Appellate Review of *Batson* Challenges

EMILY COWARD

UNC SCHOOL OF GOVERNMENT

1. Key takeaways from *Hobbs* and *Bennett*
2. Totality of the circumstances
   - Reviewing historical evidence
   - Reviewing demeanor determinations
3. Race neutral explanations
4. Remedies on appeal
5. Minimally adequate record
6. De novo vs. clear error
7. Reviewing old *Batson* cases
8. Conclusion

Key Takeaways from *Hobbs* and *Bennett*

- Trial judges must show their work (*Hobbs*)
  - Strikes by objecting party are irrelevant
  - History matters
  - Comparative juror analysis matters
- Prima facie case = low bar (*Bennett*)
  - Parties and judge may stipulate juror race

Hidden *Hobbs* Takeaway: Burden of Proof

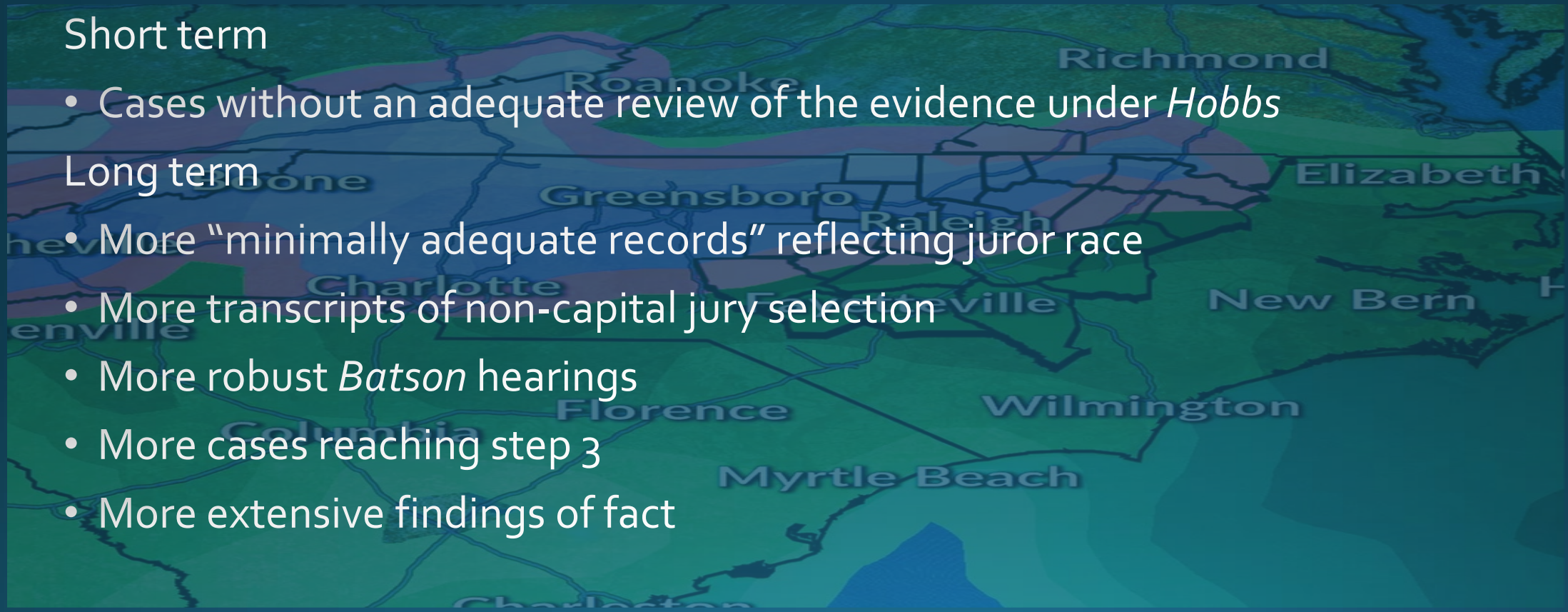
At step 3, court must determine whether it was

"more likely than not" that the . . . "strike [was] motivated in substantial part by race."

State v. Hobbs, 374 N.C. 345 at 351 (quoting *Johnson v. California*, 545 U.S. 162, 170 (2005))

State v. Hobbs, 374 N.C. 345 at 353 (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016))

Takeaways from *Hobbs and Bennett:* Forecast for the Appellate *Batson* Docket



Short term

- Cases without an adequate review of the evidence under *Hobbs*

Long term

- More "minimally adequate records" reflecting juror race
- More transcripts of non-capital jury selection
- More robust *Batson* hearings
- More cases reaching step 3
- More extensive findings of fact

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Reviewing Historical Evidence

Juries: Last Week Tonight with Jon Oliver, HBO, August 20, 2020

Types of evidence

- Trainings and manuals
- Past *Batson* violations
- Statistical evidence of strike patterns
- Statements or notes

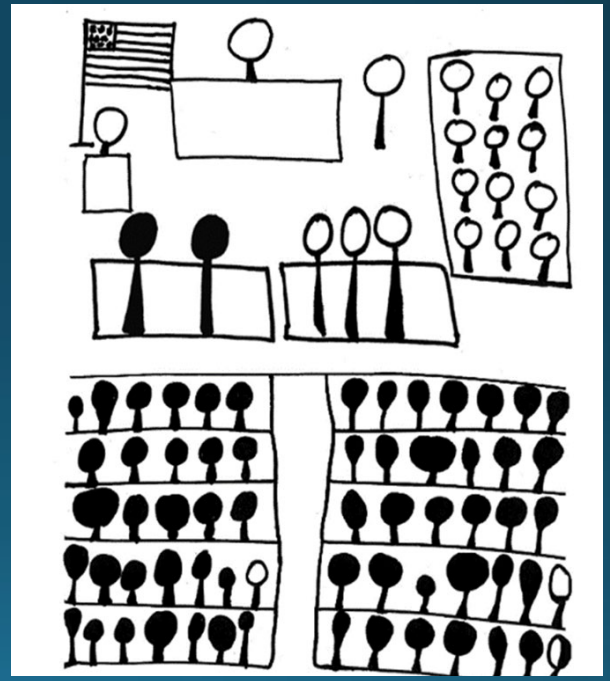
Reviewing Historical Evidence

keep men who work male jobs
keep women who work factory type jobs
keep older housewives, unemployed
keep younger housewives
keep young male students
RJR OK
Bowman Gray workers OK
keep nurses in ER
strike drug counsellees
strike country boys in 20-30 range
strike female college students
no accountants or highly technical types
Strike social workers, psyc workers, graduate degrees

Reviewing Historical Evidence

WFU Jury Sunshine Project - Prosecutor Black/White Removal Ratios for Largest Cities in NC (2011)

Winston-Salem (Forsyth)	3.0
Durham (Durham)	2.6
Charlotte (Mecklenburg)	2.5
Raleigh (Wake)	1.7
Greensboro (Guilford)	1.7
Fayetteville (Cumberland)	1.7



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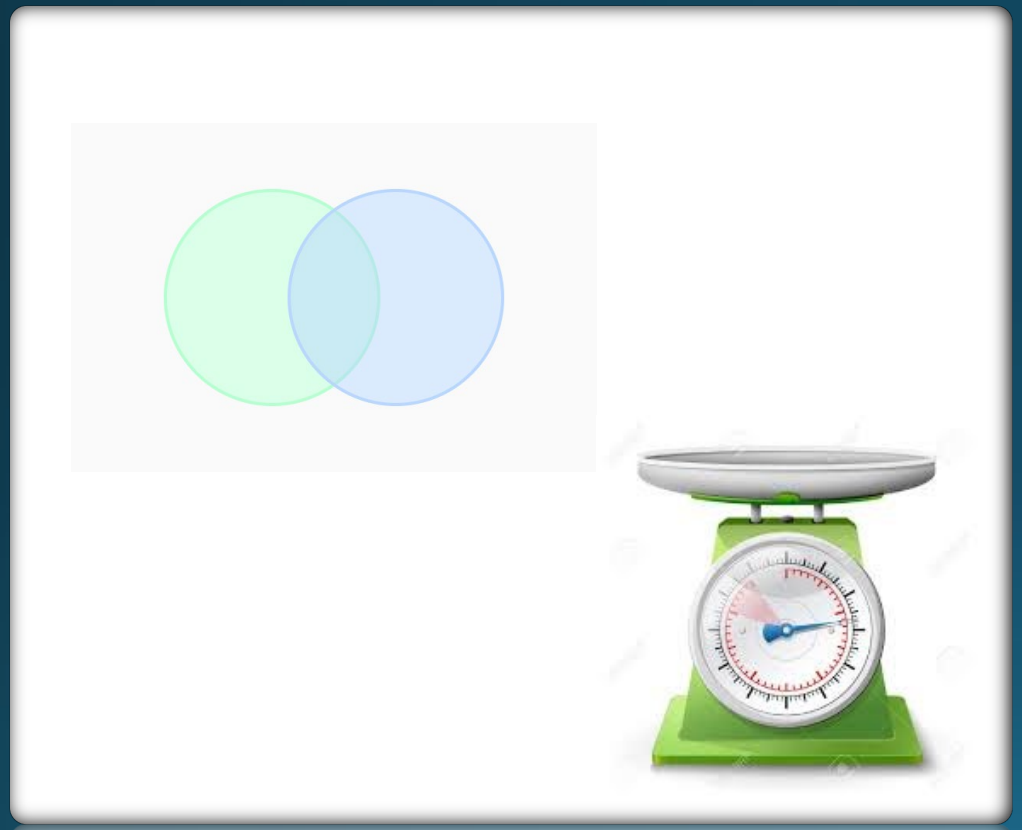

Consider relevance and weight

- Backdrop
- Direct tie to striking party?
- Historical evidence afforded "some weight" and may "cast doubt on legitimacy of motives[.]" *Miller-El v. Cockrell*, 537 US 322, 346-47 (2003).
- "[O]verall context here requires skepticism of the State's" record; [we] "cannot just look away." *Flowers v. Mississippi*, 139 S.Ct. 2228, 2250 (2019).

Reviewing Demeanor Findings

"[D]eterminations of credibility and demeanor lie peculiarly within a trial judge's province." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

Reviewing Demeanor Findings

No error to permit strike explained by the following juror demeanor:

State v. White, 349 N.C. 535 (1998) ("arms crossed")
State v. Robinson, 336 N.C. 78, 95 (1994) ("arms folded")
State v. Lyons, 343 N.C. 1, 12 (1996) ("leaning away")
State v. Smith, 328 N.C. 99, 125 (1991) ("nervous")
State v. Floyd, 115 N.C. App. 412, 415 (1994) ("head-strong")
State v. Gaines, 345 N.C. 647, 668 (1997) ("softspoken")
State v. Bonnett, 348 N.C. 417, 434 (1998) ("belligerent")
State v. Jackson, 322 N.C. 251, 255 (1988) ("hostile")
State v. Locklear, 349 N.C. 118, 139 (1998) ("smiling")

But see State v. Cofield, 129 N.C. App. 268 (1998) (upholding reverse *Batson* finding where trial judge accepted some and rejected other demeanor-based strike explanations)

Reviewing Demeanor Findings

Juror Demeanor

Reviewing court should not defer to a demeanor justification unless the trial judge credited that explanation. *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008).

"[L]itigants [may] more easily conclude that a prospective black juror is 'sullen,' or 'distant[.]'" *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

"[D]emeanor-based explanations . . . are particularly susceptible to serving as pretexts for discrimination" and are "not immune from scrutiny or implicit bias." *State v. Alexander*, ___ N.C. App. ___ (Oct. 20, 2020) (internal quotation omitted).

Reviewing Demeanor Findings

Factors exacerbating implicit bias

- Time pressure
- Incomplete information/ambiguity
- Presence of discretion
- Easily accessible social categories
- Refusal to acknowledge possibility of bias
- Stress, cognitive load, or agitated emotional state
- Lack of feedback

Reviewing Demeanor Findings

Prosecutor Demeanor

"Often the best evidence of discriminatory intent," *Hernandez v. New York*, 500 U.S. 352, 369 (1991).

But in several cases, the US Supreme Court has vacated convictions on *Batson* grounds without addressing prosecutor demeanor.

Courts have also recognized the difficulties trial judges face in ruling on prosecutor demeanor. *See State v. Saintcalle*, 178 Wash.2d 34, 53 (2013) ("Imagine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism.").

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Race Neutral Explanations

- Would factors accepted as race neutral in the past still be considered race neutral today? Examples:
  - Attending a historically black college or university
  - Membership in the NAACP

- Is support for Black Lives Matter a race neutral explanation?
  - Courts across the country are confronting this question.
  - If the North Carolina Supreme Court reaches step 2 in *State v. Campbell*, 846 S.E.2d 804 (2020), it may consider this question.

"I have sat in that young man's seat and I don't feel this system to be fair."

These statements were made by black potential jurors in North Carolina. Would they constitute valid race neutral justifications for a peremptory strike?

"Me myself, I have faith in the judicial system. But I am aware of what's going on the in world. I got trust in the system, but **I know it's flawed."**

"**I'm going to be weary of the things officers say.** I'm going to have my doubts."

"**I called the police for help, and they locked me up**. I feel a certain way about law enforcement."

"I am seeing a young black male facing life **not being jurored by a jury of his peers."**

"**I've had experiences that weren't so good or so fair.** An officer grabbed me and my friends and snapped us against the car."

"I believe **the system is racist** and disadvantages people of color."

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Remedies on Appeal

If you find clear error, you may:

- Remand for another *Batson* hearing
  - *See, e.g.*, *State v. Hobbs*, 374 N.C. 345 (2020); *State v. Bennett*, 374 N. C. 579 (2020)
- Reverse / Grant a New Trial
  - North Carolina:
    - *State v. Wright*, 189 N.C. App. 346 (2008)
  - US Supreme Court:
    - *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019)
    - *Foster v. Chatman*, 136 S.Ct. 1737 (2016)
    - *Snyder v. Louisiana*, 552 U.S. 472 (2008)
    - *Miller-El v. Dretke*, 545 U.S. 231 (2005)

OR

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Minimally Adequate Record

- Juror Race
  - Agreement of parties and judge sufficient (*State v. Bennett*, 374 N. C. 579 (2020))
  - Observation of single court actor insufficient (*State v. Mitchell*, 321 N.C. 650 (1988))

- Transcription of Jury Selection
  - Failure to seek complete recordation is likely *Batson* waiver/IAC (*See State v. Campbell*, 846 S.E.2d 804 (2020))

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De Novo vs. Clear Error

Findings of fact/assessment of evidence reviewed for clear error

- "Definite and firm conviction a mistake has been made," *State v. Chapman*, 359 N.C. 328, 339 (2005).
- Can't choose between two permissible views of evidence, *State v. Lawrence*, 352 N.C. 1, 14, (2000).
- Highly deferential, but "deference by definition does not preclude relief." *State v. Bennett*, 374 N. C. 579 (2020) (quotations removed).

Legal conclusions reviewed de novo

- "Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33 (2008).

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Reviewing Old *Batson* Cases

IAC for failure to raise *Batson*, but do you have to show prejudice?

Weaver v. Massachusetts, 137 S. Ct. 1899 (2017), identified this question but did not resolve it.

Successive petitions

Are studies of peremptory strike patterns in NC new evidence?

Do you apply *Hobbs* and *Bennett* retroactively?

See Teague v. Lane, 489 U.S. 288 (1989).

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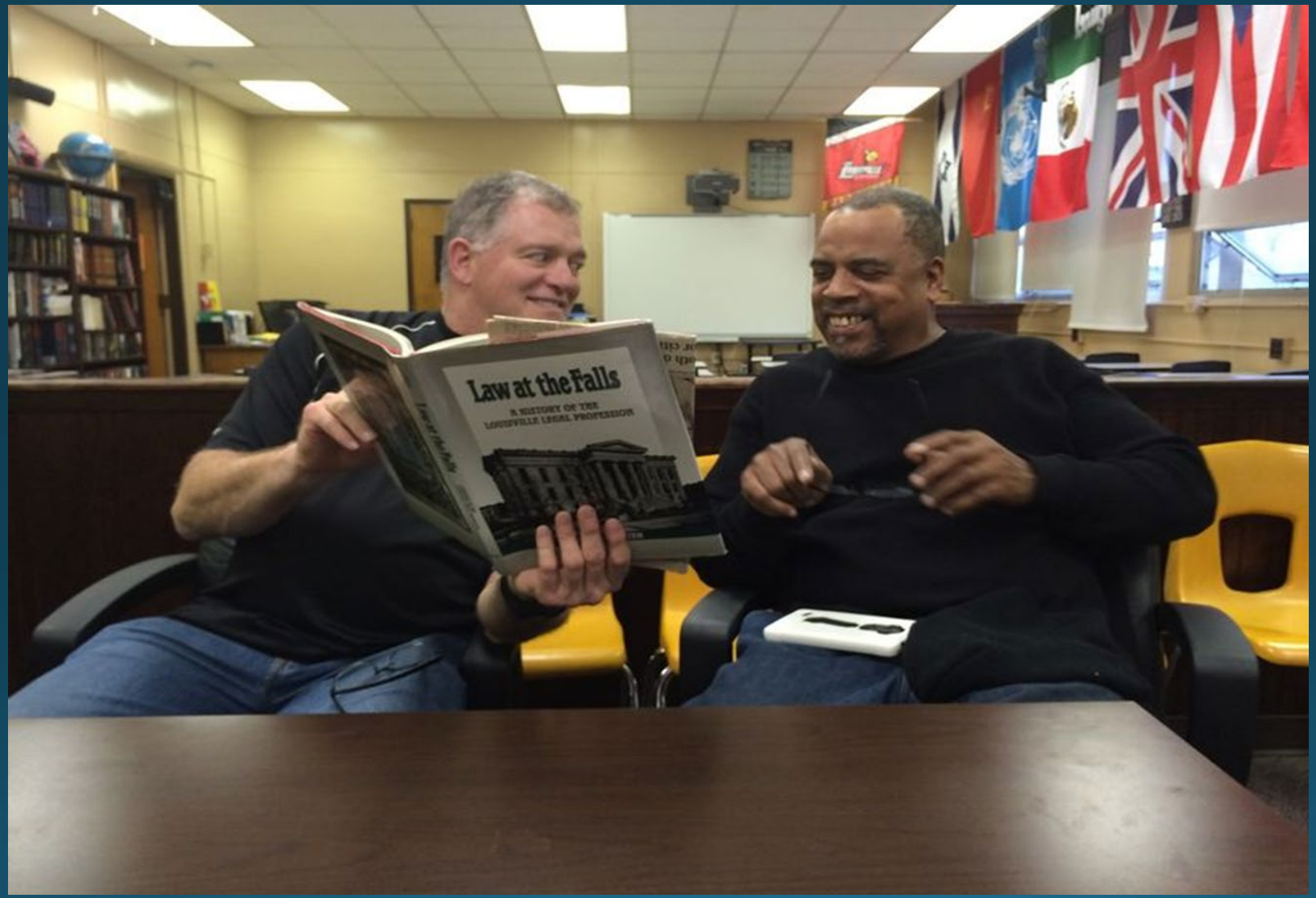
When the jury formation process is perceived as *unfair* …

- Loss of public trust in prosecutorial function
- May chill future participation by marginalized groups
- Cynicism about process correlated with failure to follow and respect law
- Undermines democratic check on state's power
- Undermines defendant's right to a fair trial
- Legitimacy of convictions depends upon perceived fairness of the process



Former Jefferson County Prosecutor Joe Gutmann with James Kirkland Batson, 30 years after *Batson v. Kentucky*
"Object Anyway," More Perfect Podcast, WNYC Radio, July 16, 2016

Please contact me with any questions:
escoward@sog.unc.edu