

STATE OF NORTH CAROLINA
COUNTY OF [REDACTED]

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. [REDACTED] **CRS**

STATE OF NORTH CAROLINA)
)
)
v.)
)
[REDACTED])

**DEFENDANT’S MOTION TO
EXERCISE STRIKES OUTSIDE
PRESENCE OF POTENTIAL
JURORS**

NOW COMES the Defendant, and respectfully moves the Court to direct the parties to exercise peremptory strikes outside the presence of potential jurors so that, in the event the Court determines that either party has attempted to exercise an unconstitutional peremptory strike, the Court can seat as a juror the citizen subject to discrimination.

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). In support of the motion, Defendant shows the following:

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, religion, and national origin 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 three distinct ways that race discrimination in jury selection causes harm. First, defendants facing trial are harmed when they are denied “the protection that a trial by jury is intended to serve.” 476 U.S. at 87. Second, citizens called for jury duty and subjected to discrimination are harmed. In “denying a person participation in jury service on account of [] race, the State unconstitutionally discriminate[s] against the excluded juror.” *Id.* Third, the legitimacy of the entire criminal punishment system is damaged. “The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.” *Id.* Specifically, “selection procedures that purposefully exclude black persons from juries undermine public confidence in our system of justice.” *Id.*

The Supreme Court of North Carolina has likewise described the three-part harm of jury selection discrimination. In *Cofield*, the Court observed that “the judicial system of a democratic society must operate evenhandedly . . . [and] be perceived to operate evenhandedly.” 320 N.C. at 302. Discrimination in the selection of jurors “deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice.” *Id.*

In the event this Court grants a *Batson* objection, the Court should seat the juror because this remedy for the constitutional violation vindicates both of the injured parties: the Defendant and the struck juror. In *State v. McCollum*, 334 N.C. 208 (1993), the trial

judge sustained the Defendant's objections under *Batson*. Defense counsel asked that the three citizens subject to the prosecutor's unconstitutional strikes be seated on the jury. Instead, the trial judge struck the venire and restarted jury selection. 334 N.C. at 235.

On appeal, the Defendant argued that the trial judge had erred in declining to seat as jurors the citizens subject to unconstitutional strikes. *Id.* The Supreme Court rejected the defendant's argument and concluded that the trial judge had not erred in striking the venire and starting jury selection anew. *Id.* at 236.

Significantly, in *McCollum*, the venire was present when the State exercised its strikes. In addressing the proper remedy, the Supreme Court noted that both the right of the defendant to a fair trial and the struck juror's right not to face discrimination had been violated. *Id.* at 235. The Court also noted that the Defendant had standing to raise this remedy question on behalf of the citizen who faced discrimination in jury selection. *Id.* The decisive consideration for the Court was this:

To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward the State or the defendant, would be to ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully.

Id. at 236. The Court concluded that, in view of the extreme difficulty a citizen would face in attempting to put aside an experience of discrimination, the "simpler" and "fairer" approach was to restart jury selection with a "new panel of prospective jurors who cannot have been affected by any prior *Batson* violation." *Id.*

There is no need to trade off a citizen's right to serve on a jury regardless of race and the right to a fair trial. This Court can simply direct the parties to exercise

peremptory strikes outside the presence of the venire. In this way, if a *Batson* objection is raised, and found to be meritorious, the improperly struck venire member can be seated. Importantly, conducting strikes outside the presence of the jurors will ensure that this Court can protect the right to a fair trial without vitiating the right of citizens of all races to serve as jurors.

WHEREFORE, Defendant asks the Court to direct the parties to exercise peremptory strikes outside the presence of potential jurors.

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