STATE OF NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
COUNTY OF WAKE	)	
	)	16 CRS 223384
	)	16 CRS 223562
	)	16 CRS 223563
	)	16 CRS 5701
STATE OF NORTH CAROLINA	)	16 CRS 205311
	)	
v.	)	
	)	
BRANDON XAVIER HILL	)	
	)	
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	)	
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BRIEF OF THE INCLUSIVE JURIES PROJECT, EMANCIPATE NC, THE DECARCERATION PROJECT, AND THE CENTER FOR DEATH PENALTY LITIGATION AS *AMICI CURIAE* SUPPORTING DEFENDANT'S CHALLENGE TO DEATH QUALIFICATION[1]

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[1] Amici gratefully acknowledge Duke University School of Law student Jackson Samples, J.D. candidate 2024, whose substantial research and writing contributions were integral to the creation of this brief.

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INTRODUCTION

The North Carolina Supreme Court, mindful of our painful history of racial discrimination and oppression, requires courts to weigh historical evidence when evaluating claims of juror discrimination. *State v. Hobbs*, 374 N.C. 345, 351 (2020). The historical evidence presented by Mr. Hill and discussed below establishes the historical and continuing link between lynching and capital punishment. This link bears directly on the impact of death qualification, rendering it a practice that exacerbates racial exclusion in cases of unparalleled consequence, where juries must weigh life and death. In evaluating death qualification, our history cannot be ignored. Instead, it must be followed to the conclusion that the discriminatory impact of death qualification violates state and federal guarantees of equal protection under law.

ARGUMENT

I. The death penalty, intertwined with the history of lynching, has been used a tool of racism and anti-Black subordination in North Carolina.

In the United States, and particularly the South, the death penalty arose "out of a racially specific history of the use of white violence to oppress African Americans." James D. Unnever et al., *Race, Racism, and Support for Capital Punishment*, 37 Crime & Just. 45, 82 (2008). Central to this history was lynching. Upon the end of the Civil War and the passage of Thirteenth Amendment, lynchings of Black people and particularly Black men became a horrifying fixture of social and

racial control in the South. *See id.* at 82–83. In North Carolina, for example, nearly 200 lynchings took place between the end of the Civil War and the mid-20th Century. Wake County Superior Court hearing in the above-captioned case, Aug. 31, 2022 Transcript vol. 1, 81 (hereinafter "Aug. 31, 2022 Tr."). Lynchings and other forms of racist terrorism were a "constant presence" in the lives of Black Southerners, *McDonald v. City of Chicago*, 561 U.S. 742, 857 (Thomas, J. concurring), instilling "a subculture of fear" and "wariness about the state's power to take life," Unnever, *Support for Capital Punishment*, *supra*, at 82–83. "Legal lynchings"—which Professor Seth Kotch testified as constituting the threat and use of mob violence to influence capital trials to find Black defendants guilty and impose the death penalty—were also part and parcel of this system of racial control. *See* Aug. 31, 2022 Tr. vol. 1, 108–09.

Beyond the occurrence of legal lynchings, state executions came to parallel lynchings in many ways. Namely, "a close relationship" existed "between people who were victims of lynching and people who were executed." Aug. 31, 2022 Tr. vol. 1, 113. Throughout the late 19th and early 20th Centuries, lynchings and executions occurred "in concert" and disproportionately impacted Black North Carolinians by a factor of *4 to 1* relative to white residents. Charles David Phillips, *Exploring Relations among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889-1918*, 21 L. & Soc'y Rev. 361, 368–69 (1987). This extreme disparity never abated in the following decades. Between 1930 and 1980, Black Americans across the United States were executed at five times the rate of white

Americans. Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 Soc. Psych. Q. 67, 68–69 (1991). The death penalty was serving the same function as lynching, but with "the gloss of legality and procedural regularity." Unnever, *Support for Capital Punishment*, *supra*, at 84 (quotations omitted).[2]

As of today, this disparity persists. 54% of people on North Carolina's death row are Black, North Carolina Department of Public Safety, *Death Row Roster*, https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster (noting that 73 of the 135 people on death row are Black), while Black people constitute only 22% of the state population, United States Census Bureau, *QuickFacts North Carolina*, https://www.census.gov/quickfacts/NC.

II. Potential Black jurors in current-day North Carolina distrust the death penalty because of its racist history.

The racist history of the death penalty and its social and historical ties to lynching are well-established. *See generally* Aug. 31, 2022 Tr. vol. 1, 68–126; Def.'s

[2] Even when upholding the constitutionality of the death penalty, the United States Supreme Court has recognized the ties between the death penalty and lynching. *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law"); *see also* Claude A. Clegg III, *Troubled Ground: A Tale of Murder, Lynching, and Reckoning in the New South* 174 (2010) ("Consistent with the reported doings of the mob, the state's use of [the death penalty] was also complemented by salacious newspaper accounts, arresting photographs, race-baiting demagoguery, and often casual observance of legal procedure. However, unlike mob executions, state killings—which in some instances were only more 'official' versions of lynching—would assume a public legitimacy that jail invaders and lynching bees never had, even though the occupants of the electric chair almost always mirrored the racial profile of those unlawfully hung from trees.")

Mot. To Bar Discriminatory Death Qualification Process, 24–33. Integrally, this history has had a significant impact on the perception of the death penalty among Black North Carolinians—and thus potential Black jurors in the state—today. Academic research in this area has drawn definitive connections between the past and present.

A. Black North Carolinians are more likely to oppose or distrust the death penalty than non-Black North Carolinians.

As a threshold matter, it is important to note the racial disparities in current support for the death penalty. In 2021, a Pew Research poll found that 63% of white Americans either "somewhat favor" or "strongly favor" the death penalty for people convicted of murder. Pew Research Center, *Most Americans Favor the Death Penalty Despite Concerns About Its Administration* 8 (2021) https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2021/06/PP_2021.06.02_death-penalty_REPORT.pdf. For Black Americans, however, that figure was a comparatively smaller 49%. *Id.* Also telling is that while 30% of white Americans "strongly support" the death penalty in these cases, only 18% of Black Americans do. *Id.* Moreover, racial identity in public opinion polls like these is likely *not* acting as a proxy for other variables such as socioeconomic status or political attitudes. *See* Unnever, *Support for Capital Punishment*, *supra*, at 82.

This racial disparity plays out in the death qualification process in Wake County to an even greater degree. Black venire members are more than *twice as likely* as white venire members (25% to 11%) to be removed from a capital jury on

account of their opposition to the death penalty. Def.'s Mot. To Bar Discriminatory Death Qualification Process, Ex. A.

B. Social science research has identified ties between the death penalty's racist history and its modern-day perceptions among Black Americans.

i. The "state threat" hypothesis and "subculture of violence" theory help explain these ties.

Criminologists posit that history is salient in the death penalty context because lynchings and state executions entrenched a high level of fear and distrust of the death penalty among Black Americans that remains to this day. Unnever, *Support for Capital Punishment*, *supra*, at 82–84. James D. Unnever and others have described this as the "state threat" theory, which finds that Black Americans have had historical reasons to conceive of the state as an instrument used to solidify the power and political interests of white Americans. *Id.* at 82. Lynchings and the death penalty, as "the ultimate weapon of state criminal justice power," have served as a violent means to this end, causing Black Americans as a collective to "have a different sensibility" and unique way of thinking about the practice. *Id., see also* Matthew A. Gasperetti, *Crime and Punishment: An Empirical Study of the Effects of Racial Bias on Capital Sentencing Decisions,* 76 U. Mia. L. Rev. 525, 593 (2022) (noting that "[s]hared histories, cultures, ideologies, and attitudes define racial groups" and that "[g]iven the long, racist history of capital punishment," racial disparities in support for the death penalty are "not surprising").

Central to this phenomenon is the cultural and intergenerational transmission of the history of Southern lynchings. An initial driving force of this transmission was the Great Migration, which was in large part caused by racial terrorism and the specter of lynchings in the South. *See* Stewart E. Tolnay & E. M. Beck, *Racial Violence and Black Migration in the American South, 1910 to 1930*, 57 Am. Socio. Rev. 103, 110–11 (1992) (finding that Southern counties that had more lynchings had significantly higher rates of out-migration). An "unintended consequence" of the Great Migration, therefore, was the dissemination of oral histories and personal accounts of lynchings, further entrenching a "deep-seeded dislike for capital punishment" among Black Americans across the country. Unnever, *Support for Capital Punishment*, *supra*, at 83.

Further transmission of the history of lynchings and state executions was a product of what political scientist James W. Clarke refers to as the "subculture of violence" in the American South. The subculture of violence theory notes that lynchings and later executions were actions "embedded in a regional culture of white supremacy," which was used to "exert absolute power over" Black Southerners. James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 Brit. J. Pol. Sci. 269, 274 (1998). This subculture was furthered by a litany of forces, including the demise of Reconstruction, racist rhetoric and norms, and the institutionalization of lynchings through the rise of state executions. *See id.* at 276–88.

In turn, Black Southerners increasingly saw institutions like the courts as "instruments of injustice and oppression." W. E. B. DuBois, *The Souls of Black Folk*, 121 (Restless Classics ed. 1970) (1903). More generally, too, the fear of lynchings and racist violence "informed the actions of every black man, woman, and child throughout the South." Clarke, *Without Fear or Shame*, *supra*, at 276. This impact, which included "bitter memories and smouldering resentments," has been transmitted generationally within Black communities. *Id*. at 278–80 (discussing the continuity and change in Black "defiance" towards racial violence, where newer generations of Black people in the late 1800s "grew to hate policemen, just as their parents and grandparents had hated Klansmen and overseers," and "'refused to believe the evidence of white witnesses or the fairness of white juries'") (quoting DuBois, *The Souls of Black Folk*).

ii. Oral histories of lynchings and state violence are key parts of Black collective memory in the South.

Given the horrors of lynchings, legal lynchings, and state executions in Southern history, it should be unsurprising that this history has been passed down generationally. This social fact has been well-documented by sociologist Charlotte Wolf, who has written that "the social climate and control" created by racist violence has "lingered to shape the way present-day [individuals] perceive their lives and racial relationships." *Constructions of a Lynching*, 62 Socio. Inquiry 83, 83 (1992). Wolf's research was well-summarized by Professor Seth Kotch:

> There is a generational traumatic effect for [lynching] events. These events continued to circulate for generations and generations. They become part of local, community,

> family lore. They enter and reenter classrooms over and over again. They become the subject of museum exhibitions.

Aug. 31, 2022 Tr. vol. 1, 89. In her work *Constructions of a Lynching*, Wolf researched the haunting impact of lynchings in a small Southern town almost 100 years after those lynchings occurred. Her interviews with Black townspeople were illuminating, who told Wolf things such as "Blacks still talk about the [lynching victims]" and "I know so many bad things about that [lynching]." *Constructions of a Lynching*, *supra*, at 88. Several individuals were able to recount the lynchings with significant detail, even remembering the types of guns that lynch mobs wielded. *Id.* at 89. Also notable is Wolf's finding that oral history and "interpretive work on the lynchings has occurred mainly within racial community boundaries," demonstrating that these oral histories are specific to Black communities. *Id.* at 95.

Shytierra Gaston, a criminologist at Georgia State University, has also documented this occurrence and compiled interviews with the descendants of lynching victims and their families. Although she found that families themselves followed "codes of silence" and avoided discussing lynchings at length, their impact was still felt acutely. Shytierra Gaston, *Historical Racist Violence and Intergenerational Harms: Accounts from Descendants of Lynching Victims*, 694 ANNALS 78, 80 (2021); *see also* Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 69 (3d ed. 2017) (explaining the culture of fear and silence around racial terror violence in the Black community and noting that "in many ways, this fear survives and the culture of silence endures").

Descendant families experienced psychological trauma, including feelings of grief, disbelief, and anger, as well as substantial economic losses associated with fleeing the location where the lynching occurred. Gaston, *Historical Racist Violence*, *supra*, at 80–88. A hauntingly similar impact occurs to the family members of Black people who are executed by the state. Family members often experience depression and "chronic grief" and "cloak[] themselves in shame" much like the families that Gaston interviewed. Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members As a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 Fla. St. U. L. Rev. 1119, 1138–42 (1999).

Furthermore, strong statistical ties between lynchings and the death penalty have been identified, further demonstrating the links between history and the current day. In jurisdictions where the lynchings of Black people occurred more frequently, the death penalty is more often sought and deployed. Ryan Gabriel & Steward Tolnay, *The Legacy of Lynching? An Empirical Replication and Conceptual Extension*, 37 Socio. Spectrum 77, 79 (2017). Gabriel & Tolnay interpret their empirical findings to show that "the values that legitimize the violent act of lynching are sustained over generations by a collective memory, which in turn influences" outcomes in the criminal justice system today. *Id.* at 92.

III. This history and its impact on current-day distrust of the death penalty are extremely relevant to any analysis of death qualification under the North Carolina Constitution.

a. *Perceptions of the criminal justice system are an important part of the analysis.*

Art. I, § 26 of the North Carolina Constitution is this state's bulwark against racial discrimination in the jury context, declaring that "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, § 26. The North Carolina Supreme Court has interpreted § 26 broadly. In *State v. Cofield*, our high court affirmed that § 26 goes beyond protecting against intentional discrimination, prohibiting the disparate exclusion of Black people and other distinctive groups from jury service. 320 N.C. 297, 302–03 (1987) (*Cofield I*). Key to this holding was the consideration of the public's views of the legal system. Importantly, the Court in *Cofield I* held that the jury system must not only operate evenhandedly, but it "must also be *perceived* to operate evenhandedly." *Id.* (emphasis in original). Public perceptions of unfairness, according to the *Cofield I* Court, "undermine the judicial process." *Id*. Protecting the perception of evenhandedness derives from the constitutional provision's purpose of "protect[ing] the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case." *Id.* at 304.

Therefore, the fact that Black venire members' historically rooted suspicion of the death penalty (i.e., their perception that this institution is associated with racial oppression) is being used against them in the death qualification process must be considered by this court. Not only does this process degrade the authentic and well-established perspectives of Black North Carolinians, but it also ensures the continuation of a vicious cycle of distrust and discrimination. Historical violence creates distrust and opposition to the death penalty, which in turn leads to Black

venire members' disproportionate exclusion from current capital juries, compounding historical discrimination. Gasperetti, *Crime and Punishment*, *supra*, at 580 (finding with statistical significance that Black potential jurors were 7.3% more likely to be excluded by death qualification than white potential jurors). If the cycle is unbroken, the North Carolina capital jury will become ossified as a racially exclusive institution in perpetuity. This is fatal to the perception of North Carolina's juries as "operat[ing] evenhandedly" under § 26 analysis. *Cofield I*, 320 N.C. at 302.[3]

b. The North Carolina Constitution has deeper and broader protections against racial discrimination in the jury context than the federal Constitution and neighboring states' constitutions.

Art. 1, § 26 was adopted by the people of North Carolina in 1971 "in the spirit of much that was done" during the Reconstruction era. John V. Orth & Paul M. Newby, The North Carolina State Constitution 82 (2d ed. 2013). Section 26 "increased [the] likelihood of doing justice to *all* individuals." *Id.* at 83. (emphasis added). Notably, neither the federal Constitution nor neighboring states' constitutions contain language exactly like § 26. In a strictly textual sense, the

[3] North Carolina courts are in good company when focusing on the public's perception of fairness in jury selection. *See e.g., Flowers v. Mississippi*, 139 S. Ct. 2228, 2240 (2019) (discussing how the "covert" exclusion of Black jurors produced the same outcomes as "overt" exclusion in terms of "the black community's confidence in the fairness of the American criminal justice system"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141–42 n.13 (noting that jurors "have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination" in part because "[t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system"); *People v. Triplett*, 48 Cal.App.5th 655, 692–93 (2020) ("To many people, excluding qualified Black jurors based on their negative experiences with law enforcement or the justice system must seem like adding insult to injury. . . . It is time to reassess whether the law should permit the real-life experiences of our Black citizens to be devalued in this way. At stake is nothing less than public confidence in the fairness of our system of justice").

Sixth and Fourteenth Amendments do not expressly mention racial discrimination in jury selection. Moreover, neither Virginia nor South Carolina's constitutions possess explicit language barring discrimination in the jury context. Va. Const. Art. I, §§ 8, 11 (establishing right to an "impartial jury" and prohibiting governmental discrimination generally); S.C. Const. Art. I, § 14 (requiring an "impartial jury"). The people of North Carolina have thus established the state as a place with heightened protections against bias and racial discrimination in jury selection. This lends textual support to the notion that historical discrimination and its vestiges are extremely relevant to any challenges brought under § 26.

c. State and federal case law on racial discrimination frequently centers the histories of practices and statutes.

The importance of history in discrimination cases is deep-rooted. In fact, both state and federal case law *require* courts to look at histories of discrimination when conducting their analysis. *See State v. Hobbs*, 374 N.C. 345, 351 (2020) (when evaluating a *Batson* challenge, "a court must consider historical evidence of discrimination in a jurisdiction," citing *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 346 (2003) and *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019)). In *Cofield I*, the North Carolina Supreme Court held that to make a successful claim of race-based exclusion from juries, defendants can show "that *for a substantial period in the past* relatively few [Black people] have served on the juries of the county notwithstanding a substantial [Black] population." 320 N.C. at 308 (emphasis added) (citation omitted). Moreover, in *State v. Clegg*, the North Carolina Supreme Court reaffirmed the idea that *Batson* challenges were important to "root out any

remaining vestiges of racial discrimination in jury selection." 380 N.C. 127, 162 (2022) (emphasis added).

Federal case law is also explicit about the importance of discriminatory history. In *Arlington Heights v. Metropolitan Housing Dev. Corp.*, for example, the U.S. Supreme Court held that "the historical background of the [challenged] decision" and "the specific sequence of events leading up to the challenged decision" are key when finding the existence of discriminatory purpose. 429 U.S. 252, 267 (1977); *see also Castaneda v. Partida*, 430 U.S. 482, 495–97 (1977) (holding that disparate outcomes over an 11-year period in conjunction with the "key-man" system of jury selection was sufficient for a prima facia showing of discriminatory purpose). In sum, it is common and often required for courts to look at history when considering claims of discrimination.

CONCLUSION

What's past is prologue. The history of lynching and racist violence in North Carolina left an indelible mark on Black North Carolinians' perception of the death penalty and has increased levels of distrust. Because the death qualification process excludes people who oppose the death penalty and disproportionately excludes Black venire members from capital juries as a result, this history and its intergenerational impact must be thoughtfully considered by this court.

Respectfully submitted, this the 17th day of November, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 17, 2022, I served a copy of the foregoing **Brief of the Inclusive Juries Project, Emancipate NC, the Decarceration Project, and the Center for Death Penalty Litigation as Amici Curiae Supporting Defendant's Challenge To Death Qualification**, by electronic means, upon the following counsel of record for the parties:

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