

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.

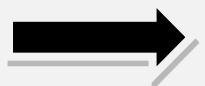
- Calculate and give the strike pattern/disparity. *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005).

"The State has struck ___% of Black jurors and ___% of white jurors"

or

"The State has used 3 of its 4 peremptory strikes on Black jurors"

- 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*, 380 N.C. 127 (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*, 380 N.C. at 149; *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*, 380 N.C. at 144.
- 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*, 380 N.C. at 156.

You do not need smoking gun evidence of discrimination. *Clegg*, 380 N.C. at 157-57.

Peremptory challenges exercised by the Defendant are not relevant. *Hobbs*, 380 N.C. at 357.

Absolute certainty is not required. Standard is more likely than not, i.e. whether the risk of discrimination is unacceptable. *Clegg*, 380 N.C. at 162-63.

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.

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*, 380 N.C. at 154 (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*, 380 N.C. at 154.

Reasons courts have found inherently suspect

- Juror's demeanor or body language. *Snyder*, 552 U.S. at 479, 488; *Clegg*, 380 N.C. at 155 (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).