

STATE OF NORTH CAROLINA
COUNTY OF _____

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

STATE OF NORTH CAROLINA)
)
 v.) **DEFENDANT’S MOTION**
) **TO PRESERVE ALL NOTES,**
) **QUESTIONNAIRES, AND OTHER**
 DEFENDANT) **DOCUMENTS FROM JURY SELECTION**

COMES NOW the Defendant, _____, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the North Carolina Constitution and respectfully moves the Court to enter an order directing that all notes, questionnaires, and other documents collected in preparation for voir dire or used during jury selection in this case be preserved. 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 this motion, the Defendant shows unto the Court the following.

Grounds for Motion

Defendant has a right to a jury selected without regard to race. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). If convicted, Defendant is entitled to appeal. See N.C. Gen. Stat. § 15A-1444. In order to vindicate Defendant’s constitutional rights on appeal, Defendant must establish a full record of the constitutional violation. See N.C. App. R. 9. Indeed, it has long been established that is it the duty of the appellant to see that the record is properly preserved.

State v. Atkinson, 275 N.C. 288 (1969). Where a defendant does not include in the record any matter tending to support the grounds for objection, the defendant has failed to carry the burden of showing error. *State v. Duncan*, 270 N.C. 241 (1967). Assignments of error based on matters outside the record are improper and must be disregarded on appeal. *State v. Hilton*, 271 N.C. 456 (1967).

With regard to ensuring a proper record for any alleged violations of *Batson*, the following materials are unquestionably relevant to any inquiry in the appellate division concerning whether race was significant in the strike decision:

- **Jury questionnaires.** The jury questionnaires, completed by each juror questioned during voir dire, are the best record of juror race. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual’s race “is not always easily discernible, and the potential for error by a court reporter acting alone is great”). In addition to including self-identification of race by each prospective juror, the questionnaires also include basic demographic information – age, gender, marital status, employment, and so on – pertinent to determining whether or not race was a factor in jury selection. *See Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 241 (2005) (“side-by-side comparisons” of black venire panelists who were struck and white panelists allowed to serve constitutes “powerful” evidence “tending to prove purposeful discrimination”); *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008) (reversing conviction and granting *Batson* relief based on the “significant” and “particularly striking” similarities between a black venire member excused by the prosecution and two passed white venire members).
- **Prosecution notes.** The Supreme Court has made clear that the contents of the prosecution’s file, including lists of jurors coded by race, highlighted racial designations, and notes on particular jurors are relevant to the *Batson* inquiry. *See Foster*, 136 S. Ct. at 1747-48 (considering prosecutor notes as evidence of discrimination); *id.* at 1749-50 (using prosecution notes to rebut prosecution’s proffered explanation for strike); *id.* at 1753 (prosecutor’s handwritten note “fortifies our conclusion that [the proffered reason] was pretextual”); *id.* at 1755 (“The contents of the prosecution’s file, however, plainly belie the State’s claim that it exercised its strikes in a ‘color-blind’ manner. The sheer number of references to race in that file is arresting.”) (record citation omitted).
- **Training materials.** 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”).

- **Criminal record checks.** To the extent the State bases strike decisions on the criminal records of prospective jurors or their family members, evidence that the prosecutor selectively reviewed the criminal records of certain racial groups is relevant to the *Batson* inquiry. See *Kandies v. Polk*, 385 F.3d 457, 475 (4th Circ. 2004) (denying relief on *Batson* claim and noting petitioner could have met his burden by establishing that the prosecution only discussed prospective African-American jurors with the local police department).¹

Accordingly, Defendant asks the Court to direct the prosecution to preserve all of its jury questionnaires, notes, training materials, criminal record checks, and any other documents collected in preparation for voir dire or used during jury selection in this case.

Respectfully submitted, this the ____ day of _____.

COUNSEL FOR DEFENDANT

¹ The United States Supreme Court subsequently granted the petitioner’s request for a writ of *certiorari*, vacated the judgment and remanded the case for further consideration in light of *Miller-El II*. *Kandies v. Polk*, 545 U.S. 1137 (2005).

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Preserve 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