

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. __ CRS ____

STATE OF NORTH CAROLINA

v.

DEFENDANT

) **DEFENDANT’S MOTION TO**
) **PROHIBIT PEREMPTORY**
) **STRIKES BASED ON RACE**
)
)

NOW COMES the Defendant, _____, and respectfully moves the Court to prohibit the exercise of peremptory strikes motivated by race. Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322 (2003); *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). In support of the motion, Defendant says the following:

Grounds for Motion

The United States and North Carolina Constitutions prohibit the consideration of race in exercising peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987).

In addition, diverse juries have been found to focus more on the evidence, make fewer inaccurate statements, and make fewer uncorrected statements – all factors which heighten the reliability of verdicts. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1180 (2012) (discussing Samuel R. Sommers, *On Diversity and*

Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006)).

In enforcing the constitutional mandate of *Batson* and its progeny, Defendant draws the Court's attention to the following rules set forth by the U.S. Supreme Court:

- **The test under *Batson* is not whether race is the sole factor, but whether race is significant in the decision to exercise a strike.** The question before the Court is whether race is “significant in determining who was challenged and who was not.” *Miller-El II*, 545 U.S. at 252 (2005). The state supreme court explained in *State v. Waring*, 364 N.C. 443, 480 (2010), that, under *Miller-El*, a defendant need not show race is the sole factor.
- **Establishing a *Batson* violation does not require direct evidence of discrimination.** See *Batson*, 476 U.S. at 93 (noting that “circumstantial evidence,” including “disproportionate impact” may establish a constitutional violation).
- **A single race-based strike violates the Constitution.** “Striking only one black prospective juror for a discriminatory reason violates a black defendant’s equal protection rights, even when other black jurors are seated and even when valid reasons are articulated for challenges to other black prospective jurors.” *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (citing *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989)); see also *Snyder*, 552 U.S. at 478 (citing *Lane* and finding the trial court erred in overruling petitioner’s *Batson* objection as to one juror and therefore declining to consider *Batson* objection on second juror).
- **The Defendant’s prima facie burden is light.** “[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.” *Johnson v. California*, 545 U.S. 162, 170 (2005). See also *id.* at 172 (“The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.”); *Miller-El II*, 545 U.S. at 240 (“[A] defendant may rely on ‘all relevant circumstances’ to raise an inference of purposeful discrimination.”); *State v. Hoffman*, 348 N.C. 548, 553 (2008) (“Step one of the *Batson* analysis . . . is not intended to be a high hurdle for defendants to cross.”).

- **The Defendant does not bear the burden of disproving each and every reason proffered as race-neutral.** In *Foster*, the petitioner challenged the prosecution’s strikes of two African Americans. As to both potential jurors, the prosecution offered a “laundry list” of reasons why these two African Americans were objectionable. 136 S.Ct. at 1748. The Court did not analyze all of the reasons proffered by the State. Rather, after unmasking and debunking three of eleven reasons for the strike of one venire member and five of eight reasons for the other strike, the Court concluded that the strikes of these jurors were “motivated in substantial part by discriminatory intent.” *Id.* at 1754, quoting *Snyder v. Louisiana*, 552 U.S. at 485. *See also State v. Montgomery*, 331 N.C. 559, 576-77 (1992) (“To allow an ostensibly valid reason for excusing a potential juror to ‘cancel out’ a patently discriminatory and unconstitutional reason would render Article 1, Section 26 [of the North Carolina Constitution] an empty vessel.”) (Frye, J., Exum, C.J., and Whichard, J. concurring in the result).
- **Differential questioning is evidence of racial bias.** When jurors of different races are asked significantly more questions or different questions, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 255 (“contrasting *voir dire* questions” posed respectively to black and white prospective jurors “indicate that the State was trying to avoid black jurors”).
- **An absence of questioning is evidence of racial bias.** When the juror is not questioned on the area of alleged concern, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 246 (“failure to engage in any meaningful *voir dire* examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination”) (internal citation omitted).
- **Disparate treatment of similarly-situated jurors is evidence of racial bias.** When prospective jurors of another race provided similar answers but were not the subject of a peremptory challenge, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 241 (“If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.”).
- **The Defendant does not have the burden of proving an exact comparison.** When comparing white venire members who were passed with jurors of color sought to be struck, the Court must not insist the prospective jurors are identical in all respects. Indeed, a “per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.” *Miller-El II*, 545 U.S. at 247 n. 6.

- **Evidence that prosecutors were trained in how to evade the strictures of *Batson* is relevant to the determination of whether race was significant in the strike decision.** See *Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for excluding minorities from jury service); *Foster v. Chatman*, Brief of Amici Curiae of Joseph diGenova, et al., available at <http://www.scotusblog.com/case-files/cases/foster-v-humphrey/> at 8 (describing North Carolina prosecution seminar in 1994 that “train[ed] their prosecutors to deceive judges as to their true motivations”).
- **Historical evidence about prior practices of the District Attorney’s Office must be considered as evidence of a *Batson* violation.** *Miller-El II*, 545 U.S. at 263-64 (considering policy of district attorney’s office of systematically excluding black from juries, which was in place “for decades leading up to the time this case was tried”).

Conclusion

Defendant asks this Court to apply these principles in adjudicating any objections under *Batson*, and thereby prohibit race discrimination in the selection of Defendant’s jury.

Respectfully submitted, this the ____ day of _____.

COUNSEL FOR DEFENDANT

Certificate of Service

I hereby certify that Defendant's Motion to Prohibit Peremptory Strikes Based on Race has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

COUNSEL FOR DEFENDANT