Is *State v. Hobbs* Too Little Too Late? Building on *Batson* Thirty-Five Years Later*

The peremptory challenge, a process during jury selection in which attorneys are able to strike potential jurors without reason, is often criticized for excluding jurors on the basis of race. The U.S. Supreme Court attempted to rectify this with their 1986 decision in Batson v. Kentucky*, which held that the use of peremptory challenges by prosecutors to strike prospective jurors on the basis of race violates the Equal Protection Clause. In that opinion, the Court outlined a three-part test to determine if a prospective juror was inappropriately disqualified due to their race.*

Despite the Court's holding in Batson*, criticism of the peremptory challenge has continued. In few states is this criticism more deserved than in North Carolina, where courts have rarely found purposeful discrimination in jury selection. While North Carolina may claim some progress in this area after the North Carolina Supreme Court's recent decision in* State v. Hobbs*, this Recent Development argues that it is past time to rely solely on* Batson *to correct these issues and that alternate methods should be considered to eliminate racial discrimination in jury selection.*

INTRODUCTION

Thirty-five years after the U.S. Supreme Court's decision in *Batson v. Kentucky*,[1] state courts continue to struggle with its application.[2] Notably, North Carolina appellate courts have a well-documented and troubled history of refusing to find, or even acknowledge the possibility of, *Batson* violations.[3] Specifically, North Carolina remains the only state within the Fourth Circuit whose appellate courts have never found a *Batson* violation based on the striking of a Black juror when the prosecution provided a reason for the strike.[4]

1. 476 U.S. 79 (1986) (holding that the use of peremptory challenges by prosecutors to strike prospective jurors on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).

2. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019) (holding that the Mississippi Supreme Court erred in its finding that discriminatory purpose could not be inferred from the use of a peremptory challenge against a Black prospective juror).

3. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1963 (2016).

4. Pollitt & Warren, *supra* note 3, at 1983–84; *see* State v. Wright, 189 N.C. App. 346, 353–54, 658 S.E.2d 60, 65 (2008) (holding that the trial court erred in dismissing the defendant's *Batson*

With its decision in *State v. Hobbs*,[5] the Supreme Court of North Carolina took the first step toward ending this disparate treatment by acknowledging that race may have played a part in the prosecution's peremptory challenges.[6] Further, the *Hobbs* court provided guidance to North Carolina's trial courts on how to effectively apply the three-part *Batson* analysis,[7] the ineffective application of which has faced scrutiny as the "most likely" reason for North Carolina's poor *Batson* record.[8]

This Recent Development examines issues with North Carolina's *Batson* record, including the implications of the *Hobbs* decision and the guidance it provided to the state's trial courts.[9] While this overdue guidance may bring North Carolina trial courts up to speed on applying *Batson* and its progeny,[10] North Carolina is bound to be left behind yet again if the state's appellate courts continue to delay their actions.[11] In continuing to fall behind the curve, the state's appellate courts do North Carolinians a twofold disservice: denying litigants the right to equal protection of the laws[12] and citizens the chance to serve on a jury—one of the "most substantial opportunit[ies] that [they] have to participate in the democratic process."[13]

This analysis proceeds in three parts. Part I provides background on North Carolina's history of denying Black prospective jurors their right to serve due to the misapplication of the principles set forth by *Batson*. Part II examines the progress made by the North Carolina Supreme Court's decision in *Hobbs* while also arguing that the court fell short of fully protecting North Carolina litigants and prospective jurors involved in *Batson* challenges. Lastly, Part III examines possible solutions that would ensure North Carolina courts uphold the principles of *Batson* and effectively safeguard against racial discrimination in

challenge when the prosecution did not offer any reason for striking two Black prospective jurors); *see* State v. Hurd, 246 N.C. App. 281, 294–95, 784 S.E.2d 528, 536–37 (2016) (holding that the trial court did not err in sustaining a *Batson* challenge relating to the peremptory striking of a white juror by a Black defendant); State v. Cofield, 129 N.C. App. 268, 280, 498 S.E.2d 823, 831–32 (1998) (holding that the trial court did not err in refusing to allow the counsel of a Black defendant to issue peremptory challenges against three white prospective jurors).

5. 374 N.C. 345, 841 S.E.2d 492 (2020).

6. *Id.* at 360, 841 S.E.2d at 503–04. For more on *State v. Hobbs*, see Meredith I. Lewis, *Case Brief:* State v. Hobbs, 99 N.C. L. REV. F. 109 (2021).

7. *Hobbs*, 374 N.C. at 350–56, 841 S.E.2d at 497–501.

8. Pollitt & Warren, *supra* note 3, at 1964.

9. *See Hobbs*, 374 N.C. at 360, 841 S.E.2d at 503–04.

10. "Progeny" includes cases that came after *Batson* that have extended its reach. *See generally* Georgia v. McCollum, 505 U.S. 42 (1992) (extending the *Batson* analysis to defense attorneys); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending the *Batson* analysis to civil suits); Powers v. Ohio, 499 U.S. 400 (1991) (extending the *Batson* analysis to all races); J.E.B. v. Alabama, 511 U.S. 127 (1994) (extending the *Batson* analysis to gender-based peremptory challenges).

11. *See* Pollitt & Warren, *supra* note 3, at 1959 ("North Carolina's highest court has never once in those thirty years [following *Batson*] found a substantive *Batson* violation.").

12. *See* Batson v. Kentucky, 476 U.S. 79, 86 (1986).

13. Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019) (citing *Powers*, 499 U.S. at 407).

jury selection. The proposed solutions include the adoption of new rules or procedures that will build on *Batson*.

I. BACKGROUND ON *BATSON* AND HOW NORTH CAROLINA APPELLATE COURTS' HAVE FAILED TO APPLY IT PROPERLY

Before analyzing the implications of *Hobbs* and examining beneficial ways to build on *Batson*, this part will first examine current federal law as set by *Batson*. Next, this part will discuss North Carolina appellate courts' continual failure to correctly apply the law articulated in *Batson*.

A. *The* Batson *Analysis*

Now expanded to cover discriminatory use of peremptory challenges in many situations,[14] the *Batson* analysis initially developed as a way to prohibit prosecutors from using peremptory challenges against Black prospective jurors for cases involving a Black defendant.[15] In *Batson v. Kentucky*, the case from which this analysis received its name, a Black defendant was indicted for second-degree burglary and receipt of stolen goods.[16] Following voir dire jury selection in the trial court, the prosecutor utilized peremptory challenges against all four Black prospective jurors, resulting in an entirely white jury.[17] The defense moved to discharge the jury, arguing, among other things, that the prosecutor's peremptory challenges violated the defendant's rights under the Equal Protection Clause of the Fourteenth Amendment.[18] The trial judge denied this motion, and the defendant was convicted on both counts.[19] After the Kentucky Supreme Court affirmed Batson's conviction, the U.S. Supreme Court granted certiorari on the issue of whether the prosecution's use of peremptory challenges against the four Black prospective jurors violated the Equal Protection Clause of the Fourteenth Amendment.[20] The Court reversed and remanded the decision of the Kentucky Supreme Court, holding that the trial court erred in denying the defendant's motion without first having the

14. *See Edmonson*, 500 U.S. at 616 (applying the *Batson* analysis to peremptory challenges in civil suits); *Powers*, 499 U.S. at 402 (applying the *Batson* analysis to peremptory challenges made on the basis of race, regardless of the race); *J.E.B.*, 511 U.S. at 129 (applying the *Batson* analysis to gender-based peremptory challenges); *McCollum*, 505 U.S. at 59 (applying the *Batson* analysis to defense attorneys).

15. *See Batson*, 476 U.S. at 97 ("[The Equal Protection Clause] forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.").

16. *Id.* at 82.

17. *Id.* at 83.

18. *Id.*

19. *Id.*

20. *Id.* at 83–84.

prosecutor explain the reasoning behind the strikes to ensure they were not used in a discriminatory way.[21]

In reaching the holding in *Batson*, the U.S. Supreme Court articulated a three-step analysis that trial courts should use when peremptory strikes are challenged as violating the Equal Protection Clause.[22] First, the defendant must present a prima facie case that the prosecutor utilized peremptory challenges to prevent Black individuals from serving on the jury.[23] Next, the burden switches to the prosecution to provide a race-neutral reason for striking the Black jurors.[24] Finally, the trial court must determine whether or not the defendant has met their burden of a preponderance of the evidence[25] of proving purposeful discrimination.[26] This core analysis, critical for finding a *Batson* violation, has been continuously misapplied by North Carolina appellate courts, resulting in the state's statistically abysmal *Batson* record.[27]

B. *Misapplications of* Batson *by North Carolina Appellate Courts*

While the second step in the *Batson* analysis has received plenty of criticism for the low bar it sets for the prosecution,[28] North Carolina's appellate courts have also created issues at steps one and three due to misapplication of the guidance provided by the U.S. Supreme Court.[29]

21. *Id.* at 100.

22. *Id.* at 94–97.

23. *Id.* at 96.

24. *Id.* at 97.

25. *See id.* at 94 n.18 ("The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion." (citing Tex. Dep't. of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–56 (1981))).

26. *Id.* at 98.

27. *See* Pollitt & Warren, *supra* note 3, at 1964; Grosso & O'Brien, *supra* note 3, at 1541; Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1428.

28. *See* Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585, 1591 (2012) (indicating that the prosecution's biggest hurdle at the second step of the *Batson* analysis is to not offer an explanation for exercising a peremptory challenge against a Black juror that also applies to an accepted white juror); Pollitt & Warren, *supra* note 3, at 1963 (discussing the willingness of courts to accept any offered race-neutral reason presented by the challenging party); EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 17 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/GX62-LK3C] ("Sometimes these 'race-neutral' reasons explicitly incorporate race."); *see also North Carolina v. Tilman Golphin, Christina Walters, and Quintel Augustine – Batson Justifications (DA Cheat Sheet)*, ACLU, https://www.aclu.org/legal-document/north-carolina-v-tilmon-golphin-christina-walters-and-quintel-augustine-batson [https://perma.cc/CZV3-EJFH] (displaying a cheat sheet that was distributed at the North Carolina Conference of District Attorneys of "race-neutral" reasons for using a peremptory challenge against a Black prospective juror, including wearing attire that shows a "lack of respect for the system," the way in which the venireman makes eye contact, and monosyllabic responses to questions).

29. Pollitt & Warren, *supra* note 3, at 1964.

1. Step One

Although the Supreme Court of North Carolina has acknowledged the theoretical simplicity of establishing a prima facie case of racial discrimination,[30] this standard has not been consistently observed in practice.[31] In the fifty cases North Carolina appellate courts have reviewed for *Batson* violations at the prima facie stage, only five were found to have successfully shown a prima facie case.[32]

In *Batson*, the U.S. Supreme Court provided guidance that a "'pattern' of strikes against black jurors" is sufficient to establish a prima facie case of purposeful discrimination and satisfy step one of the analysis.[33] North Carolina appellate courts have seemingly acknowledged this principle, stating that a pattern of discriminatory challenges can be found where a prosecutor uses "a disproportionate number of peremptory challenges against African-Americans in a single case."[34]

While this type of pattern is sufficient, the U.S. Supreme Court also confirmed that a pattern is not necessary to establish such a case.[35] In apparent

30. *See* State v. Hoffman, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998) ("Step one of the *Batson* analysis, a prima facie showing of racial discrimination, is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge.").

31. *See, e.g.*, State v. Chapman, 359 N.C. 328, 343, 611 S.E.2d 794, 808 (2005) (holding that the defendant failed to meet his burden of proof for finding a prima facie case when the prosecution used peremptory challenges against all nonwhite prospective jurors); State v. Robbins, 319 N.C. 465, 495, 356 S.E.2d 279, 297 (1987) (holding that the defendant failed to meet his burden of proof for finding a prima facie case when the prosecution used peremptory challenges against seventy-eight percent of qualified nonwhite prospective jurors).

32. Brief of Amici Curiae Coalition of State and National Criminal Justice and Civil Rights Advocates at 13, State v. Bennett, 374 N.C. 579, 843 S.E.2d 222 (2020) (No. 406PA18), 2019 WL 3061596, at *13; *see* State v. Barden, 356 N.C. 316, 344–45, 572 S.E.2d 108, 127–28 (2002) (finding step one of *Batson* satisfied when the prosecution accepted only 28.6% of qualified Black prospective jurors in contrast to 95% of qualified white prospective jurors); *Hoffman*, 348 N.C. at 554–55, 500 S.E.2d at 722 (finding step one of *Batson* satisfied when the prosecution used peremptory challenges against every qualified Black juror); State v. Smith, 328 N.C. 99, 123, 400 S.E.2d 712, 725 (1991) (finding step one of *Batson* satisfied when the State used eighty percent of its peremptory challenges to exclude qualified Black prospective jurors related to a case that involved "highly charged racial emotions"); State v. McCord, 140 N.C. App. 634, 653, 538 S.E.2d 633, 645 (2000) (finding step one of *Batson* satisfied when the prosecution used peremptory challenges to strike four Black prospective jurors, resulting in a panel of one Black juror and eleven white jurors); State v. Hall, 104 N.C. App. 375, 383, 410 S.E.2d 76, 80–81 (1991) (finding step one of *Batson* satisfied when the prosecutor used a peremptory challenge against a Black prospective juror after asking the court clerk "if there was a white male out there" in reference to the remaining prospective jurors).

33. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986); *see also* Pollitt & Warren, *supra* note 3, at 1965–67 (referencing numerous North Carolina appellate court cases where the first step of *Batson* was not found to be satisfied, despite a demonstrated pattern of the prosecutor using peremptory challenges against Black prospective jurors).

34. State v. Taylor, 362 N.C. 514, 528, 669 S.E.2d 239, 254 (2008) (holding that the defendant failed to make a prima facie case of racial discrimination pursuant to *Batson* when the prosecution utilized peremptory challenges against sixty percent of qualified Black jurors).

35. *Batson*, 476 U.S. at 95–96.

disregard of the application of this principle, North Carolina appellate courts have consistently failed to find a prima facie case when more than fifty percent of qualified minority jurors have been struck in peremptory challenges,[36] stating that striking qualified minority jurors at a rate of fifty percent actually "refute[s] a prima facie showing of discrimination."[37] Allowing racially based peremptory challenges to continue despite the presence of discriminatory patterns demonstrates North Carolina appellate courts' fundamental failure to apply the correct burden of proof at the first step of these challenges, expecting "persuasiveness" when only a mere "production of evidence" is required.[38]

2. Step Two

In addition to failing to apply the correct burden of proof at the first step of the *Batson* analysis, North Carolina appellate courts have often misapplied guidance from the U.S. Supreme Court by combining steps one and two.[39] In failing to adhere to the provided guidance of requiring the prosecution to provide a race-neutral reason for striking a Black prospective juror, appellate courts have created their own fictional but plausible race-neutral reasons for why peremptory challenges were used against Black prospective jurors and have used these reasons to justify dismissal of the *Batson* claim.[40]

The U.S. Supreme Court has made it clear that presenting race-neutral reasons for striking jurors is a burden that must be met by the nonmoving party at step two of the *Batson* analysis.[41] The Court has further articulated that possible race-neutral reasons not presented by the nonmoving party but imagined by courts should never be used as an appropriate justification for

36. Pollitt & Warren, *supra* note 3, at 1965–66; *see also* State v. Fletcher, 348 N.C. 292, 319, 500 S.E.2d 668, 684 (1998) (finding that the prosecutor's use of peremptory challenges on three out of five Black jurors was "troublesome," but not enough to constitute a prima facie case of discrimination under *Batson*); State v. Abbott, 320 N.C. 475, 481–82, 358 S.E.2d 365, 369–70 (1987) (holding that the prosecution's acceptance of two of the five tendered Black jurors proved that the prosecution was not seeking to rid the jury of Black jurors, and that therefore there was no prima facie case of discrimination under *Batson*); State v. Campbell, 200 N.C. App. 427, 428, 838 S.E.2d 660, 662 (2020) (finding that the prosecution's use of seventy-five percent of peremptory challenges against Black prospective jurors did not present a prima facie case of discrimination under *Batson*).

37. State v. Nicholson, 355 N.C. 1, 24, 558 S.E.2d 109, 127 (2002).

38. Johnson v. California, 545 U.S. 162, 171 (2005). While the U.S. Supreme Court has not provided guidance on exactly how much evidence is required, it is well established that this should be a low bar for the moving party to meet. *See infra* Section II.B.1.

39. *See* Pollitt & Warren, *supra* note 3, at 1967.

40. *See Nicholson*, 355 N.C. at 23, 558 S.E.2d at 126 (holding that the petitioner failed to establish a prima facie case under step one of *Batson* because the Black jurors who were struck had reservations about the death penalty, which could be a race-neutral reason for the prosecution striking them); State v. Chapman, 359 N.C. 328, 343, 611 S.E.2d 794, 808 (2005) (holding that the petitioner failed to establish a prima facie case under step one of *Batson* because the court found there to be "obvious non-racial reasons" for the striking of two Black jurors).

41. *See* Miller-El v. Dretke, 545 U.S. 231, 252 (2005).

dismissing a *Batson* challenge at step one.[42] By allowing this practice of court-imagined reasons, North Carolina appellate courts take the already low burden on the nonmoving party at step two and effectively eliminate it entirely.[43]

3. Step Three

If a *Batson* challenge manages to make it through steps one and two, it is overwhelmingly likely to meet its end at step three when the trial court must determine whether or not the defendant has met their burden of proving purposeful discrimination by a preponderance of the evidence.[44] This high rate of denial may be due in part to the courts' refusal to acknowledge the burden of proof required at this step: a preponderance of the evidence.[45] In fact, prior to *Hobbs*, no North Carolina appellate court opinion has ever articulated this burden of proof, referring only to the idea that "the moving party bears the burden of proving purposeful discrimination" without acknowledging what that burden is.[46] This burden is not meant to be a heavy one and is met when a "genuine issue of fact" exists as to the discrimination claimed by the moving party.[47]

Further, the U.S. Supreme Court has found that disparate treatment of Black and white jurors of the venire serves as powerful and convincing evidence at step three of the analysis.[48] These disparately treated veniremen need not hold the exact same views and may even hold some differences as long as they possess "strong similarities."[49] In repeatedly failing to find the burden of proof met at step three of the analysis, North Carolina appellate courts have inconsistently applied this guidance from the U.S. Supreme Court and have allowed disparate treatment of Black and white jurors of the venire.[50]

42. *See id.* (stating that a court's imagined reason for why a prosecutor struck a Black juror at the peremptory stage "does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions").

43. *See supra* note 28 and accompanying text.

44. *See* Pollitt & Warren, *supra* note 3, at 1971 (stating that of the seventy-one *Batson* challenges reviewed by North Carolina appellate courts at step three, seventy were denied in the last step).

45. *See* Johnson v. California, 545 U.S. 162, 170 (2005) (acknowledging that the third step of the *Batson* analysis requires the trial court to decide "whether it was more likely than not" that the challenge was racially motivated).

46. Brief of Amici Curiae Coalition of State and National Criminal Justice and Civil Rights Advocates, *supra* note 32, at 17.

47. Tex. Dep't. of Cmty. Affs. v. Burdine, 450 U.S. 248, 248 (1981).

48. *See* Miller-El v. Dretke, 545 U.S. 231, 232 (2005) (finding purposeful discrimination when a prosecutor's reason for striking a Black prospective juror similarly applies to a white juror who was allowed to serve).

49. *See id.*

50. *See* Pollitt & Warren, *supra* note 3, at 1971.

II. WHAT *HOBBS* CHANGED AND WHERE IT FELL SHORT

This part will provide background on *State v. Hobbs* and will acknowledge strides made by the Supreme Court of North Carolina in deciding this case. It will then discuss areas in which the court fell short of rectifying the state's well-documented issues with *Batson*.

A. State v. Hobbs

After being indicted on several felonies, including the murder of a white man, Cedric Hobbs Jr., a Black man, sat for jury selection for his capital trial in Cumberland County.[51] During jury selection, the prosecution used eight of its eleven peremptory challenges to strike Black jurors, resulting in a 54.5% strike rate of qualified Black jurors versus a 10% strike rate of qualified white jurors.[52]

Throughout the selection process, Hobbs made multiple objections to the prosecution's use of peremptory challenges, arguing that the challenges were racially discriminatory in nature.[53] For two of the objections made by Hobbs, regarding jurors Humphrey and Layden, the trial court did not find a prima facie case of discrimination at step one of *Batson*.[54] Regardless, the trial court went ahead with steps two and three, requesting race-neutral reasons for the strike from the prosecution.[55] At the end of what they called "a full hearing on the defendant's *Batson* claim" related to jurors Humphrey and Layden, the trial court found that the two peremptory challenges at issue were not based on race.[56] For the third objection made by Hobbs regarding the striking of juror McNeill, the trial court did find a prima facie case of discrimination under step one, but ultimately found that Hobbs failed to prove purposeful discrimination at step three of *Batson*.[57]

Hobbs was found guilty of first-degree murder and several other felonies.[58] He appealed, arguing that under *Batson*, the trial court erred by not granting his objections to the peremptory challenges used against jurors Humphrey, Layden, and McNeill.[59] Specifically, Hobbs argued two issues. First, Hobbs claimed that the question of whether or not he established a prima facie case of racial discrimination for the striking of jurors Humphrey and Layden became moot once the prosecution provided race-neutral reasons for the strikes and the

51. State v. Hobbs, 374 N.C. 345, 346, 841 S.E.2d 492, 495 (2020).

52. *Id.* at 348, 841 S.E.2d at 496.

53. *Id.* at 346, 841 S.E.2d at 495. The Supreme Court of North Carolina reviewed the prosecution's striking of three jurors: Humphrey, Layden, and McNeill. *Id.* at 353–54, 841 S.E.2d at 499.

54. *Id.* at 348, 841 S.E.2d at 496.

55. *Id.*

56. *Id.*

57. *See id.* at 348–49, 841 S.E.2d at 496.

58. *Id.* at 346–47, 841 S.E.2d at 495.

59. *Id.* at 347, 841 S.E.2d at 495.

trial court ruled the peremptory challenges were not based on race.[60] On this issue, the North Carolina Court of Appeals affirmed the findings of the trial court, stating that the question of whether or not Hobbs proved a prima facie case at step one of *Batson* for jurors Humphrey and Layden was not moot and that Hobbs had indeed failed to establish such a case.[61] Second, for all peremptory challenges used against jurors Humphrey, Layden, and McNeill, Hobbs argued that the trial court erred in finding that he did not ultimately prove racial discrimination.[62] The North Carolina Court of Appeals again affirmed the findings of the trial court, finding that Hobbs failed to meet his ultimate burden of proving purposeful discrimination in the use of the peremptory challenges against all three jurors.[63] Hobbs sought review from the Supreme Court of North Carolina on both issues.[64]

On review, the Supreme Court of North Carolina reversed the findings of the lower courts.[65] In doing so, the court found that the question of whether or not a prima facie case at step one of *Batson* had been established for the striking of jurors Humphrey and Layden was moot.[66] Additionally, the Supreme Court of North Carolina held that the Court of Appeals erred in finding that Hobbs had not met the ultimate burden of proving purposeful racial discrimination in connection with the peremptory challenges used against all three jurors, due to the fact that the Court of Appeals did not fully consider Hobbs's evidence.[67] As such, the case was remanded back to the trial court to conduct a proper *Batson* hearing.[68]

B. *A Step-by-Step Review*

In reaching its decision in *State v. Hobbs*, the Supreme Court of North Carolina provided much-needed guidance on how North Carolina trial courts should apply *Batson* and its progeny to review claims of racial discrimination in jury selection. At the same time, several areas of the analysis remain unaddressed, raising the question of how *Batson* can be built upon to fully protect North Carolina litigants and prospective jurors involved in these types of challenges moving forward.

60. *See id.*, 841 S.E.2d at 496.
61. *See id.*
62. *See id.* at 348–49, 841 S.E.2d at 496–97.
63. *See id.* at 349, 841 S.E.2d at 496–97.
64. *Id.* at 347, 841 S.E.2d at 495.
65. *Id.* at 360, 841 S.E.2d at 504.
66. *Id.*, 841 S.E.2d at 503.
67. *Id.*, 841 S.E.2d at 503–04.
68. *Id.*, 841 S.E.2d at 504.

1. Step One

In providing guidance to the lower courts, the Supreme Court of North Carolina applied precedent set by the U.S. Supreme Court, as well as its own precedent.[69] It first sought to confirm that establishing a prima facie case at step one of the analysis should be a low burden for the moving party.[70] The *Hobbs* court reiterated that the burden is not one of persuasiveness, and that a prima facie case is established when the moving party produces evidence that suggests discrimination may have occurred.[71]

Further, the court provided examples of situations that would meet this burden.[72] In doing so, the court confirmed that a defendant has satisfied step one of the *Batson* analysis if the prosecution has made "repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire."[73] When discussing this idea of a "pattern of strikes," the court confirmed that not only does the repeated use of peremptory challenges against Black jurors during the defendant's specific jury selection constitute a pattern, so does a history of the State using peremptory challenges against Black jurors across multiple cases.[74]

By adopting and providing the lower courts with instruction on these established principles of the prima facie case, the Supreme Court of North Carolina seems to have attempted to correct the history of reluctance North Carolina courts have in terms of acknowledging a prima facie case at step one of *Batson*.[75] However, the court still fell short by not providing a definitive statement as to what constitutes a "pattern," which left many important questions unanswered. How many Black jurors struck without cause is too many? And what does a historical pattern of discrimination look like? These unanswered questions leave an opening for continued flouting of the principles established by the U.S. Supreme Court in reviewing *Batson* challenges at step one.

69. *See id.* at 350–52, 841 S.E.2d at 497–98.

70. *See id.* at 351–52, 841 S.E.2d at 497–98 ("[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (quoting Johnson v. California, 545 U.S. 162, 170 (2005))); *see also id.* at 350, 841 S.E.2d at 497 ("In making this showing [of a prima facie case], a defendant is entitled to 'rely on "all relevant circumstances" to raise an inference of purposeful discrimination.'" (quoting Miller-El v. Dretke, 545 U.S. 231, 240 (2005))); *id.*, 841 S.E.2d at 498 ("It is not until the *third* step that the persuasiveness . . . becomes relevant." (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995))).

71. *See id.* at 351, 841 S.E.2d at 498.

72. *See id.* at 350–51, 841 S.E.2d at 497–98 (citing State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995)).

73. *Id.* (quoting *Quick*, 341 N.C. at 145, 462 S.E.2d at 189).

74. *See id.* (citing Miller-El v. Cockrell, 537 U.S. 322, 346 (2003); Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019)).

75. *See supra* Section I.B.1.

2. Step Two

The race-neutral reasons required by step two of the *Batson* analysis have always set a low bar for the nonmoving party,[76] and the North Carolina Supreme Court's opinion in *State v. Hobbs* did not attempt to strengthen this standard.[77] While it did not raise the bar, it did reinforce the fact that these race-neutral reasons are to be provided by the nonmoving party rather than by the court,[78] an idea that North Carolina courts have struggled with historically.[79]

3. Step Three

In a noteworthy move toward articulating precedent set by the U.S. Supreme Court at step three, the *Hobbs* court acknowledged that the ultimate burden of proof required to establish a *Batson* violation is a preponderance of the evidence.[80] While this acknowledgment was long overdue—the first statement of the correct burden of proof by any North Carolina appellate court[81]—it does nothing on its own to assist North Carolina trial courts in reviewing *Batson* claims without also providing guidance on what evidence should be weighed and how it should be weighed.

In *Hobbs*, the Supreme Court of North Carolina implemented precedent from the U.S. Supreme Court to make step three a more transparent process.[82] In doing so, the court established that trial courts must fully weigh and explain the "totality of the circumstances" at step three.[83] These "circumstances" include not only the history of discrimination against Black jurors across multiple cases, but also the disparate treatment of similar Black and white jurors during jury selection in a particular case.[84] Further, the court clarified that disparate treatment not only applies to the types of questions asked by the prosecution—which the trial court had previously held—but also to jurors' answers to the prosecution's questions.[85]

76. *See supra* note 28 and accompanying text.

77. *See Hobbs*, 374 N.C. at 352–53, 841 S.E.2d at 499 ("[U]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (quoting State v. Bonnett, 348 N.C. 417, 433, 502 S.E.2d 563, 574–75 (1998))).

78. *See id.* at 352, 841 S.E.2d at 499 ("If a defendant has made a prima facie showing, the analysis proceeds to the second step where the State is required to provide race-neutral reasons for its use of a peremptory challenge." (citing *Flowers*, 139 S. Ct. at 2243)).

79. *See supra* notes 39–43 and accompanying text.

80. *See Hobbs*, 374 N.C. at 356, 841 S.E.2d at 501 ("[T]he trial judge would have the benefit of all relevant circumstances . . . before deciding whether it was more likely than not that the challenge was improperly motivated." (quoting Johnson v. California, 545 U.S. 162, 170 (2005))).

81. *See supra* notes 44–47 and accompanying text.

82. *See Hobbs*, 374 N.C. at 356–60, 841 S.E.2d at 501–03.

83. *Id.* at 358, 841 S.E.2d at 502; *see Flowers*, 139 S. Ct. at 2245.

84. *See Hobbs*, 374 N.C. at 358, 841 S.E.2d at 502.

85. *See id.* ("[T]he trial court misapplied *Miller-El II* by focusing only on whether the prosecution asked white and black jurors different questions, rather than also examining the comparisons in the white and black potential jurors' answers that Mr. Hobbs sought to bring to the court's attention.").

While the call for trial courts to apply the correct legal standard by weighing and fully explaining their decision on the evidence may help prevent courts from incorrectly weighing discrimination, the weighing itself remains largely subjective. The discretion given to trial courts through this process continues to leave room for biases, implicit and otherwise, as trial courts answer the ultimate question of whether or not discrimination occurred.

III. MOVING FORWARD

Because of the evident issues surrounding the application of *Batson*,[86] as well as the continued shortcomings of the Supreme Court of North Carolina in providing guidance on its application to lower courts,[87] it is time for the state to consider alternate methods of ending racial discrimination in jury selection. In fact, at the time *Batson* was decided, there were already thoughts that its principles did not go far enough to protect against discrimination, suggesting that a new approach is well past due.[88] Two possible approaches are reform via the courts and reform by rule.

A. Batson *Reform in the Courts*

While it has been suggested that *Batson* was always destined to fail,[89] some state courts have made attempts similar to North Carolina's *Hobbs* court to provide strengthening guidance to the analysis in order to assist lower courts in better serving litigants and jurors.[90] Other state courts have used the judicial process to alter aspects of *Batson*.[91]

86. *See supra* Section I.B.

87. *See supra* Section II.B.

88. *See* Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process.").

89. ELISABETH SEMEL, DAGEN DOWNARD, EMMA TOLMAN, ANNE WEIS, DANIELLE CRAIG & CHELSEA HANLOCK, BERKELEY L. DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS 67 (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf [https://perma.cc/LZF2-FQ2P]. In his concurring opinion in *Batson*, Justice Marshall opined that the analysis was destined to fail due to the fact that the prima facie requirement puts a burden on the moving party that is at odds with the goal of *Batson*, the ease with which the nonmoving party could state a facially neutral reason, and the implicit bias of the nonmoving party and the courts. *Batson*, 476 U.S. at 102–06 (Marshall, J., concurring).

90. *See* People v. Rodriquez, 351 P.3d 423, 430–31 (Colo. 2015) (holding the trial court should have first determined the validity of the defendant's prima facie case, and then determined whether the prosecutor's reasons for striking the juror were race-neutral); City of Seattle v. Erickson, 398 P.3d 1124, 1131 (Wash. 2017) (holding the trial court must recognize a prima facie case in the first step of the *Batson* analysis when the sole member of a racial group has been struck from the jury).

91. South Carolina, Florida, Missouri, and Connecticut have elected to apply an altered version of *Batson* when reviewing claims of racial discrimination in jury selection. *See* People v. Rhoades, 453 P.3d 89, 148 (Cal. 2019) (Liu, J., dissenting).

One way some state courts have chosen to alter *Batson* and take a stronger stance against racial discrimination in jury selection is to eliminate step one of the analysis.[92] Rather than having to determine if the moving party has shown a prima facie case of discrimination, the courts in these states turn immediately to the nonmoving party to provide a race-neutral reason for striking the juror once a *Batson* challenge has been raised.[93] This alteration would be particularly beneficial in a state like North Carolina where so many *Batson* challenges meet their end at step one.[94]

B. Batson *Reform by Rule*

Recognizing the limitations of strictly judicial measures, some states have chosen to forego case law and utilize alternate authority to establish *Batson* reform.[95] In an unprecedented action, the Washington Supreme Court adopted General Rule 37 ("GR 37")[96] to serve as the state's alternative to *Batson*.[97]

GR 37 contains several noteworthy features to assist in ending discrimination in jury selection. First, like some states have already accomplished via reform by the courts,[98] this rule eliminates the need for the moving party to establish a prima facie case under *Batson*.[99] Second, the rule adopts an "objective observer" standard,[100] whereby the trial court must serve as an objective observer and deny a peremptory challenge if an objective observer could find that the race of the prospective juror played a part in the prosecution's use of the challenge.[101] This feature would be helpful in North Carolina, where the system in place has repeatedly failed to address issues of biases.[102] Further, by disallowing peremptory challenges where race could have been used as a factor, North Carolina would take a step toward reducing the uncertainty surrounding the more subjective weighing involved in *Batson*.[103]

92. *See id.* (citing State v. Rayfield, 631 S.E.2d 244, 247 (S.C. 2006); Melbourne v. State, 679 So. 2d 759, 764 (Fla. 1996); State v. Parker, 836 S.W.2d 930, 939–40 (Mo. 1992); State v. Holloway, 553 A.2d 166, 171–72 (Conn. 1989)).

93. *See id.*

94. *See supra* Section I.B.1.

95. *See* Annie Sloan, *"What To Do About* Batson*?": Using a Court Rule To Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 242 (2020).

96. WASH. GEN. R. 37.

97. SEMEL ET AL., *supra* note 89, at 69.

98. *See supra* note 90 and accompanying text.

99. WASH. GEN. R. 37(d).

100. An "objective observer" is defined as one who "is aware that implicit, institutional, and unconscious biases, in additional to purposeful discrimination, have resulted in the unfair exclusion of potential jurors." WASH. GEN. R. 37(f).

101. WASH. GEN. R. 37(e).

102. *See supra* notes 28–29 and accompanying text.

103. *See supra* Section II.B.

Next, the rule provides "presumptively invalid" reasons for striking a juror.[104] This list of reasons aims to eliminate the use of reasons that are considered "race-neutral" under *Batson*, but are historically associated with racially motivated peremptory challenges.[105] Lastly, the rule adopts a "reasonable notice" principle, stating that if the prosecution seeks to use a conduct-based reason for why a juror was struck, they "must provide reasonable notice to the court and the other parties so the behavior can be verified."[106] Adopting these aspects of GR 37 would help North Carolina eliminate some of the issues it has faced at step three of *Batson*, such as the disparate treatment of Black and white prospective jurors.[107] Since many reasons touted as race-neutral disproportionately impact Black prospective jurors,[108] implementing a similar list of presumptively invalid reasons, or a list of reasons that require reasonable notice, would assist North Carolina in combatting its shameful history of denying Black citizens the right to serve on a jury.

CONCLUSION

After almost thirty-five years of North Carolina trial courts misapplying the principles provided by *Batson* and its progeny, the Supreme Court of North Carolina took the important step of providing guidance on the *Batson* analysis in *State v. Hobbs*.[109] While this was a positive step, it did not provide total clarity on all aspects of *Batson* and shows that North Carolina case law is likely to continue to struggle to keep pace with developments in this area. Therefore, North Carolina must adopt a rule similar to GR 37 in order to take meaningful steps toward ending racial discrimination in jury selection.

KIMBERLY M. CORNELLA**

104. These presumptively invalid reasons include:

(i) having prior contact with law enforcement officers;
(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;
(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;
(iv) living in a high-crime neighborhood;
(v) having a child outside of marriage;
(vi) receiving state benefits; and
(vii) not being a native English speaker.

WASH. GEN. R. 37(h).

105. *Id.*

106. WASH. GEN. R. 37(i).

107. *See supra* Section I.B.3.

108. *See* Grosso & O'Brien, *supra* note 3, at 1547–56.

109. For more on the potential impact of the *Hobbs* decision, see Lewis, *supra* note 6, at 114.

** J.D. Candidate, Class of 2022.