

OBJECT to any strike that could be viewed as based on race, gender, religion, or national origin. "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. The Constitution bars "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 a member of the same cognizable class as the juror. *Powers v. Ohio*, 499 U.S. 400 (1991).
- You do not need to exhaust your peremptory challenges to preserve a *Batson* challenge.
- *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*, 374 N.C. 345, 357 (2020).

TIPS:

- Consider asking for strikes and objections to be made outside the presence of the jury.
- Whenever possible, make your objection immediately, before jurors are excused, so that they can be seated if your objection is granted.

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 biases or fear of talking about race?
 - 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).

Step one is "not intended to be a high hurdle for defendants to cross." *Hobbs*, 374 N.C. at 350 (2020).

"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*, 374 N.C. at 351.

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*, 374 NC at 350-51.

- 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 by this DA's office/prosecutor. *Miller-El*, 545 U.S. at 254, 264; *Flowers v. Mississippi*, 139 S.Ct. 2245 (2019) (Contact CDPL for supporting data from your county.)
- State questioned juror differently or very little. *Miller-El*, 545 U.S. at 241, 246, 255; *State v. Clegg*, 867 S.E.2d 885, 909-911 (N.C. 2022); *Hobbs*, 374 N.C. at 358-59.
- Juror is similar to white jurors passed (describe how). *Foster v. Chatman*, 578 U.S. 488, 505-506 (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

Hobbs, 374 N.C. at 354.

- If the State volunteers reasons without prompting from the Court, the prima facie showing is assumed; move to step 3. *Hobbs*, 374 N.C. at 354; *Hernandez v. New York*, 500 U.S. 352, 359 (1991).
- Prosecutor must give a reason and the reason offered must be the actual reason. *Clegg*, 867 S.E.2d at 903; *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; *Clegg*, 867 S.E.2d at 899-900.
- Argue reason is not race-neutral (e.g., NAACP membership)



STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove it's more likely than not race was a significant factor

Judge must weigh all your evidence, including what you presented at Step One. *Clegg*, 867 S.E.2d at 907.

You do not need smoking gun evidence of discrimination. *Clegg*, 867 S.E.2d at 908.

Absolute certainty is not required. Standard is more likely than not, i.e. whether the risk of discrimination is unacceptable. *Clegg*, 867 S.E.2d at 911.

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 every reason proffered by the State. *Foster*, 578 U.S. at 512 (finding purposeful discrimination after debunking only four of eleven reasons given).

The best way to prove purposeful discrimination is to show the prosecutor's Step Two reasons are pretextual

- Reason applies equally to white jurors the State has passed. Compared jurors don't have to be identical. *Miller-El*, 545 U.S. at 247, n.6; *Hobbs*, 374 N.C. at 358-59.
- Reason is not supported by the record. *Foster*, 578 U.S. at 502-503; *Clegg*, 867 S.E.2d at 906 (pretext shown when a prosecutor misstates, mischaracterizes, or simply misremembers).
- Reason is nonsensical or fantastic. *Foster*, 578 U.S. at 509.
- Reason is race-related. E.g., juror supports Black Lives Matter
- State failed to ask the juror any questions about the topic the State now claims is disqualifying. *Miller-El*, 545 U.S. at 241.
- State questioned Black and white jurors differently. *Miller-El*, 545 U.S. at 255.
- State gave shifting reasons. *Foster*, 578 U.S. at 507; *Clegg*, 867 S.E.2d at 906.

Reasons courts have found inherently suspect

- Juror's demeanor or body language. *Snyder*, 552 U.S. at 479, 488; *Clegg*, 867 S.E.2d at 907 (should be viewed with "significant suspicion.")
- Juror's expression of hardship or reluctance to serve. *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).
- A laundry list of reasons. *Foster*, 578 U.S. at 502.

REMEDY FOR *BATSON* VIOLATION

If the court sustains your *Batson* objection, the improperly struck juror(s) should be seated, or the entire venire should be struck. *State v. McCollum*, 334 N.C. 208, 235 (1993).