

OBJECT

to any strike that could be viewed as based on race, gender, religion, or ethnicity

"This motion is made under *Batson v. Kentucky*, the 5th, 6th and 14th Amendments to the U.S. Constitution, Art. 1, Sec. 19, 23 and 26 of the N.C. Constitution, and my client's rights to due process and a fair trial."

REMEMBER:

- You can object to the first strike. "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).
- Your client does not have to be member of same cognizable class as juror. *Powers v. Ohio*, 499 U.S. 400 (1991).
- You do not need to exhaust your peremptory challenges to preserve a *Batson* claim.
- *Batson* applies to strikes based on race, gender, religion, and national origin. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); N.C. Const. Art. 1; Sec. 26.
- Peremptory challenges exercised by the Defendant are not relevant to the question of whether the State discriminated. *State v. Hobbs*, 841 S.E.2d 492, 502 (N.C. 2020)

SLOW DOWN:

1. A strong *Batson* objection is well-supported. Take the time you need to gather and argue your facts.
2. Check your own implicit biases
 - Am I hesitant to object because of my own implicit bias?
 - Avoid "Reverse *Batson*" - Select jurors based on their answers, not stereotypes
 - What assumptions am I making about this juror?
 - How would I interpret that answer if it were given by a juror of another race?

STEP ONE: PRIMA FACIE CASE**You have burden to show an inference of discrimination**

Johnson v. California, 545 U.S. 162, 170 (2005).

"Not intended to be a high hurdle for defendants to cross." *State v. Hoffman*, 348 N.C. 548, 553 (1998).

"The burden on a defendant at this stage is one of production, not persuasion...At the stage of presenting a prima facie case, the defendant is not required to persuade the court conclusively that discrimination has occurred." *Hobbs*, 841 S.E. 2d at 498.

Establishing a *Batson* violation does not require direct evidence of discrimination. *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) ("Circumstantial evidence of invidious intent may include proof of disproportionate impact. ")

"All circumstances" are relevant, including history.

Snyder, 552 U.S. at 478; *Hobbs*, 841 S.E.2d at 497

- Calculate and give the strike pattern/disparity. *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005).

"The State has struck ___% of African Americans and ___% of whites"

or

"The State has used 3 of its 4 peremptory strikes on African Americans"

- Give the history of strike disparities and *Batson* violations in this DA's office/prosecutor. *Miller-El*, 545 U.S. at 254, 264; *Flowers v. Mississippi*, 139 S.Ct. 2245 (2019); *Hobbs*, 841 S.E. 2d at 501 (Contact CDPL for data on your county to reference.)
- State questioned juror differently or very little. *Miller-El*, 545 U.S. at 241, 246, 255.
- Juror is similar to white jurors passed (describe how). *Foster v. Chatman*, 136 S.Ct. 1737, 1750 (2016); *Snyder*, 552 U.S. at 483-85.
- State the racial factors in case (race of Defendant, victim, any specific facts of crime).
- No apparent reason for strike.



STEP TWO: RACE-NEUTRAL EXPLANATION

Burden shifts to State to explain strike

- If the State volunteers reasons without prompting from the Court, the **prima facie** showing is assumed; move to step 3. *Hobbs*, 841 S.E. 2d at 500. *Hernandez v. New York*, 500 U.S. 352, 359 (1991).
- Prosecutor must actually give a reason. *State v. Wright*, 189 N.C. App. 346 (2008).
- Court cannot suggest its own reason for the strike. *Miller-El*, 545 U.S. at 252.



STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove race was a significant factor

Argue the State's stated reasons are pretextual

Race does not have to be the only factor. It need only be "significant" in determining who was challenged and who was not. *Miller-El*, 545 U.S. at 252.

The defendant does not bear the burden of disproving each and every reason proffered by the State. *Foster*, 136 S. Ct. at 1754 (finding purposeful discrimination after debunking only four of eleven reasons given).

- The reason applies equally to white jurors the State has passed. *Miller-El*, 545 U.S. at 247, n.6. Jurors don't have to be identical; "would leave *Batson* inoperable;" "potential jurors are **not** products of a set of cookie cutters." See also *Hobbs*, 841 S.E.2d at 503.
- The reason is not supported by the record. *Foster*, 136 S.Ct. 1737, 1749.
- The reason is nonsensical or fantastic. *Foster*, 136 S.Ct. at 1752.
- The prosecutor failed to ask the juror any questions about the topic that the State now claims disqualified them. *Miller-El*, 545 U.S. at 241.
- State's reliance on juror's demeanor is inherently suspect. *Snyder*, 552 U.S. at 479, 488.
- A laundry list of reasons is inherently suspect. *Foster*, 136 S.Ct. at 1748.
- Shifting reasons are inherently suspect. *Foster*, 136 S.Ct. at 1754.
- State's reliance on juror's expression of hardship or reluctance to serve is inherently suspect. *Snyder*, 552 U.S. at 482 (hardship and reluctance **does not** bias the juror against any one side; only causes them to prefer quick resolution, which might in fact favor the State).
- Differential questioning is evidence of racial bias. *Miller-El*, 545 U.S. at 255.
- Prosecutor training and prior practices are relevant. *Miller-El*, 545 U.S. at 263-64.

JUDGE GRANTS YOUR OBJECTION: REMEDY

In judge's discretion to:

- Dismiss the venire and start again OR
- Seat the improperly struck juror(s). *State v. McCollum*, 334 N.C. 208 (1993).