

STATE OF NORTH CAROLINA
COUNTY OF _____

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

STATE OF NORTH CAROLINA)
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DEFENDANT)

**DEFENDANT’S MOTION TO APPLY OBJECTIVE OBSERVER STANDARD
WHEN RULING ON OBJECTIONS TO PEREMPTORY STRIKES**

NOW COMES the Defendant, _____, and respectfully moves the Court to rule on the parties’ objections to peremptory strikes due to alleged race, ethnicity, or gender discrimination, by applying the objective observer standard adopted by the Supreme Court of Washington on April 5, 2018, which provides in part: “If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. *The court need not find purposeful discrimination to deny the peremptory challenge.*” See also Exhibit 1, Washington General Rule 37 (emphasis added).

This Court’s adoption of the objective observer standard is required pursuant to Article I, §§ 1, 19, and 26 of the North Carolina Constitution, which provide greater protection against discrimination than the federal minimum established in *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court’s inherent power to take action in the interests of justice also requires adoption of the objective observer standard.

Legal Basis for Adopting Objective Observer Standard

In the related context of discrimination in the selection of grand jury foreperson, the Supreme Court of North Carolina has held that state constitutional protections against

discriminatory exclusion from jury service go further than the U.S. Constitution. In *Cofield*, our state Supreme Court held that race discrimination in the selection of the grand jury foreperson violated the state constitution even though the United States Supreme Court had not yet clearly decided the question under the federal constitution. 320 N.C. at 305-308. “Article I, section 26 of the North Carolina Constitution does more than protect individuals from unequal treatment.” It ensures that the jury system “must also be *perceived* to operate evenhandedly.” 320 N.C. at 302 (emphasis in original). The Court in *Cofield* emphasized that it was interpreting Article I, §§ 19 and 26 as providing more protection than their federal counterparts by separately analyzing the issue under the state and federal equal protection clauses. *See* 320 N.C. at 305-08 (“our decision in this case can stand on the North Carolina Constitution alone, and we need not reach the federal question presented.”). Chief Justice Exum explained:

Our state constitutional guarantees against racial discrimination in jury service are intended to protect values other than the reliability of the outcome of the proceedings. Central to these protections, as we have already noted, is the perception of evenhandedness in the administration of justice. Article I, section 26 in particular is intended to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case.

320 N.C. at 304 (1987).

In a subsequent case, three justices affirmed *Cofield*'s interpretation of Article I, § 26. At trial, the prosecutor in a capital case struck a potential juror because he was originally from Africa. *State v. Montgomery*, 331 N.C. 559 (1992). The Court granted a new trial because of an unconstitutional jury instruction. *Id.* at 573. Concurring in the result, Justice Frye, joined by Chief Justice Exum and Justice Whichard, wrote separately to explain they would also grant a new trial because the prosecutor's strike based on

national origin violated the North Carolina Constitution. *Id.* at 574. The justices echoed *Cofield's* holding that Article I, § 26 goes further than simply policing intentional discrimination, but also ensures that the system be perceived to operate evenhandedly. *Id.* at 576 (citing *Cofield*, 320 N.C. at 304).

In addition to the state constitution, this Court must also adopt the objective observer standard pursuant to its inherent authority to bring about justice. The Supreme Court of North Carolina has held that when “there is no statutory provision either authorizing or prohibiting [certain] orders . . . such authority exists in the inherent power of the court to act when the interests of justice so require.” *In re Superior Court Order*, 315 N.C. 378, 380 (1986) (citations omitted); *see also In Re Paul*, 84 N.C. App. 491, 499-500 (1987) (in the context of judicial discipline of attorneys, holding that a trial court has inherent power to protect the court and the public from “impropriety and to serve the administration of justice.”) (citations omitted).

The protections provided by both the state constitution, and the Court’s inherent authority, are triggered in this circumstance because the North Carolina courts’ implementation of the federal *Batson* standard has been ineffective in preventing discrimination in the exercise of peremptory strikes. *See State v. Carter*, 322 N.C. 709, 722-23 (1988) (in the context of the good faith exception to the exclusionary rule, finding it appropriate to extend additional protections under the state constitution because of the state constitutional interest in “preserv[ing] . . . the integrity of the judicial branch of government Under the judicial integrity theory [t]he courts cannot condone or participate in the protection of those who violate the constitutional rights of others.”); *In re Superior Court Order*, 315 N.C. at 380 (explaining courts may exercise inherent

powers in the interest of justice where “other options available . . . provide inadequate means of obtaining the desired” result).

The North Carolina courts’ prior application of *Batson* has been inadequate – and thus is appropriate for modification under the state constitution or inherent authority – because in over thirty years and over a hundred decisions, the North Carolina appellate courts have never found a single instance of discrimination against a minority juror under the *Batson* approach. See Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record*, 94 NC L. Rev. 1957 (2016). North Carolina is the only state in the American South whose appellate courts have never found *Batson* discrimination against a minority juror.¹

Predictably, the absence of appellate enforcement of *Batson* has led to frequent reliance on race at the trial level. One recent study analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010. 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 (2012). The study showed that prosecutors across North Carolina struck 53% of eligible African-American jurors and only 26% of all other eligible jurors. *Id.* at 1549. It further found that the probability of this disparity occurring in a race-neutral jury selection was less than one in ten trillion. *Id.* Even after adjusting for non-racial factors that might reasonably affect strike decisions – for example, reluctance to

¹ The courts in our sister Southern states have not had trouble finding *Batson* violations – more than a dozen in South Carolina and a half dozen in Virginia. In Alabama, there have been more than 80 appellate reversals because of racially-discriminatory jury selection, more than 30 in Florida, 10 each in Mississippi and Louisiana, and eight in Georgia. See *Equal Justice Initiative Report, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, p. 19, found at <https://eji.org/reports/illegal-racial-discrimination-in-jury-selection>.

impose the death penalty – researchers found prosecutors struck black jurors at twice the rate they struck all other jurors. *Id.*

Nor are racial disparities in jury selection confined to capital cases. Another recent study from Wake Forest University School of Law released preliminary findings that in all non-capital felony trials in North Carolina from 2011 to 2012 – which included data on 29,000 potential jurors – prosecutors struck 16% of minority potential jurors, while they struck only 8% of white potential jurors. Ronald F. Wright, Kami Chavis, and Gregory Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill.L.Rev. 1407.²

The Wake Forest researchers also found that, in several large North Carolina cities, including Charlotte, Durham, and Winston-Salem, prosecutors exclude minority jurors nearly three times as often as white jurors. *Id.* at 26.

A study of Durham County conducted in 1999 found the same patterns. Approximately 70% of African Americans were dismissed by the State, while less than 20% of whites were struck by the prosecution. Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695, 698-99 (1999).

Application of Objective Observer Standard

The objective observer standard, as set forth in Washington General Rule 37, *see* Exhibit 1, provides a framework for implementing *Cofield*'s mandate that jury selection be perceived to operate evenhandedly. *Cofield*, 320 N.C. at 304. There are several ways in which the objective observer standard differs from the *Batson* approach. In other

² Now available on SSRN at <https://ssrn.com/abstract=2994288>, at pp. 2, 21, 23-24.

respects, the actions of a court implementing an objective observer standard will mirror *Batson*.

As in *Batson*, objections to peremptory strikes under the objective observer standard follow a three-step process. A party or the Court may raise an objection of improper bias. However, whereas under *Batson*, the Court must determine whether the moving party has established a *prima facie* case of intentional discrimination, under the objective observer standard, the party exercising the peremptory challenge shall always, upon objection, be required to articulate the reasons for the strike. The Court will then rule on the objection in light of the totality of circumstances. *See* Rule 37(c), (d), and (e).

As in *Batson*, when ruling on an objection under the objective observer standard, the Court may consider circumstances such as the number and types of questions posed to the juror, disparate questioning of jurors based on race or another impermissible category, disparate treatment of jurors, reliance on a reason disproportionately associated with race or another impermissible category, and a party's prior history of using peremptory strikes on impermissible bases. *See* Rule 37(g).

However, unlike *Batson*, the objective observer standard does not require a showing of purposeful discrimination to sustain the objection. Rather, the Court will sustain the objection if it “determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge” Rule 37(e). An “objective observer” is defined as one who “is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors” Rule 37(f).

In this way, the objective observer standard takes into account the likelihood that

parties' strike decisions may be rooted in biases that are unknown even to themselves, recognizing that implicit stereotypes and attitudes can produce unintentional or unconscious biases. Jerry Kang, *Implicit Bias: A Primer for Courts*, National Center for State Courts (August 2009 at 1-2). The Supreme Court has repeatedly recognized the existence of negative stereotypes about African Americans. *See, e.g., Buck v. Davis*, 137 S.Ct. 759, 776 (2017) (noting “powerful racial stereotype” of African-American men as “violence prone.”); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (post-Civil War laws limiting jury service to whites were based on belief that African Americans were “abject and ignorant, and in that condition w[ere] unfitted to command the respect of those who had superior intelligence”). The Court has also acknowledged that these stereotypes are often held unconsciously. *See Turner v. Murray*, 476 U.S. 28, 36 (1986) (noting belief that blacks are “morally inferior” and “[m]ore subtle, less consciously held racial attitudes” including “[f]ear of blacks”).

If one considers the *impact* of discrimination rather than the *intent* of the decision-maker, it is clear that implicit attitudes can result in discrimination every bit as detrimental as conscious racism. The *Miller-El* Court recognized that racial minorities suffer harm from discrimination in jury selection, because the practice perpetuates “state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.” *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (1995) (internal quotations omitted). Moreover, “[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.” *Batson*, 476 U.S. 79, 87. Racial discrimination in jury selection

casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial.

That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication.

Miller-El, 545 U.S. 231, 238 (internal citations and quotations omitted). Racial discrimination — or even the appearance of it — negatively affects individuals and communities in ways that have nothing to do with whether it was the product of conscious or unconscious decisions. Thus, the objective observer approach, in accounting for the impact of implicit bias, fills a gaping hole in the traditional approach under *Batson*, which is limited to a review for intentional discrimination. Compare *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008) (under *Batson*, “the trial court must determine whether the defendant has shown purposeful discrimination.”).

The incorporation of implicit bias into the objective observer standard is consistent with a growing recognition that racial disparities appear in the justice system for reasons far more complex than blatant, intentional racism. For example, the National Center for State Courts has documented the development and implementation of pilot programs on the topic of implicit racial bias in three states, and has issued a Primer for Courts on the subject of implicit bias.³ See also *Iowa v. Plain*, 898 N.W.2d 801, 817 (Iowa 2017) (“While there is general agreement that courts should address the problem of implicit bias in the courtroom We strongly encourage district courts to be proactive about addressing implicit bias”).

The objective observer standard's recognition of implicit bias is critical, because it avoids one of the primary factors that has limited *Batson* as an effective tool for preventing the racially-disparate use of peremptory strikes. Namely, reliance on implicit

³ See <http://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/Resource-Guide.aspx>.

bias dispenses with the necessity under *Batson* that a court rule that the prosecutor has engaged in intentionally racist conduct. *See also People v. Gutierrez*, 2 Cal. 5th 1150, 1182-83 (2017) (Goodwin, J., concurring) (arguing that *Batson* should be understood as a “probabilistic standard [that] is not designed to elicit a definitive finding of deceit or racism” but instead “defines a level of risk that courts cannot tolerate,” because “brand[ing] the prosecutor a liar or a bigot . . . obscure[s] the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve.”).

In order to address this longstanding problem with *Batson*, the objective observer standard adopted in Washington General Rule 37 not only allows the court to take unconscious bias into account but declares presumptively invalid several justifications for peremptory strikes that “historically . . . have been associated with improper discrimination,” for example, prior contact with or distrust of law enforcement officers or living in a “high-crime” neighborhood. Rule 37(h). The rule also implements special procedures when a party seeks to justify a strike based on a juror’s conduct or demeanor: the party must give prior notice of intent to rely on those bases so the Court may observe the juror and make an appropriate determination. Rule 37 (i).

This Court should adopt these aspects of Rule 37, because they address the long-recognized difficulty that many common “race-neutral” reasons that are used to justify peremptory strikes are too easily susceptible to unconscious bias:

Nor is outright prevarication by prosecutors the only danger here. “[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.” *King, supra*, at 502. A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is “sullen,” or “distant,” a characterization that would not have come to his mind if a white juror had acted identically. A judge’s

own conscious or unconscious racism may lead him to accept such an explanation as well supported Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.

See Batson, 476 U.S. at 106 (Marshall, J., concurring).

Conclusion

In light of the foregoing, and pursuant to Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and the Court's inherent authority, this Court must apply the objective observer standard set forth in Washington General Rule 37 when ruling on the parties' objections to peremptory strikes due to alleged race, ethnicity, or gender discrimination. Doing so will eliminate the unfair exclusion of potential jurors on discriminatory bases, which has long been a persistent problem in North Carolina.

Respectfully submitted, this the ____ day of _____.

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion 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