STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NOS. __ CRS _____

STATE OF NORTH CAROLINA	)	**DEFENDANT'S MOTION TO PROHIBIT IMPERMISSIBLY-MOTIVATED PEREMPTORY STRIKES AND TO CONSIDER HISTORICAL EVIDENCE OF JURY DISCRIMINATION**
	)	
	)	
v.	)	
	)	
_____	)	

NOW COMES the Defendant, and respectfully moves the Court to prohibit the exercise of peremptory strikes motivated by race, gender, or any other impermissible motivation. 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*, 578 U.S. 488 (2016); *Flowers v. Mississippi,* 139 S.Ct. 2228 (2019); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice."); *State v. Hobbs*, 841 S.E.2d 492 (2020); and *State v. Clegg*, 380 N.C. 127, 867 S.E.2d 885 (2022).

Defendant also moves that this Court consider the evidence outlined below regarding the history of jury discrimination in [_____ County and] the State of North Carolina.

In support of the motion, Defendant shows the following:

I. THIS COURT MUST APPLY THE PRECEDENTS OF THE NORTH CAROLINA AND UNITED STATES SUPREME COURTS IN ADJUDICATING THE CONSTITUTIONALITY OF ANY CHALLENGED PEREMPTORY STRIKES.

Defendant intends to object to the use of any peremptory challenges exercised in violation of the Constitutions of the United States or of the State of North Carolina, or otherwise in violation of the law, and asks this Court to disallow any impermissible strikes. 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). The state and federal constitutions likewise prohibit discrimination on the basis of gender in the exercise of peremptory strikes. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); N.C. Const. Art 1, Sec. 26.

Batson identified a trifecta of harm caused by race discrimination in jury selection. First, the person being prosecuted is denied "the protection that a trial by jury is intended to serve." 476 U.S. at 87. Second, "by denying a person participation in jury service on account of [] race, the State unconstitutionally discriminate[s] against the excluded juror." *Id*. Third, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id*.

For people charged with crimes and facing trial, the protections of *Batson* are critical to securing a fair trial. Social science research indicates that diverse juries are significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused, while non-diverse juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. *See State v. Clegg*, 380 N.C. at 172, 867 S.E.2d at 917, Earls, J., concurring (research confirms "what seems obvious from reflection: more diverse juries result in fairer trials"); *see also* 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 Delib*eration, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006)) (diverse juries focus more on the evidence, make fewer inaccurate statements, and make fewer uncorrected statements).

Turning to the substantive law, the North Carolina Supreme Court has explained the *Batson* framework this way:

> [I]n step one (and in subsequent rebuttal), the defendant places his reasoning on the scale; in step two (and in subsequent rebuttal), the State places its counter-reasoning on the scale; in step three, the court carefully weighs all of the reasoning from both sides to ultimately decide whether it was more likely than not that the challenge was improperly motivated.

Clegg, 380 N.C. at 149-50, 867 S.E.2d at 903 (cleaned up).

Defendant draws the Court's attention to the following principles enunciated by the Supreme Courts of North Carolina and the United States:

- **A single race-based strike violates the Constitution**. *Flowers*, 139 S.Ct. at 2244 ("The Constitution forbids striking even a single prospective juror for a discriminator reason), *citing Foster*, 578 U.S. at 499; *State v. Clegg*, 380 N.C. at 143, 867 S.E.2d at 899 (citing *Snyder*).

- **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." *Hobbs*, 841 S.E.2d at 497, *quoting Johnson v. California*, 545 U.S. 162, 170 (2005); *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 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.

- **At the prima facie stage, the court must consider all relevant circumstances, including history.** "A defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Hobbs,*

841 S.E.2d at 497, *quoting Miller-El II*, 545 U.S. at 240. Specifically, in determining whether the prima facie case has been met, "a court must consider historical evidence of discrimination in a jurisdiction." *Hobbs*, 841 S.E.2d at 498.

- **The ultimate question under *Batson* is not whether race was the sole factor for the *s*trike, but whether race was significant in the decision**. The question before the Court is whether race is "significant in determining who was challenged and who was not." *Miller-El II, 54*5 U.S. at 252 (2005). Put another way, "the ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Hobbs*, 841 S.E.2d at 499, quoting *Flowers*, 139 S.Ct. at 2244 and *Foster*, 578 U.S. at 512. A defendant need *not* show race was the *sole* factor for the strike. *State v. Waring*, 364 N.C. 443, 480 (2010); *Hobbs* 841 S.E.2d at 513, n. 2.

- **The burden on a *Batson* claimant is preponderance of the evidence, i.e. whether it is *more likely than not* race was a significant factor in the strike decision.** *Johnson*, 545 U.S. at 170; *Clegg*, 380 N.C. at 150, 867 S.E.2d at 903, *citing Hobbs*, 374 N.C. at 351.

- **A finding of a *Batson* violation is not a definitive determination that the prosecutor is racist or even that the prosecutor discriminated.** Ultimately, "the finding of a *Batson* violation does not amount to an absolutely certain determination that a peremptory strike was the product of racial discrimination. Rather, the *Batson pr*ocess represents our best, if imperfect, attempt at drawing a line in the sand establishing the level of risk of racial discrimination that we deem acceptable or unacceptable." *Clegg*, 380 N.C. at 162-63, 867 S.E.2d at 911.

- **Evidence supporting the prima facie case must also be considered at Step Three.** *Clegg*, 380 N.C. at 163, 867 S.E.2d at 912.

- **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); *Flowers*, 139 S.Ct. at 2243 ("Our precedents allow criminal defendants raising Batson challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race.") "[A] defendant may present a wide variety of direct and circumstantial evidence in supporting a *Batson* challenge." *Clegg*, 380 N.C. at 158, 867 S.E.2d at 908 (citing *Flowers*, 139 S.Ct. at 2243).

- **Establishing a *Batson* violation does not require "smoking gun evidence of discrimination.** *Clegg*, 380 N.C. at 157, 867 S.E.2d at 908.

- **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 Hobbs*, 841 S.E.2d at 502 (trial court erred in failing to "examin[e] the comparisons in the white and black potential jurors' answers."); *Flowers*, 139 S.Ct. at 2248 ("comparison of [prospective jurors who were struck and not struck] can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination."); *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."); *see also Clegg*, 380 N.C. at 161, 867 S.E.2d at 911 ("disparate questioning and exclusion of [a potential Black juror] compared to substantially comparable white potential jurors who were questioned and accepted by the prosecutor," should have been considered by the trial court and failure to do so was erroneous).

- **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; *see also Flowers* 139 S.Ct. at 2249 ("a defendant is not required to identify an identical white juror for the side-by-side comparison to be suggestive of discriminatory intent.").

- **Disparate treatment of Black and white potential jurors with regard to a single trait is probative of discrimination**. *See Flowers*, 139 S.Ct. at 2249 (comparing jurors who knew individuals involved in the case); *Foster*, 578 U.S. at 505-506, 512 (comparing different jurors with regard to marital status, age, and employment history); *Snyder*, 552 U.S. at 483 (comparing "relevant jurors" with a "shared characteristic, i.e., concern about serving on the jury due to conflicting obligations"); *Clegg*, 380 N.C. at 159-61, 867 S.E.2d at 909-910 (disparate treatment analysis limited to single trait of work distractions).

- **A prosecutor's misrepresentation of the record is evidence of racial bias.** When prosecutors justify their strikes with statements about black prospective jurors that are factually inaccurate, this is evidence of pretext. *See Flowers*, 139 S.Ct. at 2243, 2250 ("When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent…. The State's pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury."); *Foster*, 578 U.S. at 512

(discounting prosecutor's explanation where the "trial transcripts clearly indicate the contrary"). Furthermore, a prosecutor's misrepresentation of the record need not be intentional. In *Clegg*, the Court found the prosecutor's reasoning during the initial *Batson* inquiry was plainly contradicted by the record and held that "[w]hether the initial misstatement was the product of accidental 'misremembering,' as the trial court found, or intentional 'mischaracterization' does not change the fact that the proffered reason was plainly unsupported by the record." 380 N.C. at 154, 867 S.E.2d at 906.

- **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"). In finding a *Batson* violation, the court in *Clegg* noted the prosecutor asked fifteen potential jurors about their ability to focus and singled out only one, a Black woman, for further questioning while failing to ask any further questions of another potential juror, a white man, despite his answers indicating his professional obligations might affect his ability to focus. *Clegg*, 380 N.C. at 160, 867 S.E.2d at 910.

- **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).

- **Overly-broad justifications referencing a juror's demeanor or body language should be viewed with "significant suspicion."** *Clegg*, 380 N.C. at 155, 867 S.E.2d 907; *see also Snyder*, 552 U.S. at 477 (refusing to credit uncorroborated demeanor-based justification); *Alexander*, 274 N.C. App. at 44 (recognizing that demeanor-based justifications "are not immune from scrutiny or implicit bias" and holding "that trial court erred in failing to address Defendant's argument that prosecutor's justifications were based on "racial stereotypes.").

- **Evidence that prosecutors were trained in how to evade the strictures of *Batson* is evidence of racial bias.** *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for excluding minorities from jury service); *Clegg*, 380 N.C. at 155, 867 S.E.2d at 907 (in explaining evidence to be considered in a *Batson* analysis, noting that "as recently as 1995, prosecutorial training sessions conducted by the North Carolina Conference of District Attorneys included a 'cheat sheet' titled '*Batson* Justifications: Articulating Juror Negatives.'"); *see also 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 that prosecutors discriminated in other cases is evidence of racial bias.** In *Hobbs*, the North Carolina Supreme Court held the trial court had erred at *Batson*'s third step when it failed to weigh "the historical evidence that Mr. Hobbs brought to the trial court's attention." 841 S.E.2d at 502; *see also Flowers,* 139 S.Ct. at 2245 (considering "the history of the prosecutor's peremptory strikes in Flowers' first four trials"); *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"); *Clegg*, 380 N.C. at 156, 867 S.E.2d at 907 (Recognizing the "well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination" and considering "this historical context" in rejecting prosecutor's justification for strike of Black juror.)

- **The peremptory challenges exercised by the defendant are not relevant to the question of whether the State discriminated.** *Hobbs,* 841 S.E.2d at 502 (finding the trial court erred in considering the pattern of defense strikes because "the peremptory challenges exercised by the defendant are not relevant to the State's motivations").

- **The Defendant does not bear the burden of disproving each and every reason proffered by the prosecutor**. 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. 578 U.S. at 502. The Court did not analyze all of the reasons proffered by the State. Rather, after unmasking and debunking four 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).

Defendant asks this Court to apply these principles in adjudicating any objections under *Batson*,[1] and thereby prohibit race discrimination in the selection of Defendant's jury.

II. THIS COURT MUST CONSIDER HISTORICAL EVIDENCE OF JURY DISCRIMINATION.

In *Hobbs*, the North Carolina Supreme Court held "a court *must* consider historical evidence of discrimination in a jurisdiction" when determining whether defendant has established a prima facie case of discrimination. *Hobbs,* 841 S.E.2d at 498 (emphasis added). The *Hobbs* court further held that the trial court had erred in failing to consider, at *Batson*'s third step, "the historical evidence that Mr. Hobbs brought to the trial court's attention." *Id.* at 502. More recently, in holding the trial court had properly rejected the prosecutor's generalized rationale for striking a prospective Black juror, the North Carolina Supreme Court held in *Clegg* that "[w]hen placed within our well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination, this historical [evidence] cautions courts against accepting overly broad demeanor-based justification without further inquiry or corroboration." *Clegg*, 380 N.C. at 156, 867 S.E.2d at 907. The *Clegg* court went on to say "the trial court acted properly in considering defendant's statistical evidence regarding the disproportionate use of peremptory strikes against Black potential jurors in both this case and statewide." *Id*.

Therefore, Defendant requests that the court consider the following studies

[1] The same principles apply to challenges to strikes impermissibly based on gender, religion, and national origin. *J.E.B.*, 511 U.S. at 144-45; N.C. Const., Art. I, § 26.

showing racial disparities in jury selection in North Carolina criminal cases, including capital cases. These studies include:

- A 2010 Michigan State University (MSU) study of North Carolina capital cases from 1990-2010. The MSU researchers analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010. The study showed prosecutors struck 53 percent of eligible African-American jurors and only 26 percent of all other eligible jurors in those capital proceedings. The researchers found that the probability of this disparity occurring in a race-neutral jury selection was less than one in 10 trillion. After adjusting for non-racial characteristics that might reasonably affect strike decisions, for example, reluctance to impose the death penalty, researchers found prosecutors struck black jurors at 2.5 times the rate they struck all other jurors. The study findings are described in Grosso, Catherine and O'Brien, Barbara, *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), a copy of which is attached to this notice as Exhibit A.
- A 2017 study conducted by Wake Forest University School of Law professors found that in North Carolina felony trials in 2011– which included data on nearly 30,000 potential jurors in just over 1,300 cases – prosecutors struck non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck non-white jurors about twice as often as they excluded white jurors. The Wake Forest findings are discussed in Wright, Ronald F. and Chavis, Kami, Parks, Gregory Scott, *The Jury Sunshine Project: Jury Selection Data as a Political Issue* (June 28, 2017), a copy of which is attached as Exhibit B.
- A 1999 study of the use of peremptory strikes in Durham County showed that African Americans were much more likely to be excused by the State. Approximately 70 percent of African Americans were dismissed by the State, while less than 20 percent of whites were struck by the prosecution. The Durham findings are detailed in 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), a copy of which is attached as Exhibit C.

Add any other history regarding this prosecutor or your county, for example prior sustained *Batson* objections, county-specific MSU or WFU data, or a pattern of prior cases with disparate strike rates. Contact CDPL for more information on your county or prosecutorial district.

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