In the Superior Court of Richmond County
State of Georgia

Case No. CR-2008-RCCR-212

STATE OF GEORGIA,

Plaintiff,

v.

ADRIAN TYWAN HARGROVE,

Defendant.

BRIEF FOR AMICI CURIAE

AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF GEORGIA

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STATEMENT OF INTEREST OF AMICI

Amicus curiae the American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution, and federal and state laws, including its protections under the Equal Protection Clause of the Fourteenth Amendment and the Americans with Disabilities Act. Since its founding more than 100 years ago, the ACLU has appeared as direct counsel and amicus curiae in the United States Supreme Court and state high courts in numerous cases. Amicus curiae the ACLU Foundation of Georgia is a statewide affiliate of the national ACLU. The ACLU Foundation of Georgia is a nonprofit, nonpartisan organization that works to enhance and defend the civil liberties and rights of all Georgians through legal action, legislative and community advocacy, and civic education and engagement.

PRELIMINARY STATEMENT

In Adrian Hargrove's 2014 trial for his life, the State time after time used its allotted peremptory strikes to remove Black jurors. By the end of jury selection, it had used 13 of 14 strikes to do so. It then not only provided a series of pretextual reasons for the strikes, but also admitted it struck one

juror from jury service based on his membership in the NAACP, an undeniably race-based reason that fails at step two of the analysis required by *Batson v. Kentucky,* 476 U.S. 79 (1986). Another reason it provided for striking a different Black juror was the juror's sight disability, even though court staff had already accommodated the disability through a monitor. All of this occurred against a backdrop of a history of Richmond County government officials discriminating against Black community members trying to exercise their rights. The State has denied the relevance of this history, but amici here show its relevance to the question of discriminatory intent.

Of note, although Mr. Hargrove has fully presented a meritorious *Batson* claim, amici add their voices in this case not only in his support but also on behalf of all improperly excluded jurors. As the Supreme Court has held, honoring each person's ability to serve on a jury in their community is essential to our democracy:

> Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all the people.... It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for the law." ... Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Powers v. Ohio, 499 U.S. 400, 407 (1991). At stake here, therefore, are not only Mr. Hargrove's own jury and fair cross-section rights, but also the rights of the Black members of this community, and persons with disabilities. This Court should protect their rights to take full part in our democracy by deciding the most important cases tried in the courthouse.

This Court should grant Defendant's Motion for a New Trial due to the State's blatant violation of *Batson*, the Equal Protection Clause of the Fourteenth Amendment, and the Americans with Disabilities Act.

ARGUMENT

I. The Equal Protection Clause of the Fourteenth Amendment bars the State from intentionally removing jurors based on race through peremptory strikes, denying them the full rights of citizenship.

The Equal Protection Clause of the Fourteenth Amendment forbids the government (or any litigant) from using peremptory strikes with the intent to remove Black jurors. U.S. Const. amend. XIV. Under *Batson v. Kentucky,* 476 U.S. 79 (1986), courts evaluate such claims using a three-step process: (1) the objecting party must meet the light burden of establishing a prima facie case of discrimination, (2) the strike's proponent must then provide race-neutral reasons for the challenged strikes, and (3) the trial judge then must determine whether the proponent's stated reasons were the actual reasons, or were instead a pretext for discrimination. *Toomer v. State*, 292 Ga. 49, 52 (2012). A successful *Batson* claim may result either from a

failure of the strike's proponent at step two to offer a race neutral reason, or from a finding of pretext at step three, or from a combination of step two and three failures when multiple reasons or jurors are at issue.

The disputes before this Court center on the second and third steps. Because the State here offered step-two reasons for its strikes, step one is now moot. *See Lewis v. State*, 262 Ga. 679, 680 (1993) (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)).

II. The State violated *Batson* when it used 13 of its 14 peremptory strikes to remove Black jurors, and offered both race-specific and pretextual reasons for doing so.

The State violated *Batson* repeatedly. Using all but one of its 14 strikes, it relentlessly removed Black jurors. The State violated *Batson* by removing one juror, Dennis Williams, without offering a race-neutral reason for the strike. And it violated *Batson* again by removing several other jurors for reasons shown in this brief (and Mr. Hargrove's pleadings) to be mere pretexts for intentional discrimination.

A. A model juror's NAACP involvement was race-specific discrimination -- not a valid race-neutral reason -- for his removal.

"With respect to the State's burden at step two as the proponent of the strike, the State need only articulate a facially race-neutral reason for the strike." *Clayton v. State*, 341 Ga. App. 193, 197 (2017). If, however, "discriminatory intent is inherent in the prosecutor's explanation, the reason offered" is not considered race neutral and the prosecutor has violated *Batson*. *Id.* An "explanation is not racially neutral if it is based upon either a characteristic that is specific to a racial group or a stereotypical belief that is imputed to a particular race." *Dukes v. State*, 273 Ga. 890, 891 (2001). Even reasons that do not "explicitly reference race" should be rejected at *Batson*'s second step when the reasons are "a cultural proxy stereotypically associated with African-Americans." *Clayton*, 341 Ga. App. at 198 (discussing gold teeth as cultural proxy). But, unlike gold teeth, the title "NAACP" *does* explicitly reference race, making the prosecutor's step-two answer here even more improper.

The prosecutor justified her strike of Dennis Williams, a military veteran, model citizen, and former grand juror in Richmond County, by citing his "extensive" work "as the president of the NAACP and [the prosecutor's] belie[f] that they have in the past released position statements indicating their opposition to capital punishment." [TR.4443:21-24]. Thus, to

strike this model juror, the prosecutor relied on Mr. Williams's membership in an organization of Black people who advocate for Black advancement, as well as a series of prosecutor-manufactured and record-rebutted inferences about what that membership meant for Mr. Williams's own death-penalty views. She did so without so much as asking a single question of Mr. Williams about the NAACP's death penalty stance, or attempting to link it with the views of Mr. Williams, who was in fact entirely open to the punishment of death.

Several courts have held that NAACP membership fails *Batson*'s step-two demand for a race-neutral reason. For example, in *Ledford v. State*, the trial court correctly refused to accept the state's explanation for the strike of a Black juror "based upon his membership in the NAACP and he was [therefore] seated on the jury[.]" *Ledford v. State*, 207 Ga. App. 705, 706 (1993).

Likewise, an Illinois appellate court has held that "because a Black prospective juror's membership in the NAACP relates to race and is thus *race specific*, a court would appear to condone racial discrimination if it were to accept a potential juror's membership in the NAACP as a racially neutral explanation for the prosecution's peremptory strike of that individual." *People v. Holmes,* 651 N.E.2d 608, 615 (Ill. App. Ct. 1995); *see also Somerville v. State*, 792 S.W.2d 265, 268-69 (Tex. Ct. App. 1990) (rejecting NAACP

membership as race-neutral reason at *Batson*'s step two, and finding such a reason is "race-specific").

Akin to here, in *Somerville*, the Texas appellate court noted that "the prosecutor did not question [a Black juror] concerning his degree of involvement in the NAACP or his knowledge of the NAACP's involvement with the District Attorney's office. Nor did the prosecutor explore whether [he] could abide by his oath to follow the law as given by the trial judge." *Id.* at 268. The court thus held "that the record fails to support the trial court's conclusion that the prosecutor's explanation for the peremptory challenge of [the juror] was race-neutral." *Id.* at 269. Here, too, the trial court erred when it held that the strike of Mr. Williams was not discriminatory. The State's faulty and offensive step-two answer did not satisfy the State's step-two burden.

Similarly, here, if the State was attempting to impute NAACP organizational views to Mr. Williams, it impermissibly relied on stereotype rather than fact. In fact, as shown below, Mr. Williams proved open to a sentence of death, [TR. 1855-56, 1870-72, 1874-75], while nothing in the record supports the idea that his NAACP membership swayed him against that view.

The prosecution asked Mr. Williams about his membership and role in the NAACP, as well as numerous other organizations in which he was

involved. [TR. 1865-68]. But it failed to ask even a single question about his understanding of the NAACP's position on the death penalty or whether any NAACP position that did exist would affect his own views. *Id.* at 1865-68 (asking Mr. Williams about the many civic clubs in which he was involved, asking specifically about a social service organization to which he belonged, about his responsibility as human rights chairperson for that organization, about patients' rights, about his membership in a police advisory committee, about his bike being stolen, about his familiarity with many locations related to the case, and his prior service on a grand jury in the county, *but nothing about the NAACP's death penalty views*). The prosecutor *did* ask if Mr. Williams's "religious experience" had shaped his death-penalty views and Mr. Williams said no. [TR. 1865].

Most telling, Mr. Williams stated his willingness to consider the death penalty. [TR.1870]. Mr. Williams explained that he thought it was justified in some situations, but not the only appropriate sentence in every murder case. *Id.* In his words, "I would be able to make an open-minded decision." [TR.1872]. *See also* [TR.1855-56] (stating he could consider mitigation and aggravation), 1854 (could deliberate with others), 1876 (open to aggravation and mitigation when asked by the defense – "You have to have an open mind."). By any objective measure, Mr. Williams presented as a model citizen, community member, and ideal juror.

More specifically, Mr. Williams is a military veteran who went on to work in support of our nation's injured military patients for decades, a former grand juror for the county, civically engaged across organizations, a choir member, trustee, and Sunday School teacher at his local Baptist Church, who was then running for county commission on a campaign of business improvement, better jobs, and better community relations. [TR. 1850-86]. He was open-minded about the death penalty, and so oriented to law and order that, when asked on voir dire if he had ever been a victim of a crime, he reported his bicycle's having been stolen decades earlier, saying "[t]hat's a crime." [TR.1868].

The State's reason for striking Mr. Williams was glaringly race-based, rather than race-neutral (and as argued below, and by Mr. Hargrove, also insufficient at step three). Based on the discriminatory removal of this juror alone, the Court should find a *Batson* violation and order a new trial. *Clayton*, 341 Ga. App. at 201 ("Accordingly, the trial court erred by finding there was no *Batson* violation, and we therefore reverse the trial court's judgment denying the motions for new trial filed by [defendants].").[1]

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[1] *See also Cf. State v. Ruth*, No. COA20-657, 2022 WL 30135, at *5 (N.C. Ct. App. 2022) (unpublished) (granting new trial due to prosecutor's failure at step two to provide race-neutral reason for strike); *State v. Wright*, 658 S.E.2d 60, 65 (N.C. Ct. App. 2008) ("As the prosecutor failed to provide a race-neutral explanation as to *each* challenged juror mentioned by the

B. The State's reasons for striking Black jurors were pretextual.

At *Batson*'s third step, a number of factors may be relevant in proving that the State's stated reason for a strike was pretextual, and that the strike was in fact based on intentional discrimination. Most pertinent, and ultimately damning in this case, are these five:

- Statistical evidence about the prosecutor's use of peremptory strikes against Black prospective jurors, as compared to white jurors the prosecutor did not strike. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019).
- A prosecutor's mischaracterization of or misstatement concerning a challenged juror's testimony to create a false race-neutral reason to justify a challenged strike. *Miller-El v. Dretke II,* 545 U.S. 231, 244 (2005); *see also Flowers*, 139 S. Ct. at 2250 ("A series of factually inaccurate explanations for striking black prospective jurors can be telling[.]").
- Side-by-side comparisons between Black prospective jurors the prosecutor struck and white prospective jurors the prosecutor did not strike. *Flowers*, 139 S. Ct. at 2243.

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defendant the trial court clearly erred" in not granting defendant's *Batson* motion.).

- A prosecutor's "failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about . . . suggest[s] that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U.S. at 246.
- A history of racial discrimination by government actors. *Flowers*, 139 S. Ct. at 2242.

1. *Damning statistics*

The State used 13 of 14 peremptory strikes to remove Black jurors. Alternatively, calculated as a function of all Black or white jurors (and including those considered for alternate seats), the State struck eligible white jurors at a rate of 9% (2/22), [2] whereas it struck Black jurors at over seven times that rate, at 65% (15/23).[3] Under *Flowers* and abundant other

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[2] The available white jurors, including those the State struck, and including candidates for alternates, were: 1. Richard Wood, 2. Laura Fanning, 3. Terry Dohmen, 4. Kristen Middleton, 5. Bonnie Williams, 6. Nicole Dyches, 7. Elizabeth Coulter, 8. Bryan Adams, 9. Kim Degner, 10. Sterling Gray, 11. Rosemary Jagoe (STRUCK), 12. Patricia Hawkins, 13. Johnell Bowman, 14. Suzan Harvel, 15. Ashley Jones, 16. Joshua Blue, 17. Ellis Miller, 18. Jennifer Flanigan, 19. Stephanie Lemon (STRUCK ALTERNATE), 20. Robert Thompson, 21. Wesley Morris, and 22. Charles Bland. *See* Strike Sheet appended to this Brief as Exhibit A; Panel List, Defense Exhibit 11 at the Motion for New Trial Hearing (noting race of jurors).

[3] The available Black jurors, including those the State struck, and including candidates for alternates, included: 1. Samantha Tarte, 2. Brenda Leverett (STRUCK), 3. Rodrick Johnson (STRUCK), 4. Frankie Morgan (STRUCK), 5. Stacy Palmer-Carpenter (STRUCK), 6. Rayford Mills

precedent, these statistics alone powerfully demonstrate the State's discriminatory intent. *See Miller-El II*, 545 U.S. at 266 (finding intentional discrimination where State peremptorily struck 12% of non-Black potential jurors but 91% of potential Black jurors).

2. *Repeated mischaracterization*

In justifying the prosecution's strikes of Black jurors, the District Attorney repeatedly mischaracterized the Black jurors' answers, evincing the prosecutors' discriminatory intent.

Rodrick Johnson: The State claimed to have struck Mr. Johnson because he "lean[ed]" towards a sentence of LWOP. [TR.4436:10-25]. In fact, however, when the State questioned Mr. Johnson about whether he could give meaningful consideration *to all three sentences,* including life with the possibility of parole, life without parole, or death, he answered yes. [TR.1110:11-25]. Mr. Johnson was more than open to sentences of death or life with parole, contrary to the State's claims. Indeed, he was adamant that

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(STRUCK), 7. Antoine Gilmore, 8. Keira Johnson, 9. Jessica Batey (STRUCK), 10. Gail Pennant, 11. Dennis Williams (STRUCK), 12. Shenequa Bell (STRUCK), 13. Evelyn Parson (STRUCK), 14. Fritz Strother (STRUCK), 15. Charlie Barker (STRUCK), 16. Joyce Fuller (STRUCK), 17. Evelyn Walker, 18. Kenneth Lawson, 19. Kimberly Williams (STRUCK), 20. Lori Taylor, 21. Geneva Foreman (STRUCK ALTERNATE), 22. Peggy Holiday, 23. Linda McClinton (STRUCK ALTERNATE). *See* note 2, *supra* for source information.

before choosing a sentence he "ha[d] to hear everything first . . . I got to hear it. I got to hear it." [TR.1111-112]. He later unequivocally repeated that if convinced it were the appropriate punishment, he could impose life with the possibility of parole, life without parole, or death. [TR.1119-120]. *See also* TR.1109 (stating in some cases he is for death, and some not, needs to "hear everything"); 1110 (stating he could give "meaningful consideration to all three sentencing options in [this] case"). Rather than acknowledge Mr. Johnson's true words, the State fabricated a response refuted by the record.

Rayford Mills: The State struck potential Black juror Rayford Mills for being "open to a sentence of parole." [TR.4439:22-4440:1-8]. In fact, however, his answers showed he was not open to such a sentence in this case. The State asked him whether he could give a sentence of life *with* parole to the defendant if they could prove the defendant was guilty of triple homicide, feticide, and child molestation. [TR.1211]. Mills answered, "If all such is proven, then a life sentence- this is someone *that doesn't need to be paroled back to society*[.]" *Id.* (emphasis added). Again, the state provided a false report of this Black juror's testimony, ignoring his words and mischaracterizing his answers to justify the strike.

Charlie Barker: The State claimed that another Black potential juror, Charlie Barker, viewed "criminal behavior [as] the norm," without "condemnation of that behavior." [TR.4447:10-13]. The State went so far as

to suggest that Mr. Barker said "we all are" drug dealers in his family. *Id.* at l. 6. It argued that the State didn't "want a juror who believes that criminal behavior is acceptable. We don't know whether or not he's distanced himself from those family members or not." *Id.* at 14-16. In truth, Mr. Barker said none of this. Rather, the prosecutor asked about his ability to be fair and impartial if it came out that any party in the case struggled with substance abuse. [TR. 2498]. Mr. Barker disclosed that he has five uncles who have sold drugs, went to prison, and used drugs, but affirmed repeatedly that these facts would *not* make it hard for him to be fair. [TR.2497-2498].

When the prosecutor asked specifically if an addicted person "s[old] kind of to support their habit, is that kind of what's going on," Mr. Barker did not endorse that behavior or signal acceptance. *Id.* He disclosed the facts that his uncles were selling drugs, went to prison, and then began using drugs, *id*., but this disclosure by no means conveyed a view that criminal behavior was "the norm" or not to be condemned. To the contrary, Mr. Barker himself, despite—if not perhaps because of—this family history, applied to work in juvenile corrections. [TR. 2499].

The State's claims were not only false, but offensive and disrespectful. Mr. Barker obeyed a jury summons, came to court, and answered questions by forthrightly disclosing deeply personal family information. The State used that information against him in a dishonest and discriminatory manner.

Joyce Fuller: The State also struck Joyce Fuller, another Black woman, for being a nurse "who is used to following the instructions of doctors . . . and may automatically go with what experts say . . . just because they happen to have a degree." [TR.4448-4449]. Ms. Fuller was a Licensed Practical Nurse who works in the post-surgical unit of the neurology, urology, and orthopedic department of a hospital. [TR.2376-2378]. To suggest that she would "automatically" follow an expert instead of the facts, the law, and her own intellect is unsupported by the record and offensive. When asked if she would give the same level of consideration towards expert witness testimony versus lay witness testimony – "[w]ould [she] judge them all the same" – she simply and clearly said "yes." [TR.2383-2384].

Ms. Fuller is also a prime example of how the State attempted to justify removing Black women by offering false and offensive characterizations of their intellectual capacity. Prosecutors added that they removed Ms. Fuller, as well as a Black woman named Brenda Leverett, for having a hard time following and answering questions presented to them. [TR.4435-4436,4448-4449]. Both women, however, like their white counterparts, repeatedly and clearly articulated answers to the State's straightforward questions with "yes," "no," as appropriate. [TR.951-984, 2375-2408]. Pointing to an unjustified characterization of these jurors' intellectual capacity was not only disingenuous, but also leveraged deeply

discriminatory stereotypes about Black people. Indeed, a "foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority[.]" *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 319 (2023) (Sotomayor, J., dissenting) (citing H. Williams, *Self-Taught: African American Education in Slavery and Freedom* 7, 203–213 (2005)).

Shenequa Bell: The State doubled down on offensive tropes concerning Black women with the reasons it provided for striking Shenequa Bell, a bookkeeper at IGA. [TR.1930]. The State said that it struck her because she "parroted" information. [TR.4444]. The State claimed that she showed an "inability to receive information in a meaningful fashion [that] would limit her ability to think meaningfully and appropriately process the information." *Id.* While the record reveals the prosecutor's repeated reliance on offensive stereotypes, the record in no way supports this claim about Ms. Bell. [TR. 1916-1937]. Rather, she answered each question appropriately and meaningfully. *Id.* Like dozens of other jurors in this case, she asked for clarification of questions when needed, [TR.1926], but also answered "yes sir," "no sir," "yes ma'am." and "no ma'am" to a series of leading questions. [TR. 1916-37]. On perhaps the State's most critical question – concerning the death penalty – she gave a model answer: "I think it's kind of harsh, but when you do the crime, you just have to do what the jurors decide." [TR.

1926].

In sum, Ms. Bell never once "parroted" an explanation given by the judge, prosecutor, or defense counsel. As the Supreme Court has held, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

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The State's claimed reasons for striking five different Black jurors lack factual support and are implausible and often offensive, proving a pretext for discrimination.

3. *Disparate treatment of similarly situated jurors*

"More powerful than . . . bare statistics . . . are side-by-side comparisons of some black venire panelists who were struck and white ones who were not." *Miller-El II,* 545 U.S. at 241. As discussed above, Ms. Fuller's employment as a nurse supposedly gave rise to the State's suspicion that she would defer "automatically" to the experts. And yet the State did not strike Ms. Degner, a white woman, for working in that that exact same profession. [TR.1967-1968].

Another striking comparison arises with the State's disparate treatment of Rayford Mills. In part, the State's claimed reason for striking Mr. Mills was for not giving thought towards the death penalty. [TR.4439-

4442]. But the State did not strike three white jurors, Richard Wood, Sterling Gray, and George White who also had never given thought to the death penalty. [TR.350, 2012, 4347].

It became even more clear that the State's reason for striking Mr. Mills was a pretext for discrimination after it claimed to strike Dennis Williams, the model juror discussed above, in part for having "put *a lot* of thought into the death penalty." [TR.4443]. In other words, the State went on record claiming to strike Black jurors both for thinking too little and too much about the death penalty. Only intentional discrimination explains these removals.

Additionally, the State alleged to have struck Evelyn Parson because of her connection to PTSD and mental illness. Specifically, the State argued it struck Ms. Parson because she had a husband with PTSD and schizophrenic friends, which would "probably" make her "a person who is exceptionally kind and sympathetic and understanding of deficiencies." [TR.4445]. In contrast, the State did not strike two white women, Laura Fanning and Bonnie Williams, even though their husbands suffered from either schizophrenia or bipolar disorder. [TR.434, 571-72]. Moreover, the State did not strike white, male juror Terry Dohmen, despite having a current diagnosis of PTSD. [TR.601-02]. The State clearly would also have stricken such likely "sympathetic and understanding" white jurors had Ms. Parson's

connection to mental illness been the true reason for the State removing her.

4. *Failure to conduct a meaningful voir dire on supposedly undesirable factors*

As discussed above, but also relevant at *Batson*'s third step, the State failed to engage in any voir dire concerning the effects of the NAACP's alleged death penalty positions on Dennis Williams' own views before striking him due to those views. Rather than asking details about his involvement with the NAACP, the State dismissed the topic by saying "I see you were the past president of the local … chapter of the NAACP… You either are now or have been the chairman of the African American Historical Society, and there were some other ones with acronyms that I didn't recognize. . . . If you can sum up any other sort of civic club or anything like that that you're a member of." [TR.1865:13-18]. The State never asked Mr. Williams about his personal beliefs or the organizational viewpoints of the NAACP. *Id.* That is because the State's concern was not with Mr. Williams' or the NAACP's capital punishment viewpoints, but instead with Mr. Williams being a Black man affiliated with a Black organization.

The State made its discriminatory intent abundantly clear when, by contrast, it gave the following white jurors an opportunity to distinguish between their personal death-penalty views and those of the religious organization in which they were affiliated: Kristen Middleton, Elizabeth

Coulter, Kim Degner, and Sterling Gray [TR. 652,1975-76,1362-1363, 2034-25]. All four jurors identified with Catholic or Baptist church groups that collectively took strong stances against the death penalty. But the prosecutor asked each of these jurors in detail about their personal beliefs regarding capital punishment in comparison to their religious affiliation, and did not strike any of them. *See* Strike Sheet (Ex. A). Thus, even setting aside the step-two problems with the State's reliance on Mr. Williams' NAACP involvement set out above, the record also reveals this reason to be a pretext for discrimination at step three.

5. A history of government discrimination in this county supports the inference of intentional discrimination.

"[I]n the real world of criminal trials against black defendants, both *history* and *math*" inform the *Batson* analysis. *Flowers*, 139 S. Ct. at 2242. Amici have already addressed the math – 13 of 14 strikes against Black jurors. The available history further cements the conclusion that prosecutors acted with discriminatory intent when they exercised their strikes.

Mr. Hargrove's counsel have submitted a detailed pleading (Supplemental Briefing Supporting *Batson* Claims, Feb., 2023) setting out an extensive and unmistakable pattern of racial discrimination in this county going back for decades. Without repeating it, for reference, it includes Richmond County's history of discrimination against Black voters, resistance

to school integration that lasted for decades after *Brown v. Board of Education*, 347 U.S. 483 (1954), police shootings and misconduct leading up to and during the 1970 Augusta riot, lack of diversity on the Augusta police force, lack of diversity in the judiciary, and lack of diversity on juries, due to prosecutors' use of peremptory strikes. *See*, *e.g.*, *Avery v. State*, 174 Ga. App. 116, 118-19 (1985) (Richmond County case) ("The record shows that during voir dire the State's attorney used all ten of his peremptory strikes to remove blacks from the jury.")[4]. The State has asked this Court to ignore the historical evidence, and has gone so far as to argue "what happened in some other court can't be relevant to whether Mr. Hargrove received a fair jury." Tr. Hr'g. March 26-27, 2019, at 247 at ll, 21-23. *See also id.* at 3-6, 11. (prosecutor arguing: "What's the relevance of what happened in other cases to the proceedings here?"). The law directs otherwise.

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[4] The following Batson cases also arose in Richmond County. *Wise v. State*, 179 Ga. App. 115, 115 (1986) (remanding for step two when State struck "all black jurors"); *Williams v. State*, 262 Ga. 732, 733–34 (1993) (finding *Batson* violation where State used nine of ten peremptory strikes to remove Black jurors, offered suspect reasons, including reasons that applied with equal force to white jurors); *Hudson v. State*, 234 Ga. App. 895, 898 (1998); *Stevens v. State*, 245 Ga. App. 237, 239 (2000); *Brown v. State*, 278 Ga. 724, 728 (2004); *Overton v. State*, 295 Ga. App. 223, 239 (2008); *Arrington v. State*, 286 Ga. 335, 339 (2009); *Brown v. State*, 291 Ga. 887, 889 (2012); *Thomas v. State*, 334 Ga. App. 189, 191 (2015) (describing *Batson* hearing after State used eight strikes and two additional in the alternate pool to remove Black jurors, where State failed to offer race-neutral explanations for three of those strikes and judge ordered the jurors returned to the panel).

Recently, the Supreme Court in *Flowers* explained the importance of history in the *Batson* inquiry, and traced it to the pre-*Batson* requirement for proving an equal protection violation in *Swain v. Alabama*, 380 U.S. 202 (1965). Under *Swain*, proof of racial discrimination required "establishing a historical pattern of racial exclusion of jurors in the jurisdiction in question." *Flowers*, 139 S. Ct. at 2244. While *Batson* overruled *Swain*, and disavowed the requirement of proving past discrimination, it "did not preclude defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination." *Flowers*, 139 S. Ct. at 2245. Having set the stage for historical inquiry, the *Flowers* Court looked to the defendant's four prior trials, in which the prosecutor used its "peremptory strikes to remove as many black prospective jurors as possible." *Id.* at 2246. The Court found that the "State's actions in the first four trials necessarily inform our assessment of the State's intent going into Flowers' sixth trial. We cannot ignore that history. We cannot take that history out of the case." *Id.* at 2246.

The Court broke no new ground, not even for the post-*Batson* era. For example, in *Miller-El*, 545 U.S. at 263, the Court considered history in addition to statistical and other evidence of intentional discrimination in the State's use of peremptory strikes. It found "a final body of evidence that confirm[ed]" the conclusion that the State was engaged in intentional

discrimination. *Id.* It observed that "for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries, as we explained the last time the case was here." *Id.*

These cases represent only two examples that illustrate a wider principle: An actor's past acts often illuminate their present intent. Thus, in *Rogers v. Lodge*, 458 U.S. 613, 625 (1982)—in a case emerging from Burke County, in the same judicial circuit as Richmond County—the Supreme Court held in a voting-rights challenge under the Fourteenth Amendment that "[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination." *Id.* Mr. Hargrove's pleading discusses the same types of historic discrimination in this judicial circuit that were at issue in *Rogers*. But the precedent is additionally relevant to support the wider principle at stake in this Fourteenth Amendment claim: discriminatory history may prove discriminatory intent. *Id.* at 617-25. *Rogers* reaffirmed the intent requirement for Fourteenth Amendment claims, but emphasized that "discriminatory intent need not be proved by direct evidence." *Id.* at 617-18. And notably, the history of discrimination the Court relied upon to find discriminatory intent on the county's part was systemic – the result of multiple actors, within and outside the county government, working in concert. *Id.* at 625-26. The prosecutor's use of 13 of 14 peremptory

strikes to remove Black jurors here is the natural progression of that history.

Indeed, *Rogers* parallels *Miller-El*, in which historic discriminatory policies in the Dallas County, Texas prosecutor's office helped to prove intentional discrimination by individual prosecutors in an individual case. 545 U.S. at 266. "If anything more is needed for an undeniable explanation of what was going on," the Court found, "history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection[.]" *Id.* In tandem, these equal protection cases illustrate why this Court should not permit the State to wash its hands of prior acts of intentional discrimination.

The only question at issue here is relevance. Does the historical evidence fit among the other evidence of discriminatory intent this Court must consider in ultimately making *Batson*'s step-three determination? Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ga. Code Ann., § 24-4-401. In other words, does the unmistakable and documented pattern of intentional racial discrimination in this jurisdiction set out by Mr. Hargrove have "any tendency" to make it more likely that prosecutors discriminated based on race when they used 13 of 14 peremptory strikes to remove Black jurors in 2014? Basic legal principles, as applied in this state, say yes. Neither amici nor Mr. Hargrove claim that the historical evidence alone

suffices to prove discrimination, only that this Court must consider it. *See Flowers*, 139 S. Ct. at 2251 ("To reiterate, we need not and do not decide that any one of those four facts alone would require reversal.").

Prior similar acts dispute any claim that the current act occurred by mere happenstance, accident, or wild coincidence. *State v. Jones*, 297 Ga. 156, 162 (2015); *see also United States v. Henthorn*, 864 F.3d 1241, 1252 n.8 (10th Cir. 2017) ("The doctrine of chances relies on objective observations about the probability of events and their relative frequency, and the improbability of multiple coincidences."). These principles apply here. Was the State's use of 13 of 14 peremptory strikes simply a wild and improbable coincidence, or does it form part of a larger pattern of government discrimination in this jurisdiction? This is not a jury trial. There is no risk that this Court, unlike a juror, will confuse the issues or accord this history undue weight. This Court should consider it.

The prosecutor's discriminatory strikes against Black jurors were not simply the isolated acts of a rogue and racist individual who just happened to gain access to the levers of state power (nor does Mr. Hargrove bear the burden of proving that DA Wright is a racist individual). Such actions rather represent symptoms of a broader and more systemic disease – embedded and systemic racism, acknowledged in *Rogers* – that requires, even today, further

work to eradicate.[5] If the question for this Court is whether the symptoms exist in this case, surely determining the existence of the underlying disease is too a relevant inquiry.

III. The State violated the Equal Protection Clause of the Fourteenth Amendment and the Americans with Disabilities Act when it removed a qualified, capable, and properly accommodated Black juror because of her visual impairment, without any rational basis.

Asked at *Batson*'s second step to justify its strike of Frankie Morgan, a Black juror, the State did not admit racial bias. But it did acknowledge removing her from jury service due to her visual impairment. [TR. 4437-438]. Ms. Morgan's eye disorder, retinitis pigmentosa, meant that she has "no peripheral vision," but it did not impact her ability to see "straight ahead." [TR.1030]. The prosecutors admitted to striking Ms. Morgan because, in their view, her visual impairment would be "distracting to other jurors." [TR.4437]. The alleged "distraction" was that Ms. Morgan used a CCTV to help her see pictures and read documents clearly. [TR.1031]. The prosecutors struck her even though, when asked if Ms. Morgan could use the CCTV during trial, she said "yes." [TR. 1032].

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[5] *See* President's Committee on Civil Rights, *To Secure These Rights* 133 (1947). ("The strong arm of government can cope with individual acts of discrimination, injustice and violence. But in one sense, the actual infringements of civil rights by public or private persons are only symptoms. They reflect the imperfections of our social order, and the ignorance and moral weaknesses of some of our people.").

Indeed, the State admitted that Ms. Morgan was "eminently qualified," "a trooper," and that she did not want "any part of her handicap to impede her ability to perform fully in this world[.]" [TR.4437-438]. And yet, in the prosecutor's view, "putting up a monitor for" one qualified, capable, and adequately accommodated disabled person – also one of thirteen Black jurors it was striking – would be "very burdensome for the progress of the trial." [TR.4437]. Amici agree with Mr. Hargrove's showing that the State offered Ms. Morgan's disability as a pretext for racial discrimination in violation of *Batson*, but here additionally show why this offensive rationale violated other federal law and too denied Ms. Morgan, a person with a disability, of her right of participation in this vital part in our democracy. *Powers*, 499 U.S. at 407.

While exclusions due to disability do not require strict scrutiny, they must be justified by "a rational relationship to a legitimate governmental purpose." *Tennessee v. Lane*, 541 U.S. 509, 522 (2004). Even though issues of this type do not arise nearly as frequently as *Batson* challenges, courts have condemned the government's peremptory strikes of disabled persons made without a rational basis. *See People v. Green*, 561 N.Y.S.2d 130, 133 (N.Y. Cnty. Ct. 1990) (finding that peremptory challenge of deaf juror was not rational where attorney admitted it was based solely on disability and not on any doubt of his ability to communicate); *United States v. Harris*, 197 F.3d

870, 876 (7th Cir. 1999) ("If the government had struck Ms. Wilson because of an irrational animosity toward or fear of disabled people, this would not be a legitimate reason for excluding her from the jury."); *cf. Unzueta v. Akopyan*, 85 Cal. App. 5th 67, 82 (Cal. Ct. App. 2022) (citing state law provisions to rule that peremptory strikes of the two prospective jurors based on the disabilities of their family members was itself based on protected characteristics and was impermissible).

Here, while the State did not convey an irrational animosity towards Ms. Morgan, *Harris*, 97 F.3d at 876, it did admit to an irrational concern about other jurors feeling "distracted" by a disabled juror's modest accommodation, a monitor. And it admitted to an irrational concern about the inconvenience of providing that accommodation. The State did so without any regard for Ms. Morgan's admitted ability to perform as a juror.

In fact, Ms. Morgan was capable, and, even the State admitted, "eminently qualified" to participate fully with this modest accommodation. *Cf. State v. Speer,* 925 N.E.2d 584, 589 (Ohio 2010) ("A hearing impairment by itself does not render a prospective juror incompetent to serve on a jury, but when the accommodation afforded by the court fails to enable the juror to perceive and evaluate the evidence, an accused cannot receive a fair trial. To avoid such situations, a trial court must determine whether reasonable accommodations will enable an impaired juror to perceive and evaluate all

relevant and material evidence, and when no such accommodation exists, the court must excuse the juror for cause."); *People v. Pigford*, 17 P.3d 172, 177 (Colo. App. 2000) (employing similar analysis and noting the trial court's "discretion to determine whether the juror can adequately perform"); *United States v. Dempsey*, 830 F.2d 1084, 1088-89 (10th Cir. 1987) (holding that juror's deafness did not deprive defendant of a fair trial, nor did the presence of a sign-language interpreter). Given that Ms. Morgan was qualified and capable, the prosecutor's removal of her because of a purported distraction was irrational.[6] *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (finding requirement of a permit for facility for persons with intellectual disability lacked a rational basis, appeared based on "irrational prejudice" and that "mere negative attitudes, or fear" were insufficient). The State thus violated the Equal Protection Clause.

Finally, the State's explicit refusal to seat Ms. Morgan, based on the "inconvenience" of affording her an accommodation violated the Americans

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[6] Just as other disabilities are readily accommodated, the trial court, its staff, and the jurors could have easily managed any distractions from the monitor accommodation Ms. Morgan needed. Indeed, incorporating accommodations into our public spaces has become an expected part of our inclusive democracy. Here, the staff, Ms. Morgan and the other jurors could have easily figured out how to minimize any plausible distraction, including but not limited to ideas such as having the monitor be placed in the back row of jurors so as not to minimize the number of jurors seated with the monitor in their potential line of sight.

with Disabilities Act. Title II of the ADA provides in relevant part: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1992). Here, in violation of this clear command, the State excluded Ms. Morgan from participation in jury service due to her disability. *See Galloway v. Superior Court of District of Columbia*, 816 F. Supp. 12, 19 (D.D.C. 1993) (enjoining policy and practice of categorically disqualifying blind jurors as a violation of the ADA as well as the Rehabilitation Act and 42 U.S.C. § 1983); *cf. Trotman v. State*, 218 A.3d 265, 278-79 (Md. 2019) (holding that ADA prohibits court from summarily excusing for cause jurors with disabilities, and presupposing standing of criminal defendant to raise this claim).[7]

Interestingly, the blanket policy challenged in *Galloway* assumed that blind persons were not qualified to serve because they could not "assess adequately the veracity or credibility of witnesses or to view physical

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[7] As it does in the *Batson* context, the Court should consider this claim given Mr. Hargrove's third-party standing. *See Powers*, 499 U.S. at 408 (affording third-party standing to white defendant to object to discriminatory removal of Black jurors because of the importance of the jury right, and the inability of excluded jurors to vindicate their rights); *see also Trotman*, 218 A.3d at 278-79 (presupposing standing).

evidence and thus cannot participate in the fair administration of justice." *Galloway*, 816 F. Supp. at 16. The court went on to find this was false – that blind persons could serve in many cases, just as blind judges have served as fact finders, and that accommodations could allow non-qualified blind persons to be qualified. *Id.* at 16-18. Considering this evidence, the court found the government's position not only "profoundly troubling," but also a violation of the ADA (and other federal law not here relevant). *Id.* Here, by contrast, the prosecutor *conceded* that Ms. Morgan was qualified, "eminently" so. The only problem was inconvenience and an unsupported claim that her monitor would be distracting. What was thus "profoundly troubling" and unlawful in *Galloway* is doubly so here.

CONCLUSION

For these reasons, the Court should find the State's repeated removal of Black jurors violated *Batson*, and that its removal of Ms. Morgan violated the ADA and the Equal Protection Clause. The Court should therefore order a new trial.

Respectfully submitted, this the 31st day of October, 2023.

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