STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____

STATE OF NORTH CAROLINA	)	**DEFENDANT'S MOTION FOR DISCOVERY OF INFORMATION PERTAINING TO THE LITIGATION OF *BATSON* OBJECTIONS**
	)	
v.	)	
	)	
_____	)	

NOW COMES the Defendant, and respectfully moves the Court for an order directing the State to provide to the defense information concerning any policy or training, past or present, written or informal, regarding the use of peremptory strikes in jury selection, and notice of any prior findings that this prosecutor struck a juror based on race, ethnicity or gender. This information is required under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994); *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. Hobbs*, 374 N.C. 345 (2020); *State v. Clegg*, 380 N.C. 137, 867 S.E.2d 885 (2022); and *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (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."). In support of this motion, Defendant states the following:

Grounds for Motion

Under the Supreme Court's decision in *Batson*, courts must consider a history of prosecutorial strikes based on race, ethnicity, or gender. The North Carolina Supreme Court has recognized a "well-established national history of prosecutors employing peremptory challenges as tools of covert racial discrimination." *Clegg*, 380 N.C. at 156, 867 S.E.2d at 907. In *Hobbs*, 374 N.C. at 358, the North Carolina Supreme Court held the trial court erred in not "consider[ing] historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction." *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"). This history need not be specific to an individual prosecutor in a given case. *Clegg*, 380 N.C. at 156, 867 S.E.2d at 907 ("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 . . . such data is included among the many types of evidence that a defendant may present, and a court may consider, within a *Batson* challenge) (citing *Flowers*, 139 S.Ct. at 2243).

Evidence that training materials providing instruction on how to evade the strictures of *Batson* are available to the prosecution is unquestionably relevant to the question of whether a strike is motivated by race. In *Miller-El II*, the Court considered the following training evidence in reaching its conclusion that the Texas prosecutor had violated *Batson*:

> A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller–El's trial.

545 U.S. at 264 (bracket in original, citation omitted).

It is notable the petitioner in *Miller-El II* did not present evidence that the attorneys who personally prosecuted his case actually studied the training manual at issue. Rather, the Supreme Court focused on the fact that the training materials were "available." Additionally, in *Miller-El II*, the discriminatory training materials predated the defendant's trial by approximately a decade. Nonetheless, the *Miller-El II* Court concluded,

> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection.

Id. at 266.

It is significant also that we know that North Carolina prosecutors have been trained in how to justify strikes of African Americans. At a 1994 seminar called *Top Gun*, prosecutors were given a list of race-neutral reasons to cite when *Batson* challenges were raised. This list, or "cheat sheet," titled "*Batson* Justifications," included "attitude," "body language," and a "lack of eye contact with Prosecutor" — the types of justifications that prosecutors routinely give for striking black jurors in North Carolina. The Supreme Court of North Carolina recently acknowledged evidence that that prosecutors in North Carolina attended the "Top Gun" training which taught them how to articulate facially-neutral reasons for striking African American jurors and then used

those exact reasons to justify striking a Black juror. *State v. Robinson*, 375 N.C. 173, 181, 846 S.E.2d 711, 717 (2020). In *State v. Augustine*, 375 N.C. 376, 847 S.E.2d 729, 732 (2020), the Court referred to the *Top Gun* handout as a "cheat sheet" for use in responding to *Batson* objections. In holding historical context must be considered when conducting a *Batson* analysis, the North Carolina Supreme Court in *Clegg* noted 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.'" *Clegg*, 380 N.C. at 155, 867 S.E.2d at 907.

A group of prominent former prosecutors filed a friend-of-the-court brief in *Foster v. Chatman* and described the *Top Gun* cheat sheet as an effort to "train their prosecutors to deceive judges as to their true motivations." Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8. "[T]he *Batson* process 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 163, 867 S.E.2d at 911. Unfortunately, as the existence of the *Top Gun* handout demonstrates, "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before," *Miller-El II*, 545 U.S. at 270 (Breyer, J., concurring), creating an unacceptable risk that "even a single prospective juror [was struck] for a discriminatory purpose." *Clegg*, 380 N.C. at 143, 867 S.E.2d at 903 (internal quotations omitted).

Wherefore, Defendant asks the Court to enter an order directing the prosecutor to turn over to the defense all information pertaining to any policy or training, past or

present, written or informal, regarding the use of peremptory strikes in jury selection, and any prior findings by any court that the prosecutor struck a juror based on his or her race, ethnicity, or gender.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion for Discovery of Information Pertaining to Jury Selection Training 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