

“OBJECT ANYWAY”: Litigating *Batson* in North Carolina Trials

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UNC School of Government – High Level Felony Defender Training

September, 2025

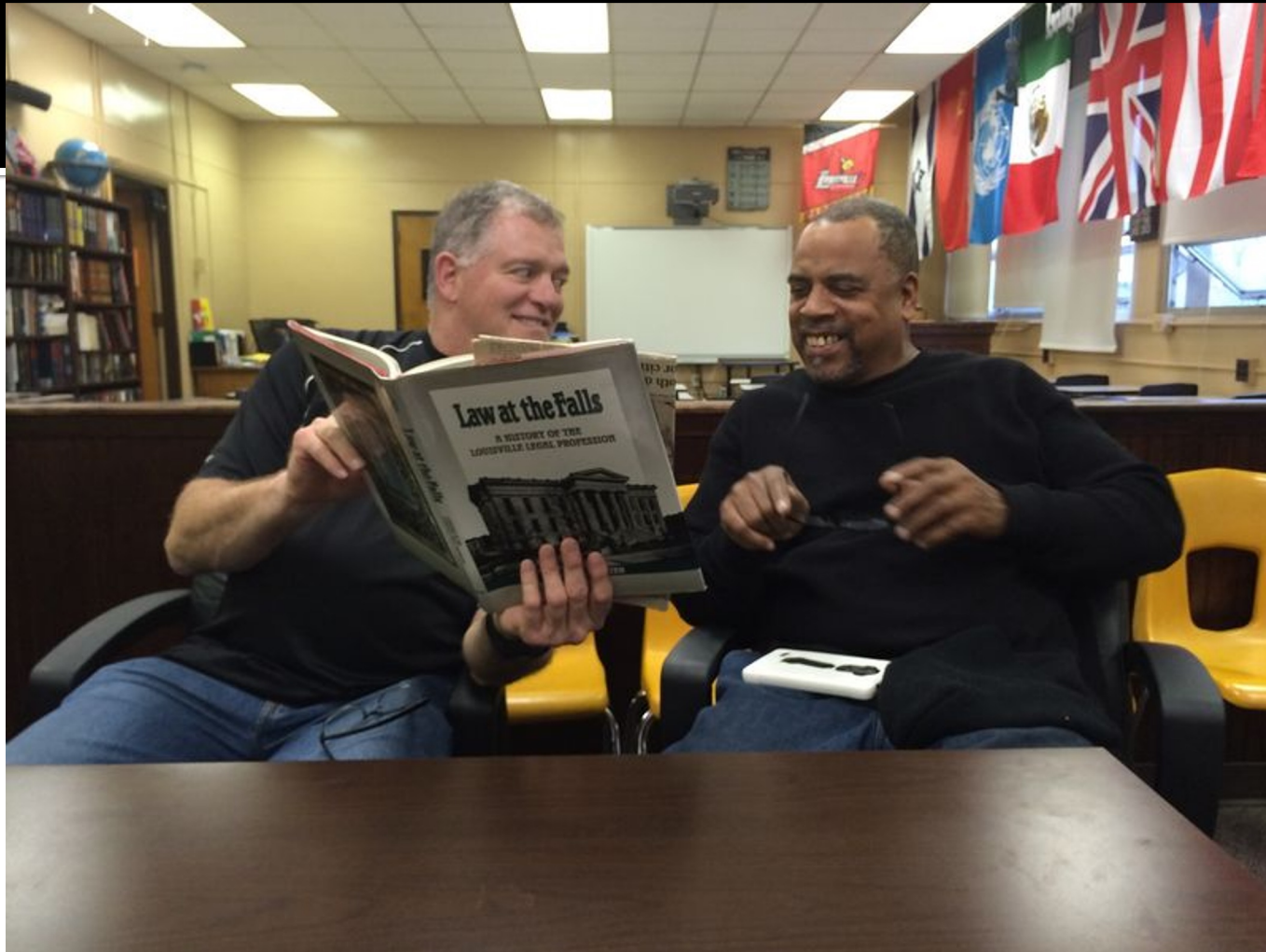
Jury Service

Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.

Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019)



- 
- Before the *Batson* decision in 1986, trial courts followed the thinking that the parties could use peremptory strikes to “strike anybody they want to.” (*Batson*, 476 U.S. 79, 83) as long as that person wasn’t striking people based on race every single time in every single case.



Podcast Episode:
"Object Anyway"
More Perfect
WNYC Radio
July 16, 2016

Batson & its progeny - takeaway

- One strike based on race is one too many

Batson Cheat Sheet

BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress - attire may show lack of respect for the system, immaturity or rebelliousness
2. Physical Appearance - tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age - Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude - air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors, or those who vacillated in answering D.A.'s questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

"For example, 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.'

State v. Clegg, 380 N.C. 127, 155 (2022)

"[M]ere possession of a CLE handout from a State Bar sanctioned CLE class does not raise an inference that a peremptory challenge was based on race."

State v. Tucker, 895 S.E.2d 532, 550 (2023)

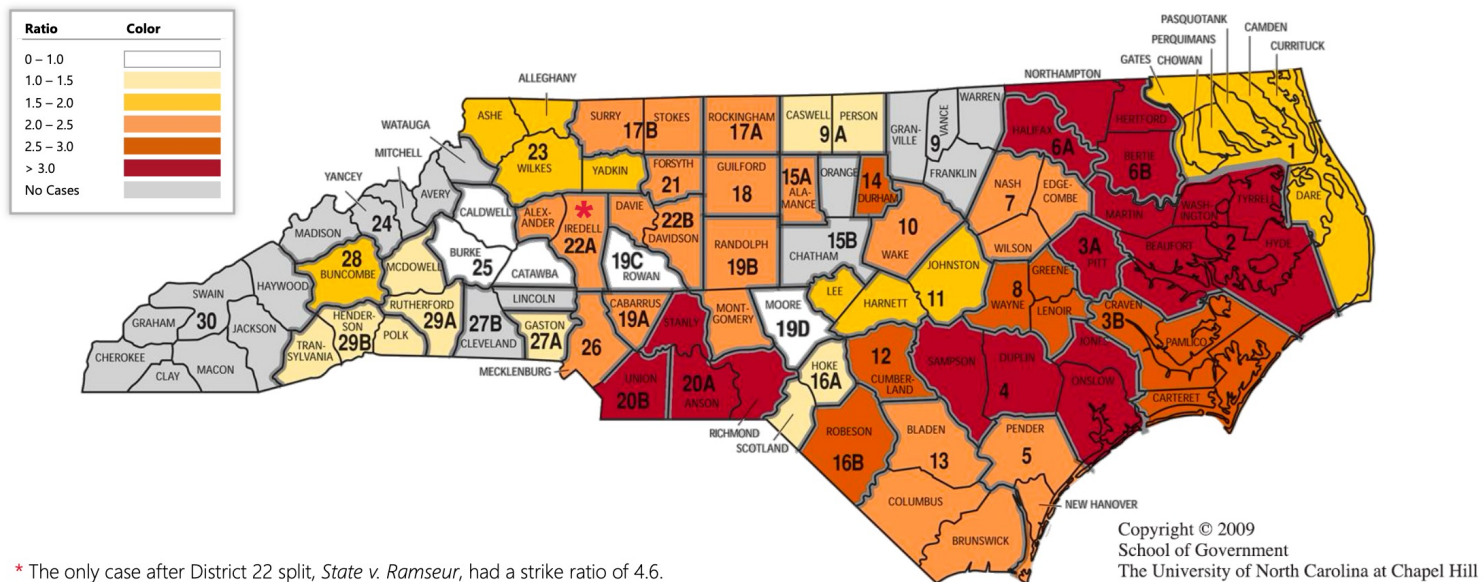
MSU Study (1990-2010)

$$\approx 2/1$$

Statistics are powerful

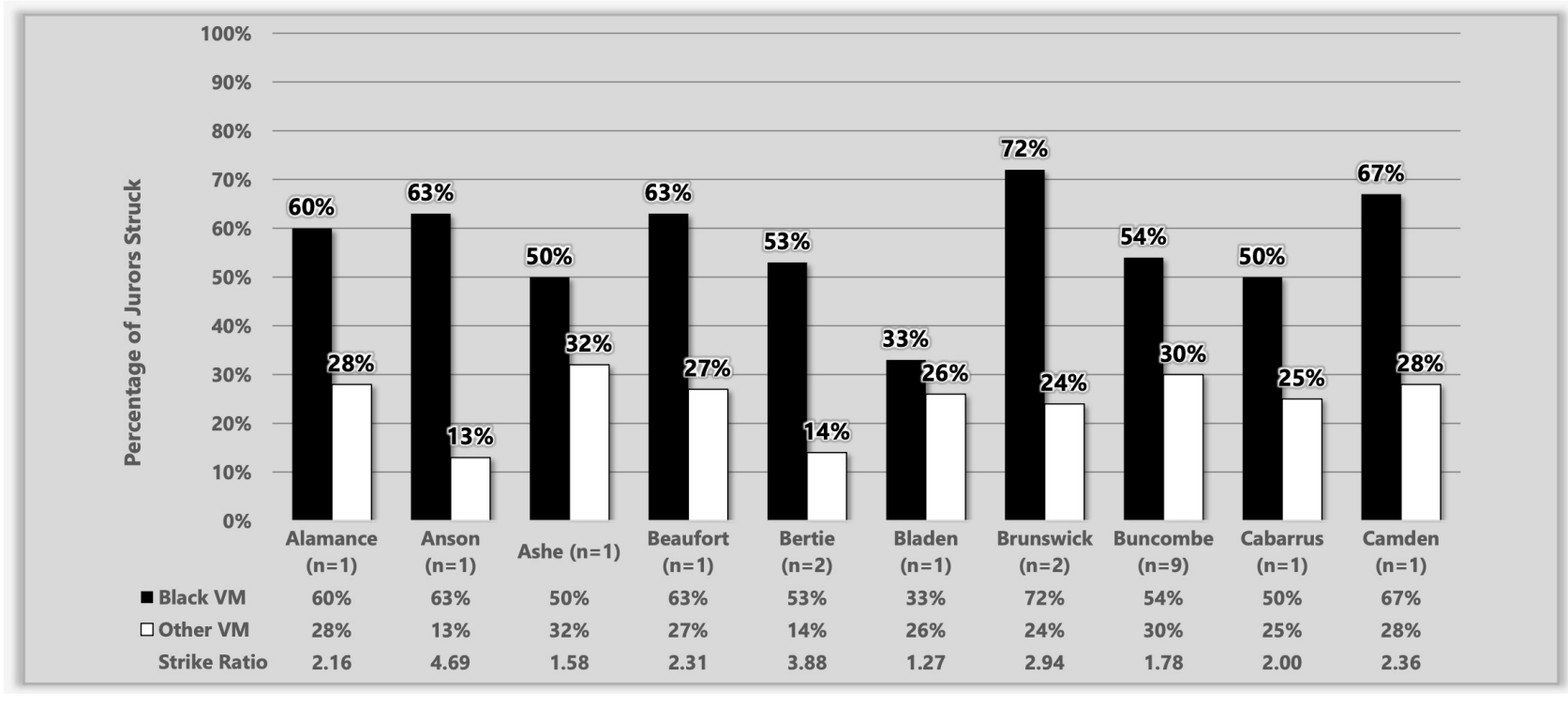
Jury Selection – Ratio of Strike Rates Among Black and Non-Black Veniremembers (Reported by District)

North Carolina Prosecutorial Districts (Effective January 15, 2009)



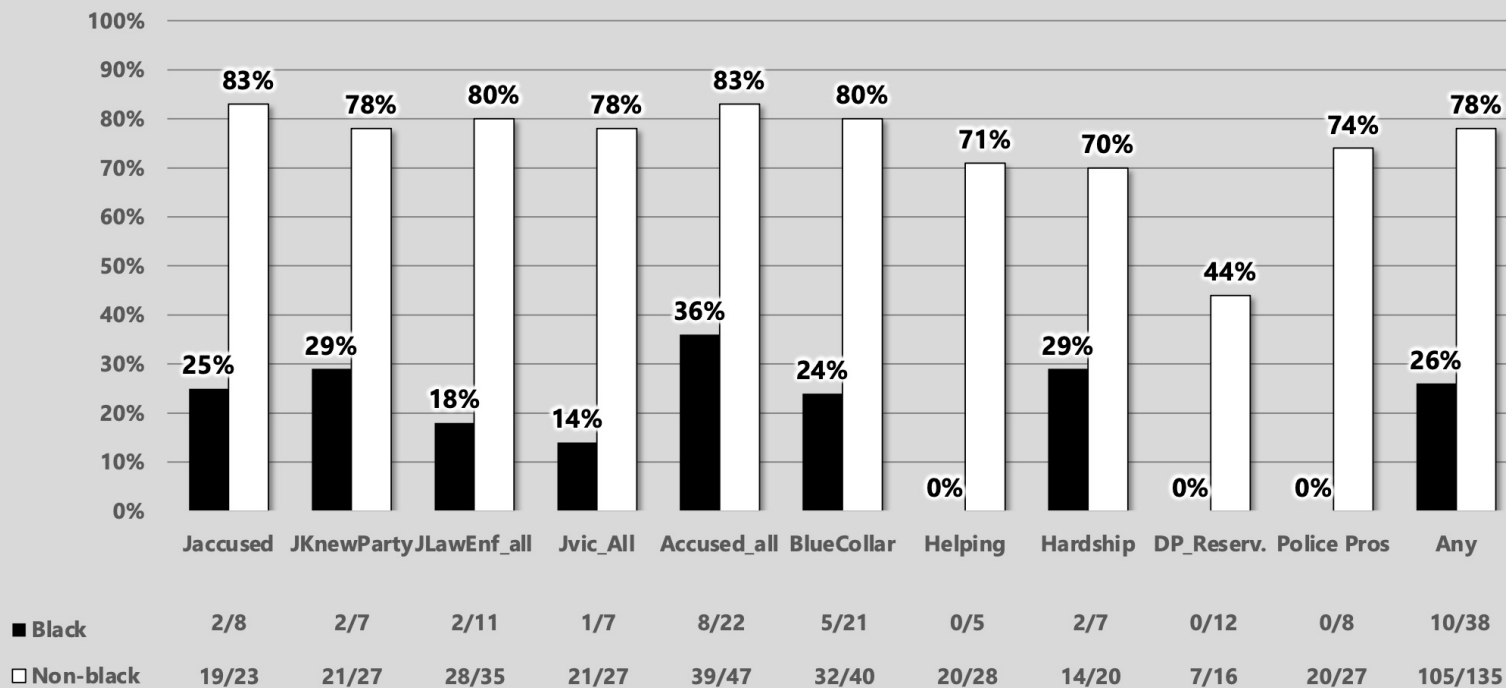
Statistics are powerful

State Strikes by Counties



Statistics are powerful

Jurors Accepted by Prosecutor



WFU Jury Sunshine Project (2011)

Black/White Prosecutor Removal Ratios for Largest Cities in NC

Winston-Salem (Forsyth)	3.0
Durham (Durham)	2.6
Charlotte (Mecklenburg)	2.5
Raleigh (Wake)	1.7
Greensboro (Guilford)	1.7
Fayetteville (Cumberland)	1.7

State v. Robinson

- “In stark contrast to these findings, this Court has *never* ruled that the State intentionally discriminated against a juror of color in violation of *Batson*.”

State v. Robinson, 2020

- 
- State v. Clegg (2016): “based on their **body language**, based on their failure to look at me when I was trying to communicate with them”
 - State v. Campbell (2017): “she was a participant, if not an organizer, for **Black Lives Matter**.”
 - State v. Hood (2018): prosecutor assumed Black male juror had been **a participant in crime rather than a victim**
 - State v. Alexander (2019): “[T]he gentleman struck me as someone who was **just not a reasonable citizen basically**.”
 - State v. Smith (2021): struck the only two Black jurors called thus far; “**she was giving me a mean look the whole time**.”

IN THE SUPREME COURT OF NORTH CAROLINA

IN THE SUPREME COURT OF NORTH CAROLINA

No. 406PA18

Filed 5 June 2020

STATE OF NORTH CAROLINA

v.

CORY DION BENNETT

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 262 N.C. App. 89, 821 S.E.2d 476 (2018), affirming judgments

REVERSED AND REMANDED.

Joshua H. Stein, Attorney General, by Kristin J. Uicker and Brent D. Kiziah, Assistant Attorneys General, for the State-appellee.

Franklin E. Wells, Jr., for defendant-appellant.

Donald H. Beskind, Robert S. Chang, and Taki V. Flevaris for Fred T. Korematsu Center for Law and Equality, amicus curiae.

David Weiss, James E. Coleman, Jr., and Elizabeth Hambourger for Coalition of State and National Criminal Justice and Civil Rights Advocates, amici curiae.

ERVIN, Justice.

VICTORY AT LAST!

State v. Clegg, 380 N.C. 127 (2022)

The defendant was tried for armed robbery and possession of firearm by felon in Wake County. When the prosecution struck two Black jurors from the panel, defense counsel made a Batson challenge. The prosecution argued the strikes were based on the jurors' body language and failure to look at the prosecutor during questioning. The prosecution also pointed to one of the juror's answer of "I suppose" in response to a question on her ability to be fair, and to the other juror's former employment at Dorothea Dix, as additional race-neutral explanations for the strikes. The trial court initially found that these reasons were not pretextual and overruled the Batson challenge.

At NCSC, Court found:

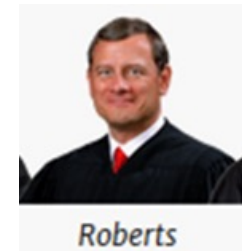
- Shifting and mischaracterized reasons were evidence of pre-text
- Demeanor-based explanations were insufficient without findings of fact on the point
- Trial court did not meaningfully apply the "more-likely-than not" burden of proof
- Prosecutor questioned jurors in a disparate manner
- Trial court recited a reason for the strike not offered by the prosecution

Key Takeaways from *State v. Hobbs I*, *State v. Bennett*, and *State v. Clegg*

- ❖ Prima facie case = low bar (we really mean it this time!)
- ❖ Strikes by Objecting Party are Irrelevant
- ❖ Review of History is Required
- ❖ No smoking gun needed!
- ❖ Reasons contradicted by record are weightless
- ❖ Shifting reasons are suspicious
- ❖ Demeanor-based reasons valid only if credited by court
- ❖ Court cannot invent own reasons for strikes

SCOTUS is your friend!

- 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, 136 S.Ct. 1737 (2016)
- Flowers v. Mississippi, 139 S.Ct. 2228 (2019)



Comparative Juror Analysis

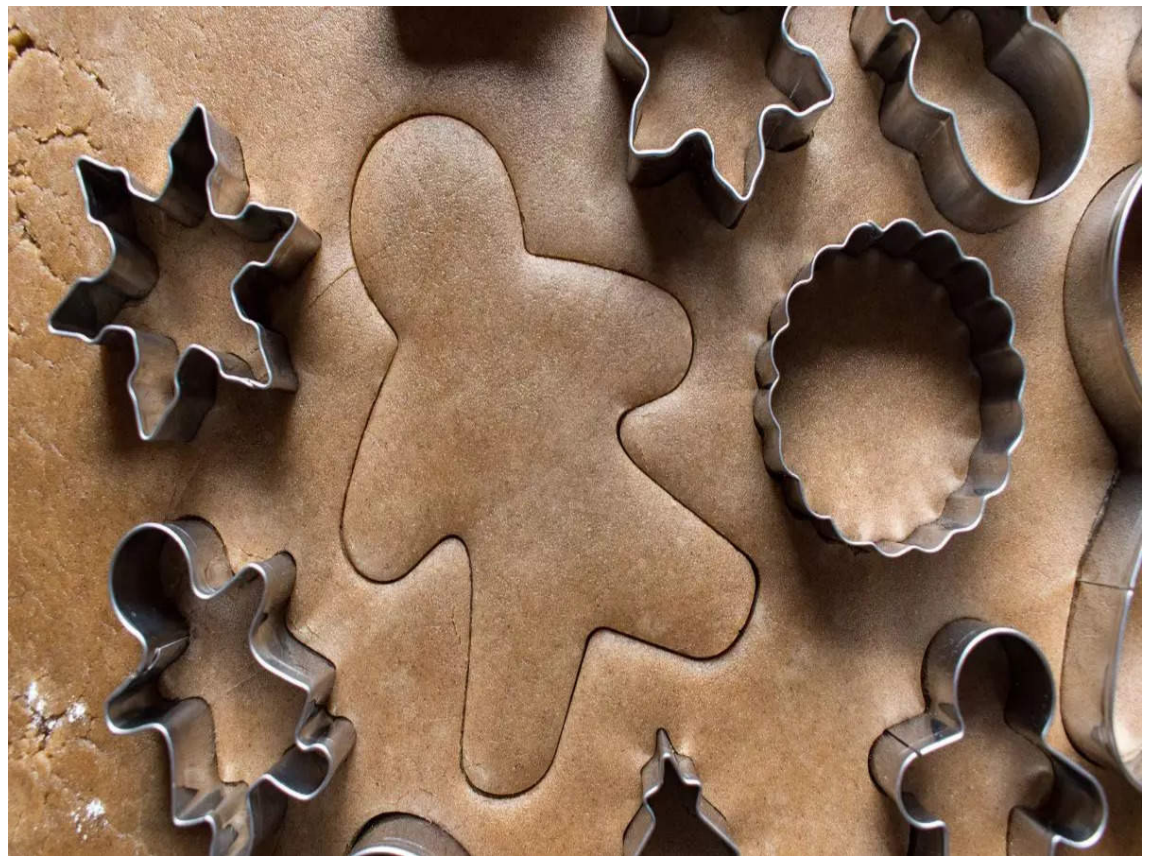
“**More powerful** than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve.”

Miller-El v. Dretke, 545 U.S. 231, 241 (2005).

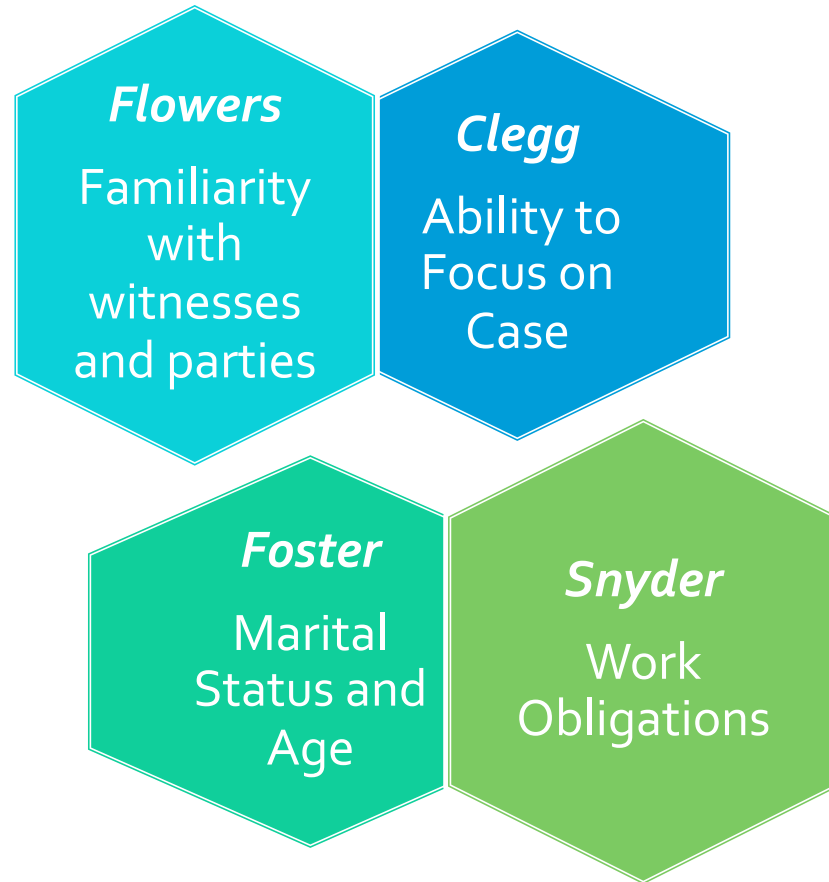


**“Potential jurors
are not products
of a set of
cookie cutters.”**

Miller-El v. Dretke, 545 U.S. 231, 247 n.6 (2005)



Example: Single Factors



Identical Jurors?

NC Supreme Court

“The trial court declined to adopt defendant’s suggested ‘single factor approach’ to compare the prospective jurors because that approach fails to consider each juror’s characteristics ‘as a totality.’ **Instead, the trial court adopted the State’s “whole juror” approach in its comparisons.**”

State v Hobbs, 884 S.E.2d 639 (2023) (emphasis added).

Clarence Thomas Dissent

“Similarly situated does not mean matching any one of several reasons the prosecution gave for striking a potential juror — **it means matching *all* of them.**”

Miller-El v. Dretke (Miller-El II), 545 U.S. 231, 291 (2005) (Thomas, J., dissenting) (emphasis added)

Historical Deference to Trial Court Rulings on Strikes Justified by Juror Demeanor

No error to permit strike explained by the following juror demeanor:

- *State v. White*, 349 N.C. 535 (1998) ("arms crossed")
- *State v. Robinson*, 336 N.C. 78, 95 (1994) ("arms folded")
- *State v. Lyons*, 343 N.C. 1, 12 (1996) ("leaning away")
- *State v. Smith*, 328 N.C. 99, 125 (1991) ("nervous")
- *State v. Floyd*, 115 N.C. App. 412, 415 (1994) ("head-strong")
- *State v. Gaines*, 345 N.C. 647, 668 (1997) ("softspoken")
- *State v. Bonnett*, 348 N.C. 417, 434 (1998) ("belligerent")
- *State v. Jackson*, 322 N.C. 251, 255 (1988) ("hostile")
- *State v. Locklear*, 349 N.C. 118, 139 (1998) ("smiling")



Evolving *Batson* Doctrine in North Carolina

- ***Skepticism Towards Demeanor Justifications:***
Observing that “demeanor-based explanations . . . are particularly susceptible to serving as pretexts for discrimination” and are “not immune from scrutiny or implicit bias.”
- *State v. Alexander*, 274 N.C. App. 31 (2020) (internal quotations omitted) *Batson remand, still ongoing

Reasons why *Batson* challenges aren't being made

1. Didn't think of it at the time
2. Didn't know the law well enough
3. Didn't think the judge would grant it
4. Didn't feel comfortable making objection

Reasons to object, anyway!

- Create appellate issue (no need to exhaust peremptories) – potential for new trial!
- Potential for a *Batson* remand
- Get future jurors passed by State in your case
- Strengthen later *Batson* objections
- Right thing to do/duty to the client

When to use Batson?

ALWAYS

Batson Motions

1. Record jury selection/complete recordation (15A-1241)
2. Record juror race (via questionnaire or self identify on record)
3. Motion Seeking Strike and *Batson* Hearing Procedures

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?

Batson's Three Step Framework

1. Prima facie case

2. Race neutral justification

3. Purposeful discrimination

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 stuck ____% 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.



State v. Richardson, 385 N.C. 101, 195 (2023)

“The North Carolina court system has a well-documented problem with Black citizens being disproportionately excluded from the fundamental civil right to serve on juries.”

WFU Jury Sunshine Project (2011)

Black/White Prosecutor Removal Ratios for Largest Cities in NC

Winston-Salem (Forsyth)	3.0
Durham (Durham)	2.6
Charlotte (Mecklenburg)	2.5
Raleigh (Wake)	1.7
Greensboro (Guilford)	1.7
Fayetteville (Cumberland)	1.7

How to collect data

Jury seating charts from past trials in your jurisdiction

Transcripts from jury selection

Questionnaires from case file

Affidavits from seasoned attorneys

Strike rate sheets – file away in your office for future cases

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).

Demo – Calculate Strike Rate & Make Objection!

Strike Ratio Worksheet

State v. _____

Date: _____

County: _____

Defense Counsel: _____

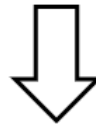
Prosecutor(s): _____

BLACK Venire Members

Peremptorily Struck by State

Your honor, the State has removed _____ Black jurors...

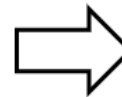
...out of _____ Black jurors available to them.

In other words, the state has removed
_____ % of Black jurors.**NON-BLACK Venire Members**

Peremptorily Struck by State

The State has removed _____ non-Black jurors...

...out of _____ non-Black jurors available to them.

In other words, the state has removed
_____ % of non-Black jurors.**Example**State struck 3 of 7 Black jurors:

3 divided by 7 = .42

Convert to percentage by moving
decimal to the right two spaces =
42%State struck 1 of 5 Non-Black jurors:

1 divided by 5 = .20

Convert to percentage by moving
decimal to the right two spaces =
20%

42 divided by 20 = 2.1 STRIKE RATIO

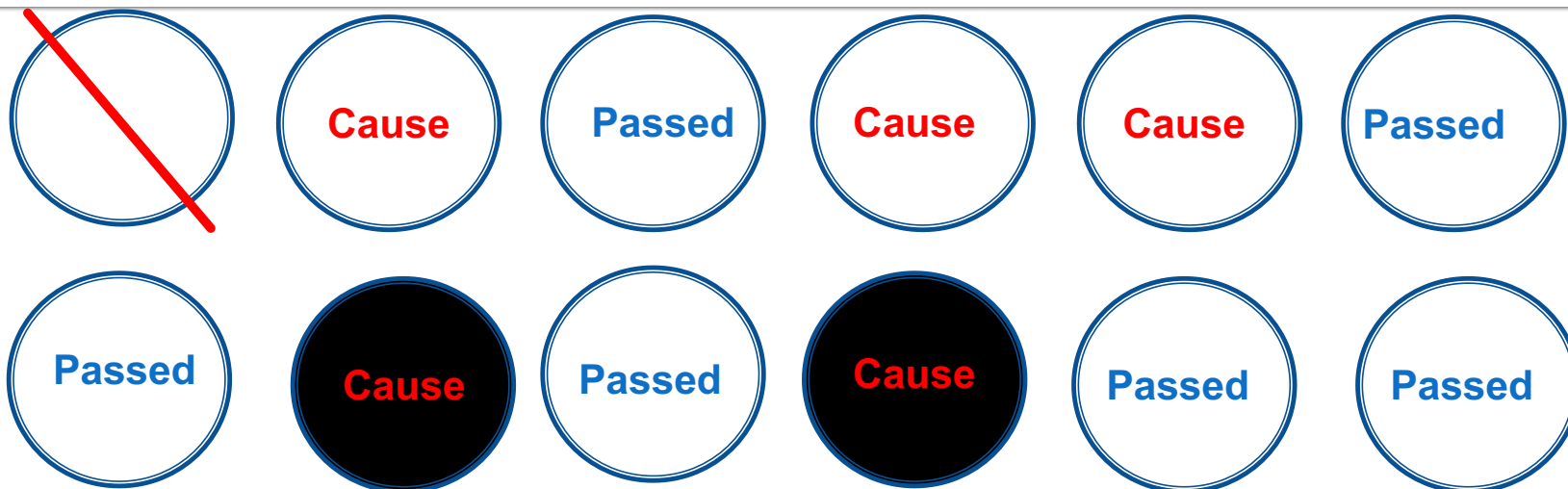
Strike RatioYour Honor, that means that
the State is removing Black
jurors at _____ times the rate
of non-Black jurors.

*Do not include jurors struck for cause in this count. Include a tally mark for each juror passed by the State and each juror struck by the State.

Caveat: Multiple Strike Rate Sheets

- Print out multiple sheets for your trial binder. Designate one for Black vs. Non-Black, Latino vs. Non-Latino, and Women vs. Non-Women (i.e. Men), and any other scenarios that may arise.

Panel 1 – strikes by the State



Strike Ratio Worksheet

State v. _____

Date: _____

County: _____

Defense Counsel: _____

Prosecutor(s): _____

BLACK Venire Members

Peremptorily Struck by State

Passed plus struck by the State*

NON-BLACK Venire Members

Peremptorily Struck by State

|

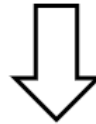
Passed plus struck by the State*

||||

Your honor, the State has removed _____ Black jurors...

...out of _____ Black jurors available to them.

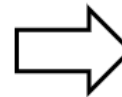
In other words, the state has removed _____% of Black jurors.



The State has removed _____ non-Black jurors...

...out of _____ non-Black jurors available to them.

In other words, the state has removed _____% of non-Black jurors.



Example

State struck 3 of 7 Black jurors:

3 divided by 7 = .42

Convert to percentage by moving decimal to the right two spaces = 42%

State struck 1 of 5 Non-Black jurors:

1 divided by 5 = .20

Convert to percentage by moving decimal to the right two spaces = 20%

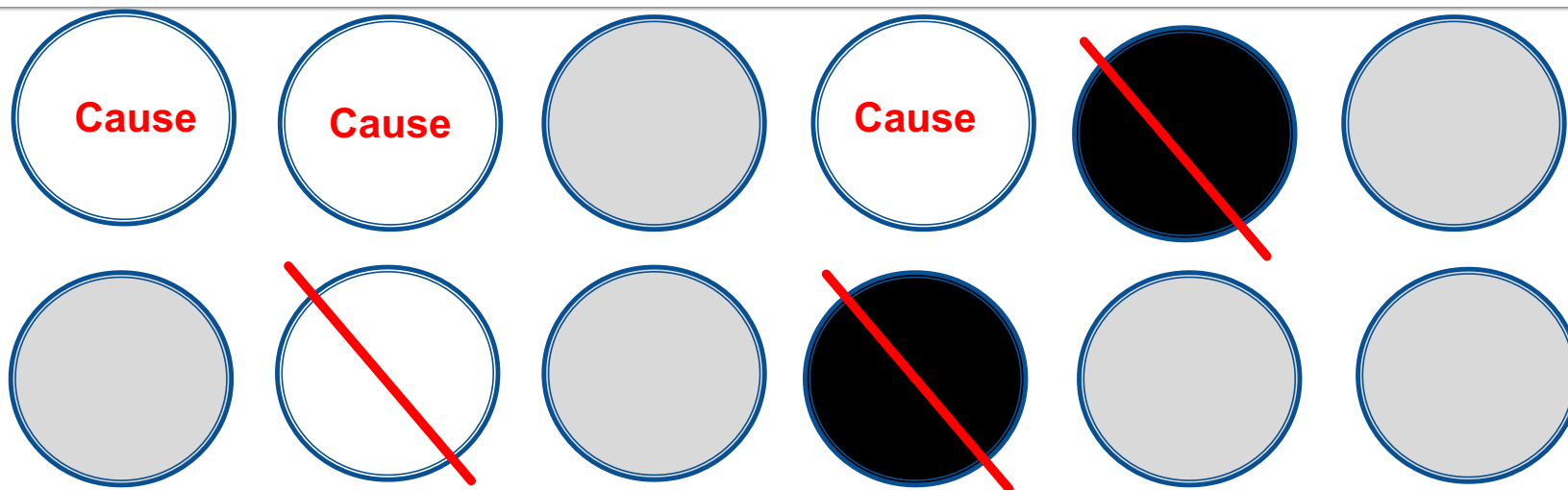
42 divided by 20 = 2.1 STRIKE RATIO

Strike Ratio

Your Honor, that means that the State is removing Black jurors at _____ times the rate of non-Black jurors.

*Do not include jurors struck for cause in this count. Include a tally mark for each juror passed by the State and each juror struck by the State.

Panel 2 – strikes by the State



Strike Ratio Worksheet

State v. _____

Date: _____
County: _____

Defense Counsel: _____
Prosecutor(s): _____

BLACK Venire Members

Peremptorily Struck by State
||

Passed plus struck by the State*
||

NON-BLACK Venire Members

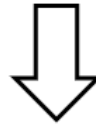
Peremptorily Struck by State
||

Passed plus struck by the State*
||||

Your honor, the State has removed 2 Black jurors...

...out of 2 Black jurors available to them.

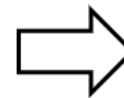
In other words, the state has removed
100 % of Black jurors.



The State has removed 2 non-Black jurors...

...out of 8 non-Black jurors available to them.

In other words, the state has removed
25 % of non-Black jurors.



Example

State struck 3 of 7 Black jurors:

3 divided by 7 = .42

Convert to percentage by moving decimal to the right two spaces =
42%

State struck 1 of 5 Non-Black jurors:

1 divided by 5 = .20

Convert to percentage by moving decimal to the right two spaces =
20%

42 divided by 20 = 2.1 STRIKE RATIO

Strike Ratio

Your Honor, that means that the State is removing Black jurors at 4 times the rate of non-Black jurors.

*Do not include jurors struck for cause in this count. Include a tally mark for each juror passed by the State and each juror struck by the State.


$$\frac{2}{2} \div \frac{2}{8} = 4$$

(100%) (25%)

Practice!

Step 1: Prima Facie Case

- State struck 2 of 8 qualified white jurors and 2 of 2 qualified Black jurors. Calculate the strike ratio!
- What else to say?

Step 2: Prosecutor's reasons

- Ms. Jeffreys -Black Woman. Worked as nurse aid at Dortehea Dix (record shows no other juror asked questions about work in mental health field).
- Ms. Aubrey - Black Woman - "I suppose so" in response to "can you be fair?" (record shows that she said that in response to "can you focus?"")
- Both: Failure to look at me when I was trying to communicate with them
- Both: body language

What does the record show?

- Mr Smith – white man, passed by the State, has a business and it will be difficult to serve, wasn't asked if he could focus
- Ms Fleming – white woman, passed by the State, has two children and child care issues, wasn't asked if she could focus
- Defense attorney did not observe inappropriate body language



Step 3: Response?

- Shifting reasons
- Reasons not supported by record
- Disparate questioning
- Non-specific reasons (gave reasons as to body language of both jurors collectively)
- Reasons based on demeanor and body language inherently suspect
- Did not observe the demeanor cited by prosecutor
- Repeat of the strike data



THE CENTER FOR DEATH PENALTY LITIGATION

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Batson Resources

Jury service is, along with voting, one of the few ways that citizens participate directly in democracy. It gives ordinary people a voice in the criminal punishment system and is an established civil right. Studies show that diverse juries deliberate more thoroughly and are less likely to convict innocent people.

Yet, courts across the country have tried and failed to stamp out jury discrimination since the Civil Rights Movement made it possible for Black people to finally begin serving on juries in the South. Even *Batson v. Kentucky*, a 1986 U.S. Supreme Court ruling that explicitly outlawed the race-based exclusion of jurors, has failed to change the fact that Black citizens are systematically denied their right to jury service.

In recent years, CDPL has made the enforcement of *Batson*, in both capital and non-capital cases, a key part of our work. We helped expose North Carolina's 30-year failure to enforce the law, and then pushed forward the [first case](#) in which a sentence was struck down because of discrimination against a juror of color. Most recently, the litigation of a *Batson* claim in the case of Henry White led to him being freed after 25 years in prison. We continue to litigate *Batson* claims in several other cases and to train attorneys around the state to challenge *Batson* violations in their own cases.

FOR ATTORNEYS:
[BATSON QUICK GUIDE](#)
[BATSON SAMPLE PLEADINGS](#)



A Batson challenge led to Henry White, center, being freed from prison after 25 years.

www.cdpl.org

- 
- ❖ WHEN to object?
 - ❖ Approach the bench pursuant to pre-established strike/hearing procedures
 - ❖ Make objection as soon as possible after objectionable strike, then renew
 - ❖ WHAT to say?
 - ❖ Strike ratio, CJA, historical data, put observations of demeanor on the record
 - ❖ WHAT remedy to seek?
 - ❖ When possible, seek seating of wrongly struck juror



[W]hen you see that [the defendant is] going to get stuck being judged by middle-aged white women, middle-aged white men, as a Black man, I didn't feel like that was—it kind of hurt me that I didn't get picked.

Questions?

Hannah: Hannah.b.autry@nccourts.org

Kailey: Kmorgan@cdpl.org