain had failed to prove intentional discrimination.

8. *Swain* set the bar so high for proving discriminatory intent that no litigant won a *Swain* claim for 20 years. The Court reconsidered the question in 1986 in *Batson v. Kentucky*, holding that once the defense meets a *prima facie* showing of discrimination, the burden shifts to the State. However, *Batson* did not end discrimination in the use of peremptory strikes. As Justice Marshall predicted in his *Batson* concurrence: "Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." Today, peremptory strikes are still used to exclude African

Americans and other racial minorities from jury service at disproportionately high rates in many jurisdictions. This includes North Carolina. I am familiar with the statistical analysis of jury strikes in North Carolina capital cases conducted by Michigan State University researchers. The pattern and practice of striking African American jurors at disproportionately high rates is so longstanding, consistent, and widespread, that it is evidence supporting a finding of purposeful discrimination in any North Carolina case with a racially disproportionate strike rate.

9. In *Batson*, the Supreme Court identified racial discrimination in jury selection as not only a violation of a criminal defendant's constitutional rights but also a social problem harming the jurors discriminated against and the community as a whole. The most effective response to the serious concerns expressed by the Court would have been for those working within the criminal justice system to examine their jury selection practices with the aim of eliminating race as a factor in peremptory strikes. Following *Batson*, one federal prosecutor in Memphis created procedures in her office to reduce racial bias in jury selection. But this response was an outlier.

10. By far, prosecutors' most frequent response to *Batson* has been resistance. In a number of jurisdictions across the county, district attorney offices have trained prosecutors how to mask their efforts to exclude racial minorities from jury service. For example, almost immediately after *Batson*, Philadelphia assistant district attorney Jack McMahon recorded a training session for Pennsylvania prosecutors on how to question African Americans during *voir dire* in order to later provide race-neutral reasons for the striking them. Prosecutors in Dallas County, Texas maintained a decades-long policy of systematically

excluding African Americans from jury service in criminal cases and codified their methods in the training manual cited in the *Miller-El* cases.

11. The North Carolina *Batson* Justifications handout is another example of the common prosecutorial response to *Batson*: prosecutors came up with ways to conceal racial bias, and avoid findings of *Batson* violations, by developing "reasons" that would likely be deemed race-neutral and, therefore, acceptable to reviewing courts. On its face, the *Batson* Justifications handout is not a document that is intended to help prosecutors pick a jury in a race-neutral way. The title says it all. Prosecutors must provide "*Batson* justifications" and "articulate juror negatives," not when making strike decisions, but only at *Batson*'s second step, once an objection has been lodged and typically, once the judge has found a *prima facie* case of discrimination. Thus, the document is a list of reasons to be used once an inference of discrimination has been raised to prevent the judge from making a finding of purposeful discrimination. This purpose is at odds with the proper function of *Batson*'s second step, which is for the prosecutor to provide her true subjective reasons for striking the juror. If a prosecutor chooses instead to give reasons suggested by the handout, this is the very definition of pretext and strong evidence that her unspoken, subjective reasons were impermissibly race-conscious.

12. Just as the purpose of the handout points to racial bias, so does the language of the justifications. Justice Marshall warned in his *Batson* concurrence that, "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." Words and phrases in the North Carolina handout such as "rebelliousness," "air of defiance," "lack of respect,"

"resistance of authority," "antagonism," and "evasive or monosyllabic," exemplify Marshall's concerns.

13. Under slavery and during a period of racial terror that persisted through 1950, African Americans were beaten, tortured, and lynched for minor social transgressions or any display of what a white person considered rebelliousness, disrespect, or unresponsiveness. Under Jim Crow laws that enforced racial hierarchy through 1965, African Americans were criminalized for minor social transgressions. Thus, phrases like those in the North Carolina handout are rooted in historically derogatory labels applied to African Americans who did not show adequate deference to the prevailing racial order. As such, these justifications are not truly race-neutral, in that they have a much different and more insidious meaning when applied to African Americans.

14. Further affiant sayeth naught.

Bryan Stevenson

Sworn to and subscribed before me this 22nd day of February, 2019.

Notary Public
My commission expires: 7/7/2020

STATE OF NORTH CAROLINA COUNTY OF FORSYTH	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 94-CRS-40465

STATE OF NORTH CAROLINA	)
	)
V.	)
	)
RUSSELL WILLIAM TUCKER	)

Affidavit of Dr. Ibram X. Kendi, Ph.D.

I, Ibram X. Kendi, appearing before the undersigned and being duly sworn and affirmed, state the following:

1. My name is Dr. Ibram X. Kendi. I am a resident of Washington, D.C. I am over the age of eighteen and give this statement of my own free will regarding facts within my personal knowledge.

2. I am currently a professor and the Director of the Antiracist Research and Policy Center at American University in Washington, D.C. I received a Ph.D. in African American Studies from Temple University in 2010.

3. My career as an academic has been devoted to studying the history of racist ideas in the United States. I am recognized as one of the foremost scholars on racist ideas in the United States and abroad. My second book, *Stamped from the Beginning: The Definitive History of Racist Ideas in America*, which traces the roots of anti-black racist ideas from colonial times to the modern era, was awarded the 2016 National Book Award for Nonfiction, the highest literary award in the United States. I published another award-winning book on race in 2012, and my third book on the topic is set for release by Random House on August 20, 2019. I have also published numerous essays on racism in publications ranging from academic journals to periodicals like the *New York Times*, *Washington Post*, *The Atlantic*, and *Time*. A current copy of my curriculum vitae is attached to this affidavit.

4. In 2018, I was contacted by attorneys Mark Pickett and Elizabeth Hambourger regarding their client Russell William Tucker, who was sentenced to death in Forsyth County, North Carolina in 1996 and is currently on death row.

Specifically, they asked me to review a single-page handout with the heading *Batson Justifications: Articulating Juror Negatives*. It is my understanding that this handout was discovered in the prosecutor's file in Mr. Tucker's case several years after his trial. During jury selection in Mr. Tucker's trial, prosecutors used many of the justifications listed on the handout as "race neutral" reasons to justify the removal of black prospective jurors from the case. I have also reviewed selections from the jury selection transcript in Mr. Tucker's trial related to Debra Banner, Thomas Smalls, and Wayne Mills, who were prospective black jurors removed by the prosecution during jury selection.

5. Mr. Pickett and Ms. Hambourger asked me to review these materials to determine whether, based on my expertise, the "race neutral" reasons listed on the *Batson Justifications* handout and offered to the court by the prosecution at trial actually reflect stereotypes of Blacks in the United States.

Findings

6. In general, I found that many of the reasons listed on the *Batson Justifications* handout and offered to the court as "race neutral" reasons to remove Blacks from Mr. Tucker's jury were not race neutral at all. Instead, many of the listed reasons are based on longstanding racist stereotypes that have been used to deny rights to Blacks for centuries, many of which I chart in my work.

7. For centuries, descriptions of Blacks as lazy, unintelligent, barbaric, and unruly have been used to justify slavery and other racist practices. Proponents of slavery created the myth of Black inferiority to maintain a system in which human beings were allowed to own other human beings as chattel. Notwithstanding the demise of slavery, that myth never died. Racial disparities in everything from wealth to health have persisted in the United States because racist ideas have persisted, although their expression has shifted over time.

8. The use of facially neutral language to justify racist stereotypes and policies is nothing new. In the Jim Crow era, "race neutral" language was used to skirt the Fourteenth Amendment's guarantee of equal protection. Voter literacy tests, poll taxes, and grandfather clauses never explicitly referenced race, yet were clearly designed with discriminatory intent in mind. Richard Nixon designed his Southern Strategy to appeal to George Wallace-type segregationists with "race neutral" references to forced busing, crime, and

states' rights. More recently, North Carolina's voter suppression law was struck down in July 2016 by the 4th U.S. Circuit Court of Appeals. The U.S. Supreme Court refused to consider an appeal of the case. This law had no racial language, but still the appeals court found that the law would "target African-Americans with almost surgical precision."

9. The handout I reviewed is another example of the same phenomenon. What follows is a discussion of the racist stereotypes that are embedded in the *Batson* handout and were employed by the prosecutor at Mr. Tucker's trial.

10. ***Blacks as Unintelligent.*** Multiple items listed on the handout indicate confusion or difficulty answering questions as potential justifications for striking Black jurors. The handout suggests that Black jurors might be "confused" and easily "misled," may "vacillat[e]," or "have difficulty understanding questions and the process," and can be expected to give "responses which are inappropriate, non-responsive, ... or monosyllabic."

11. In researching *Stamped from the Beginning*, my 500-page, 500-year history of racist ideas, I found that the most common racist idea is the inferior intelligence, cognitive ability, and communication skills of African Americans. As the founder of eugenics, Francis Galton wrote in *Hereditary Genius* in 1869, "The average intellectual standard of the negro race is some two grades below our own." The popularizer of IQ tests, Lewis Terman, wrote in 1916, that these tests will show "enormously significant racial differences in general intelligence, differences which cannot be wiped out by any scheme of mental culture." The notion of test scores showing genetic differences between the races persisted in the twentieth century. In 1994, Richard Herrnstein and Charles Murray published *The Bell Curve: Intelligence and Class Structure in American Life*. "It seems highly likely to us that both genes and the environment have something to do with racial differences" in test scores, they wrote. A 1990 study conducted by the National Opinion Research Center found that 53 percent of White, Hispanic, and other non-Black respondents thought Blacks were less intelligent than Whites.[1]

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[1] Smith, Tom W. *GSS Topical Report No. 19*. National Opinion Research Center, U. of Chicago (1990); available online at

(last viewed March 12, 2019).

12. ***Blacks as Defiant or Hostile.*** There are numerous items on the handout that encourage prosecutors to justify the removal of Black jurors because of their perceived lack of respect or defiant attitude toward authority, including the prosecution. The handout suggests Black jurors may be "rebellious" and "evasive" and exhibit "antagonism," "resistance to authority" or an "air of defiance." Item 6 references Black jurors' "attitude." Item 5 suggests "body language" as a potential reason for striking a black juror, specifying the following types of body language as being problematic: "arms folded, leaning away from questioner, obvious boredom." Item 9 suggests that Black jurors are inadequately forthcoming and will fail to "reveal" their "previous criminal justice experience." The prosecutor's statement to the court that prospective juror Thomas Smalls "was very difficult" and that "his body language was absolutely horrible in our opinion," echoes these stereotypes.

13. The construct of African Americans as defiant and difficult to deal with is as old as slavery. Within the institution of chattel slavery, it was the role of White people to control and subdue Blacks, and it was also assumed that slavery and submission were the natural condition of Blacks. Thus, Blacks who resisted the horrors of slavery—abduction, family separation, forced labor, and corporal punishment—were labeled "difficult." Rather than blaming the institution, White people blamed those enslaved who refused to submissively accept it. Under Jim Crow, Blacks who resisted that regime of white supremacy faced severe retribution, from being fired to being beaten to being killed. In 1906, Theodore Roosevelt blamed Black men themselves for the prevalence of lynching.

14. The body language, behavior, and "attitude" of African Americans is still routinely stereotyped and scrutinized. Recent studies have shown that White subjects perceive Black faces as expressing greater hostility and aggression than White faces.[2] This pervasive stereotype has deadly consequences: according to the FBI statistics, in 2016, Black males aged 15 to 34 were nine times more likely than other Americans to be killed by police officers. [3]

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[2] Duncan, B. L. *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*. J. Pers. Soc. Psychol. 34, 590–598 (1976); Hugenberg, K. & Bodenhausen, G. V. *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*. Psychol. Sci. 14, 640–643 (2003).

[3] https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database

15. ***Blacks not Making Eye Contact.*** Item 4 in the *Batson Justifications* handout lists "lack of eye contact with prosecutor." This reference to "eye contact" has particular meaning. Under slavery and Jim Crow Black people were constrained not only by laws but also by a social code. African Americans were supposed to bow their heads and lower their eyes, and not make eye contact with Whites, especially Whites they did not know and White authority figures. As historian Douglas Flamming, puts it: "In the South, informal racial mores were enforced with deadly seriousness. These customs demanded that Blacks step off the sidewalk when a white person approached, look at the ground when they talked to a white person, and hold their tongue when insulted by a white person."[4]

16. Even after desegregation, Black parents have taught their children to avoid eye contact with Whites, in an effort to keep their children safe. In the Black community, eye contact with White authorities within the criminal justice system is considered especially dangerous. The *Batson* handout reveals the way in which this social code becomes a double-bind for Black people. If Black people make eye contact, they may be considered aggressive or insufficiently deferential. If they do not, they may be considered dishonest, evasive, or unfriendly.

17. ***Blacks as Physically Unattractive and Unclean.*** Items 1 and 2 in the *Batson* handout lists justifications that play on stereotypes related to Black's physical appearance. Prosecutors are told to expect Black jurors with "inappropriate dress," "disheveled appearance," and "hair style[s]" indicating resistance to authority.

18. Hair has historically been a signifier of the supposed inferiority of Black people. For example, Nineteenth Century scientist Peter A. Browne published a study in 1850 finding that since Whites had "hair" and Blacks "wool," he had "no hesitancy" in pronouncing that they "belong[ed] to two distinct species." According to his study, in which he deemed Blacks a separate and inferior animal-like species, straight hair was "good hair" and the "matted" hair of African people was bad. The standard of, not just physical beauty, but personal worth, has thus been the straighter, the better. In an attempt to meet this elusive ideal, many Black people have, as Malcolm X recounted, "endured all of that pain, literally burning my flesh to have it look like a white

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[4] Douglas Flamming, *Bound for Freedom: Black Los Angeles in Jim Crow America*, University of California Press (2005) at 43.

man's hair." And when African Americans have chosen to forego that pain, their natural hairstyles have been classified as unprofessional, aesthetically inferior, and politically dangerous.

19. The expectation that Blacks may have a "disheveled appearance" echoes racist ideas about the cleanliness of Black bodies. Under Jim Crow, the fear that Black people were dirty and might somehow contaminate White people led to segregation of restrooms, drinking fountains, and swimming pools.

20. ***Blacks as Other.*** The prosecution used Debra Banner's supposed lack of "stake in the community" as a reason for removing her. This echoes the way that Blacks have historically been viewed as "other," and not true citizens. The idea of the United States as a nation of and for White people is deeply rooted in the nation's history. In 1860, Jefferson Davis, the future president of the Confederacy, vocalized the prevailing view that the United States "Government was not founded by negroes nor for negroes," but "by white men for white men." Even many Whites who opposed slavery believed that Black citizenship was unworkable and that United States citizenship should be reserved for Whites, envisioning a solution to slavery whereby all Blacks, whether born free or formerly enslaved, would be deported to Africa. The passage of the Fourteenth Amendment provided citizenship to all persons born or naturalized in the United States, including those recently freed from slavery. But following Reconstruction, Southern states resisted this mandate, passing laws to deny Blacks the basic rights of citizenship such as voting, as well as jury service. Thus, the central facet of the history of African Americans has been the struggle to be acknowledged and treated as full-fledged citizens of their county and their communities.

21. The perception that Blacks lack a "stake in the community" is also linked to the stereotype of Blacks as lazy, compared to hardworking Whites. This stereotype grew almost inevitably from an institution based on forced, unpaid labor. As sociologist David Pilgrim puts it: "The master and the slave operated with different motives: the master desired to obtain from the slave the greatest labor, by any means; the slave desired to do the least labor while avoiding punishment.... Slave owners complained about the laziness of their workers, but the records show that slaves were often worked hard -- and brutally so."[5] Enslaved Blacks who did not work as hard as overseers

[5] Pilgrim, David, *The Coon Caricature*, 2000, edited 2012, available online at (last viewed February 28, 2019).

demanded were deemed "slow," "lazy," "wants pushing," and "trifling."[6] As Florida secessionists stated in 1861, it was necessary to enslave Black people because "their natural tendency" was toward "idleness, vagrancy and crime." As with other stereotypes born from slavery, this one has persisted. The 1990 study conducted by the National Opinion Research Center found that 78 percent of non-Black respondents believed Blacks were more likely than Whites to "prefer to live off welfare" and "less likely to prefer to be self-supporting." Sixty-two percent said Blacks were more likely to be lazy.[7]

22. There is also special meaning in the prosecutor's specific claim that Ms. Banner lacked community connections because she rented, rather than owned, her home. Ms. Banner was 39 at the time of the trial, and thus born in Forsyth County in the mid-1950s. Study after study have found that, at that time and ever since, public and private policies, including redlining and residential segregation, have made it more difficult for hard-working African Americans to purchase and keep their homes. As a result, 71 percent of White families live in owner-occupied homes, compared to 45 percent of Latinx families and 41 percent of Black families. To determine stake in the community by home ownership is to be able to effectively exclude long-term African American residents for no other reason than their race.

Ibram X. Kendi, Ph.D.

Sworn or affirmed before me this the 30th day of April, 2019 ~~2018~~ in Washington DC County, Washington DC.

Notary Public

[6] Id.

[7] Smith, Tom W. *GSS Topical Report No. 19*. National Opinion Research Center, U. of Chicago (1990); available online at

(last viewed March 12, 2019).