BATSON AFTER HOBBS AND BENNETT

Judge Robert C. Ervin

Superior Court Judges Conference
October 2020

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Peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.

Johnson v. California, 545 U. S. 162, 162 L. Ed. 2d 129 (2005); State v. Chapman, 359 N. C. 328, 611 S. E. 2d 794 (2005)

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In Batson v. Kentucky, the United States Supreme Court reaffirmed the principle first announced in 1880 that purposeful exclusion of African-Americans from participation as jurors solely on account of race violates a defendant's rights under the Equal Protection Clause of the United States Constitution.

State v. Chapman, 359 N. C. 328, 611 S. E. 2d 794 (2005).

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Article I, Section 26 of the North Carolina Constitution forbids the use of peremptory challenges for a racially discriminatory purpose.

State v. Gattis, 166 N. C. App 1, 601 S. E. 2d 205 (2004).

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ARE THE RULES DIFFERENT UNDER THE STATE AND FEDERAL CONSTITUTIONS?

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NO

Our review of discrimination during petit jury selection has been the same under both the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution.

State v. Waring, 364 N. C. 443, 701 S. E. 2d 615 (2010); State v. Maness, 363 N. C. 261, 677 S. E. 2d 796 (2009).

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WHAT TYPES OF DISCRIMINATION ARE PROHIBITED?

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BATSON EXTENDS TO:

GENDER DISCRIMINATION

J. E. B. v. Alabama, 511 U. S. 127, 128 L. Ed 2d 89 (1994); State v. Wiggins 159 N. C. App. 252, 584 S. E. 2d 303 (2003).

NATIVE AMERICANS

State v. Locklear, 349 N.C. 118, 505 S. E. 2d 277 (1998).

RELIGION

Article I, Section 26

NATIONAL ORIGIN

Article I, Section 26

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DOES BATSON APPLY TO CIVIL PROCEEDINGS?

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YES

We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

J. E. B. v. Alabama, 511 U. S. 127, 128 L. Ed. 2d 89 (1994)

By its plain terms, Article I, Section 26 prohibits the exclusion of persons from jury service for reasons of race. It makes no distinction between civil and criminal trials. We conclude that this section applies to the use of peremptory challenges in all cases, civil and criminal.

Jackson v. Housing Authority, 321 N.C. 584, 364 S. E. 2d 416 (1998).

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CAN THE STATE RAISE A BATSON OBJECTION?

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YES

Batson has been expanded to prohibit not only the State, but also criminal defendants, from engaging in purposeful racial discrimination in the exercise of peremptory challenges.

State v. Cofield, 129 N. C. App. 268, 498 S. E. 2d 823 (1998)

Our court has made clear that the State may also raise a Batson challenge to a defendant's use of peremptory challenges, sometimes referred to as a "reverse Batson" objection.

State v. Hurd, 246 N. C. App. 281, 784 S. E. 2d 528 (2016)

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WHO HAS STANDING TO RAISE A BATSON CHALLENGE?

- Can a white defendant object to a challenge of an African-American prospective juror?
- Can a female defendant object to a challenge of a male prospective juror?

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YES

The Supreme Court of the United States has ruled that a white defendant has standing to raise a challenge to the exclusion of blacks from his jury.

State v. Payne, 327 N. C. 194, 394 S. E. 2d 158 (1990), citing Holland v. Illinois, 493 U. S.474, 107 L. Ed 2d 905 (1990).

A defendant also has standing to complain that a prosecutor has used the State's peremptory challenges in a racially discriminatory manner even if there is no racial identity between the defendant and the challenged juror. Thus, defendant, although Native American, is not prohibited from challenging the excusal of black prospective jurors on the basis of race.

State v. Locklear, 349 N. C. 118, 505 S. E. 2d 277 (1998).

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DOES BATSON APPLY TO CHALLENGES FOR CAUSE?

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BATSON APPLIES ONLY TO PEREMPTORY CHALLENGES; NOT CHALLENGES FOR CAUSE.

State v. Norwood, 344 N.C. 511, 476 S. E. 2d 349 (1996).

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WHAT IS THE PURPOSE OF THE RULE IN BATSON?

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BATSON PROTECTS A DEFENDANT'S RIGHT TO A JURY OF HIS OR HER PEERS.

Purposeful racial discrimination in selection of the venire violates a defendant's right to Equal Protection because it denies him the protection that a trial by jury is intended to secure. The very idea of a jury is a body composed of peers or equals of a person whose rights it is selected or summoned to determine.

Batson v. Kentucky, 476 U. S. 79, 90 L. Ed 2d 69 (1986).

Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by an impartial jury.

Miller-El v. Dretke, 545 U. S. 231, 162 L. Ed 2d 196 (2005).

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BATSON PROTECTS THE RIGHTS OF JURORS TO SERVE.

We have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures.

J. E. B. v. Alabama, 511 U. S. 127, 128 L. Ed 2d 89 (1994).

It reaffirms the promise of equality under the law – that all citizens, regardless of race, ethnicity or gender have the chance to take part directly in our democracy.

J. E. B. Alabama, 511 U.S. 127 (1994).

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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, 588 U. S. ____, 204 L. Ed 2d 638 (2019).

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BATSON SAFEGUARDS THE JUDICIAL SYSTEM.

Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

Batson v. Kentucky, 476 U. S. 79, 90 L. Ed 2d 69 (1986).

When persons are excluded from participation in our democratic processes solely because of their race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.

J. E. B. v. Alabama, 511 U. S. 127, 128 L. Ed. 2d 89 (1994**).**

The very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality and undermines public confidence in adjudication.

Miller-El v. Dretke, 545 U. S. 231, 162 L. Ed. 2d 196 (2005).

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WHAT IS THE BATSON TEST?

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In Batson, the United States Supreme Court set out a three-part test to determine whether a prosecutor has impermissibly used peremptory challenges to excuse prospective jurors on the basis of race:

First, the party raising the claim must make a prima facie showing of intentional discrimination under the totality of the relevant facts in the case.

State v. Bennett, 374 N. C. 579 (S. Ct. June 5, 2020)

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SECOND…

If such a showing is made, the burden shifts to the State to present a race-neutral explanation for the challenge.

State v. Bennett, 374 N. C. 579 (S. Ct. June 5, 2020)

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THIRD…

The trial court must then determine whether the defendant has met the BURDEN OF PROVING PURPOSEFUL DISCRIMINATION.

State v. Bennett, 374 N. C. 579 (S. Ct. June 5, 2020)

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BEFORE DISCUSSING THE THREE-PART TEST, another issue arises:

HOW DOES A PARTY PROVE THE RACE, SEX OR NATIONAL ORIGIN OF A JUROR?

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In order to preserve a Batson challenge for purposes of appellate review, an appellant must make a record which shows the race of the challenged juror.

State v. Bennett, 374 N. C. 579 (S. Ct. May 1, 2020).

ALL OUR SUPREME COURT REQUIRES IS PROPER EVIDENCE OF THE RACE OF EACH JUROR.

State v. Brogden, 329 N. C. 534, 407 S. E. 2d 158 (1991)

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WHAT IS NOT SUFFICIENT PROOF OF THE RACE OR SEX OF PROSPECTIVE JURORS?

THE OBSERVATIONS OF THE COURT REPORTER.

State v. Bennett, 374 N. C. 579 (S. Ct. June 5, 2020)

The Court properly denied a motion to have the court reporter note the race of the jurors.

(Popcorn Princess)

State v. Mitchell, 321 N. C. 650, 365 S. E. 2d 554 (1988)

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UNCHALLENGED AFFIDAVIT OF AN ATTORNEY. State v. Payne, 327 N C. 194, 394 S. E. 2d 158 (1990).

That affidavit, however, contained only the perception of one of the defendant's lawyers concerning the races of those excused – perceptions no more adequate than the court reporter's or the clerk's would have been.

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WHO WAS THE ATTORNEY WHO WAS UNQUALIFIED TO ACCURATELY PERCEIVE SUCH MATTERS?

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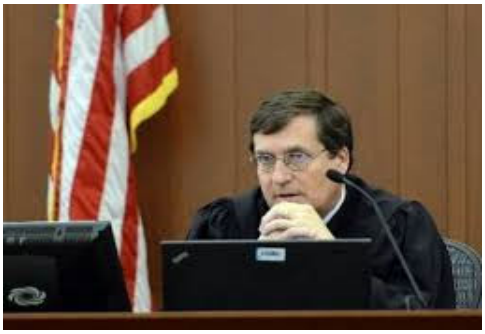

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WHAT ARE SOME PROPER WAYS TO ESTABLISH THE RACE OF JURORS?

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JUROR QUESTIONNAIRES

ASKING THE JURORS ON THE RECORD. State v. Bennett, 374 N. C. 579 (S. Ct. June 5, 2020).

If there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence.

State v. Bennett, 374 N. C. 579 (S. Ct. June 5, 2020); State v. Mitchell, 321 N.C. 65, 365 S. E. 2d 554 (1988).

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The Supreme Court of North Carolina decided State v. Bennett and clarified the record necessary to permit appellate review of a BATSON claim.

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In State v. Bennett, 374 N.C. 579 (S. Ct. June 5, 2020)

THERE WERE NO QUESTIONNAIRES USED.

NO ONE ASKED THE JURORS TO IDENTIFY THEMSELVES BY RACE OR GENDER.

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DURING THE HEARING ON THE BATSON MOTION, the following statements were made:

DEFENSE ATTORNEY:	The two jurors challenged were “black jurors” or of African-American descent.
DISTRICT ATTORNEY:	Referred to “the fact” that both jurors happened to be African-American.
TRIAL COURT:	Said it “seems to me that you excused two but kept three African-Americans.”

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DISTRICT ATTORNEY:	Identified three African-Americans that he had accepted.
TRIAL COURT:	Found that five African-American jurors were called and that three remained in the panel.

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THE SUPREME COURT concluded in Bennett that these various statements constituted an implied STIPULATION OF THE RACE OF THE JURORS AT ISSUE and that this record was sufficient to permit the Court to consider the BATSON CLAIM.

THE NO OSTRICH RULE:

APPELLATE COURTS SHOULD NOT BE REQUIRED TO STICK THEIR HEAD IN THE SAND AND IGNORE WHAT EVERYONE KNOWS.

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WHAT IS A PRIMA FACIE CASE?

HOW HARD IS IT TO ESTABLISH?

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Step One of the Batson analysis is not intended to be a high hurdle for defendants to cross.

State v. Bennett, ____ N. C. ___ (S. Ct. June 5, 2020); State v. Hobbs, ___ N. C. ____ (S. Ct. May 1, 2020)

The burden of presenting a prima facie showing that the State exercised a race-based peremptory challenge is a low hurdle for defendants.

State v. McQueen, 249 N. C. App 543, 790 S. E. 2d 897 (2016).

The showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for the challenge.

State v. Bennett, ___ N. C. ___ (S. Ct. June 5, 2020); State v. Hobbs, ____N. C. _____, (S. Ct. May 1, 2020)

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HOWEVER A DEFENDANT MUST MAKE SOME SHOWING SUGGESTIVE OF RACE DISCRIMINATION. State v. Gattis, 166 N. C. App. 1, 601 S. E. 2d 205 (2004).

A prima facie case can be made out by offering a wide variety of evidence so long as the sum of the proffered facts gives rise to an inference of discriminatory purpose.

Johnson v. California, 545 U. S. 162, 162 L. Ed 2d 129 (2005).

A defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

State v. Bennett, 374 N. C. 579 (S. Ct. June 5, 2020); State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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CAUTION:

A court should not attempt to determine whether a prosecutor has actually engaged in impermissible purposeful discrimination at the first step of the Batson inquiry.

State v. Bennett, 374 N. C. 579 (S. Ct. June 5, 2020)

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DOES THE OBJECTING PARTY HAVE TO MAKE A SHOWING THAT DISCRIMINATION IS MORE LIKELY THAN NOT?

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We conclude that California's more likely than not standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case.

Johnson v. California, 545 U. S. 162, 162 L. Ed 2d 129 (2005).

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WHAT EVIDENCE DO I CONSIDER IN DETERMINING WHETHER THE OBJECTING PARTY HAS MADE A PRIMA FACIE CASE?

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In making this showing, a defendant is entitled to rely on ALL RELEVANT CIRCUMSTANCES to raise an inference of purposeful discrimination.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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Relevant circumstances include, but are not limited to:

- RACE OF THE DEFENDANT
- RACE OF THE VICTIM
- RACE OF THE KEY WITNESSES
- PROSECUTOR'S QUESTIONS TO JURORS
- PROSECUTOR'S STATEMENTS
- A PATTERN OF STRIKES AGAINST PARTICULAR JURORS
- STATE'S USE OF A DISPROPORTIONATE NUMBER OF STRIKES AGAINST MINORITIES
- THE ACCEPTANCE RATE OF PARTICULAR JURORS
- HISTORICAL EVIDENCE OF DISCRIMINATION IN A JURISDICTION

State v. Bennett, 374 N. C. 579 (S. Ct. June 5, 2020); State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020); State v. Augustine, 359 N. C. 709, 616 S. E. 2d 515 (2005)

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SOME CASES ADD:

WHETHER THE STATE USED ALL OF ITS PEREMPTORY CHALLENGES

THE ULTIMATE MAKE-UP OF THE JURY

State v. Wiggins, 159 N. C. App. 300, 584 S. E. 2d 303 (2003)

SINCE THIS ISSUE ARISES IN THE MIDDLE OF JURY SELECTION, THESE CONSIDERATIONS OFTEN AREN'T KNOWN.

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RACE OR SEX OF THE PARTICIPANTS

That a defendant is African-American and the murder victim is white does not standing alone establish a prima facie case of discrimination.

State v. Taylor, 362 N. C. 514, 669 S. E. 2d 239 (2008).

Racial identity between the defendant and the excused person might in some cases be an explanation for the prosecution's adoption of the forbidden stereotype and thus is a legitimate factor for the court to consider.

State v. Locklear, 349 N. C. 118, 505 S. E. 2d 277 (1998).

The shared race of the involved parties tends to contradict an inference of purposeful discrimination.

State v. Chapman, 358 N. C. 328, 611 S. E. 2d 794 (2005)

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THE NATURE OF THE QUESTIONING MAY BE IMPORTANT.

In a capital case, the State had two distinct lines of questioning about the method of execution. One was a bland description of the death penalty. Another was a graphic script describing the method of execution in rhetorical and clinical detail.

94% of white jurors were given the bland description before they were asked about the death penalty. 53% of the black jurors were given the graphic script before they were asked about the death penalty.

THE REASONABLE INFERENCE IS THAT RACE WAS A MAJOR CONSIDERATION WHEN THE PROSECUTION CHOSE TO FOLLOW THE GRAPHIC SCRIPT.

Miller-El v. Dretke, 545 U. S. 231, 162 L. Ed 2d 196 (2005)

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NUMBER OF QUESTIONS ASKED:

The State asked the five black prospective jurors who were struck a total of 145 questions. By contrast, the State asked the 11 seated white jurors a total of 12 questions. On average, therefore, the State asked 29 questions to each struck black prospective juror. The State asked an average of one question to each seated white juror.

Flowers v. Mississippi, 588 U. S. ____, 204 L. Ed 2d 638 (2019).

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THE USE OF THE FIRST PEREMPTORY CHALLENGE AGAINST AN AFRICAN-AMERICAN JUROR DOES NOT ESTABLISH A PATTERN.

State v. Waring, 364 N. C. 443, 701 S. E. 2d 615 (2010)

"To the extent that the trial court's remark indicates a belief that a pattern must be shown to establish a violation of Batson, the trial court was incorrect. The excusal of a single juror for a racially discriminatory reason is impermissible."

State v. Gattis, 166 N. C. App. 1, 601 S. E. 2d 205 (2004).

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FEWER CHALLENGES AGAINST A PARTICULAR GROUP MAKES IT MORE DIFFICULT FOR A DEFENDANT TO ESTABLISH A PATTERN OF STRIKES INDICATING PURPOSEFUL DISCRIMINATION.

State v. Wiggins, 159 N. C. App. 252, 584 S. E. 2d 303 (2003).

RELIANCE UPON STATISTICS MAY BE MEANINGLESS WHEN THE JURY POOL CONTAINS ONLY ONE OR TWO AFRICAN-AMERICANS.

State v. Headen, 206 N. C. 109, 697 S. E. 2d 407 (2010).

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NUMERICAL ANALYSIS – PATTERNS OF STRIKES AND ACCEPTANCE RATES

NUMBERS DO NOT TELL THE WHOLE STORY.

State v. Chapman, 359 N. C. 328, 611 S. E. 2d 794 (2005).

WHILE NUMERICAL ANALYSIS OF THE PEREMPTORY CHALLENGES USED MAY BE USEFUL IN THE BATSON ANALYSIS, IT IS NOT DISPOSITIVE.

State v. Mills, 225 N. C. App 773, 741 S. E. 2d 427 (2013)

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AN EXAMPLE CAN GIVE YOU SOME IDEA HOW STATISTICS COULD BE IMPORTANT.

Out of 20 African-American members of the 108 person venire panel, only 1 served as a juror. Although 9 were excused for cause or by agreement, 10 were peremptorily challenged by the prosecution. The prosecutors used their peremptory strikes to excuse 90% of the eligible African-American venire members. **HAPPENSTANCE IS UNLIKELY TO PRODUCE THIS DISPARITY.**

Miller-El v. Dretke, 545 U. S. 231, 162 L. Ed 2d 196 (2005).

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WHAT KIND OF AN ACCEPTANCE RATE TENDS TO SHOW A DISCRIMINATORY INTENT?

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A showing that more jurors of one race were peremptorily challenged than jurors of another race does not, standing alone, establish a prima facie case of racial discrimination.

State v. Cofield, 129 N. C. App. 268, 498 S. E. 2d 823 (1998).

The Supreme Court has held that a defendant failed to establish a prima facie case of discrimination where the minority acceptance rate was 66%, 50%, 42.8%, and 37.5%. These rates have been deemed indicative of a lack of discriminatory intent.

State v. Taylor, 362 N. C. 514, 669 S. E. 2d 239 (2008); State v. Barden, 356 N. C. 316, 572 S. E. 2d 108 (2002).

A rate of 28.6% has been deemed suggestive of such an intent. In Barden, the trial court found no prima facie case and the Supreme Court concluded that the trial court erred in that determination.

State v. Barden, 356 N. C. 316.

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ANSWERS OF JURORS TO QUESTIONS ARE AVAILABLE.

This Court has held that responses of prospective jurors during voir dire are relevant circumstances which may be considered to determine whether a defendant has established a prima facie showing under Batson.

State v. Chapman, 359 N. C. 328, 611 S. E. 794 (2005)

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THE SUPREME COURT ADDRESSED WHAT IS SUFFICIENT TO CONSTITUTE A PRIMA FACIE CASE IN STATE v. BENNETT, 374 N. C. 579 (S. Ct. June 5, 2020)

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THE EVIDENCE BEFORE THE COURT IN BENNETT SHOWED:

- The State had questioned 5 African –American jurors.
- The State had passed 3 of those 5 jurors for an acceptance rate of 60%.
- The State had challenged 2 of those 5 jurors for a strike rate of 40%.
- The State had passed on 9 white jurors for an acceptance rate of 100%.
- The State had challenged no white jurors for a strike rate of 0%.

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THE RECORD IN BENNETT also included:

- No identification of the race of the defendant.
- No victim since Bennett was a meth case.
- No indication of the race of the key witnesses.
- No reference to discriminatory statements by the District Attorney.
- No indication that the State was questioning jurors of different races differently.

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THE SUPREME COURT detailed the answers given by the two African-American jurors who were excused by peremptory challenges and compared them with the answers given by the white juror who replaced them and who was accepted by the State.

THE SUPREME COURT referred to:

- THE ABSENCE OF ANY SIGNIFICANT DISSIMILARITY BETWEEN THE ANSWERS GIVEN BY THE JURORS AT ISSUE.
- THE ABSENCE OF ANY IMMEDIATELY OBVIOUS JUSTIFICATION FOR THE CHALLENGES.
- THE ANSWERS OF THE TWO STRUCK JURORS DID NOT CAST ANY DOUBT ON THEIR ABILITY TO BE FAIR AND IMPARTIAL.

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The Supreme Court held in State v. Bennett, 374 N.C. 579 (S. Ct. June 5, 2020)

- THAT THE TRIAL COURT'S DETERMINATION THAT THE DEFENDANT HAD FAILED TO MAKE OUT THE REQUIRED PRIMA FACIE CASE WAS CLEARLY ERRONEOUS.

The Supreme Court further noted that:

- ACCEPTANCE RATES STANDING ALONE DO NOT SUFFICE TO PRECLUDE A FINDING THAT A DEFENDANT MADE A PRIMA CASE SHOWING.

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DOES THE REQUIREMENT THAT THE DEFENDANT MAKE A PRIMA FACIE SHOWING MEANINGFULLY EXIST ANYMORE?

IT IS CLEAR AFTER STATE v. BENNETT THAT THE THRESHOLD IS NOW LOW.

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WHAT HAPPENS IF YOU FIND THAT THE OBJECTING PARTY HAS MADE A PRIMA FACIE SHOWING DISCRIMINATION?

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If a defendant has made a prima facie showing, the analysis proceeds to the second step where the State is required to provide race-neutral reasons for its use of a peremptory challenge.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

If a prima facie case of gender-based discriminatory dismissal is established, the burden shifts to the prosecutor to articulate a gender-neutral explanation.

State v. Maness, 363 N. C. 261, 677 S. E. 2d 796 (2009).

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WHAT HAPPENS IF YOU CONCLUDE THAT THE PARTY FAILED TO ESTABLISH A PRIMA FACIE CASE?

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If a prima facie case is not established, then the peremptory challenge will stand.

State v. Matthews, 162 N. C. App. 339, 595 S. E. 2d 446 (2004).

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WHAT HAPPENS IF YOU ASK THE STRIKING PARTY TO STATE THEIR REASONS FOR EXERCISING THE CHALLENGES BEFORE MAKING THIS DETERMINATION?

WHAT HAPPENS IF THE STRIKING PARTY VOLUNTEERS ITS REASONS BEFORE YOU RULE ON THE PRIMA FACIE CASE?

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IF THE TRIAL COURT REQUIRES THE PROSECUTOR TO GIVE HIS REASONS WITHOUT RULING ON THE QUESTION OF A PRIMA FACIE SHOWING, THE QUESTION OF WHETHER THE DEFENDANT HAS MADE A PRIMA FACIE SHOWING BECOMES MOOT.

State v. Littlejohn 158 N. C. App 628, 582 S. E. 2d 301 (2003).

WHETHER DEFENDANT ESTABLISHED A PRIMA FACIE CASE IS MOOT AS THE PROSECUTOR VOLUNTEERED HIS REASONS FOR THE PEREMPTORY CHALLENGES.

State v. Wright, 189 N. C. App. 346, 658, S. E. 2d 60 (2008).

IF THIS HAPPENS, THE ANALYSIS JUMPS TO STEP THREE.

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What happens if you find that no prima facie case exists, then ask the State to explain its strikes and then rule on the validity of those explanations?

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If that occurs, the finding of no prima facie case is ignored and the case is evaluated as having proceeded to the third step.

The prima facie case ruling becomes moot.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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WHAT IS THE STATE REQUIRED TO SHOW AT THE SECOND STEP?

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COUNSEL'S EXPLANATION NEED NOT RISE TO THE LEVEL JUSTIFYING A CHALLENGE FOR CAUSE.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020), State v. Maness, 363 N. C. 261, 677 S. E. 2d 796 (2009); State v. Matthews, 162 N. C. App. 339, 595 S. E. 2d 446 (2004).

THE EXPLANATION NEEDS TO BE CLEAR AND REASONABLY SPECIFIC.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020), State v. Locklear, 349 N. C. 118, 505 S. E. 2d 277 (1998); State v. James, 230 N. C. App. 346, 750 S. E. 2d 881 (2013).

THE EXPLANATION NEEDS TO BE RELATED TO THE PARTICULAR CASE TO BE TRIED.

State v. James. 230 N. C. App 346, 750 S. E. 2d 851 (2013); State v. Headen, 206 N. C. App. 109, 697 S. E. 2d 407 (2010).

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THE EXPLANATION:

NEED NOT BE PERSUASIVE OR EVEN PLAUSIBLE.

State v. Pender, 218 N. C. App. 233, 720 S. E. 2d 836 (2012); State v. Matthews, 162 N. C. App. 339, 595 S. E. 2d 446 (2004).

MAY BE BASED ON LEGITIMATE HUNCHES OR PAST EXPERIENCE.

State v. Pender, 218 N. C. App. 233, 720 S. E. 2d 836 (2013); State v. Littlejohn, 158 N. C. App. 628, 582 S. E. 2d 301 (2003).

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UNLESS DISCRIMINATORY INTENT IS INHERENT IN THE CHALLENGING ATTORNEY'S EXPLANATION, THE REASON OFFERED WILL BE DEEMED RACE-NEUTRAL AT THIS SECONDARY STAGE OF THE INQUIRY.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020), State v. Pender, 218 N. C. App. 233. 720 S. E. 2d 836 (2012); State v. Matthews, 162 N. C. App. 339, 595 S. E. 2d 446 (2004).

THE ISSUE AT THIS STAGE IS MERE FACIAL VALIDITY, AND ABSENT A DISCRIMINATORY INTENT, WHICH IS INHERENT IN THE REASON, THE EXPLANATION GIVEN WILL BE DEEMED RACE-NEUTRAL.

State v. Carter, 212 N. C. App. 516, 711 S. E. 2d 515 (2011); State v. McClain, 169 N. C. App. 657, 610 S. E. 2d 783 (2005).

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WHAT DOES A DEFICIENT EXPLANATION LOOK LIKE?

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The prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption or his intuitive judgment that they would be partial to the defendant because of their shared race.

Batson v. Kentucky, 476 U. S. 79, 90 L. Ed 2d 69 (1986).

Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selections.

Batson v. Kentucky, 476 U. S. 79, 90 L. Ed 2d 69 (1986).

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ANOTHER EXAMPLE

Striking a potential juror from a jury pool because another attorney exercised a peremptory challenge against the juror in a previous unrelated case without further explanation from the challenging attorney in the present case does not articulate a legitimate reason that is reasonably specific and related to the particular case to be tried.

State v. Matthews, 162 N. C. App. 339. 595 S. E. 2d 446 (2004).

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WHAT IS GOING ON AT STEP TWO?

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Even if the State produces only a frivolous or utterly nonsensical justification for the strike, the case does not end – it proceeds to step three. The first two Batson steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim.

Johnson v. California, 545 U. S. 162, 162 L. Ed 2d 129 (2005); State v. Hobbs, 374 N. C . 345 (S. Ct. May 1, 2020.)

THE VALIDITY OR MERITS OF THE EXPLANATION IS CONSIDERED AT STEP THREE.

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ONE PRACTICAL POINTER FOR STEP TWO

WHAT HAPPENS IF THE DEFENDANT QUESTIONS THE CHALLENGES TO 7 JURORS AND THE STATE ONLY OFFERS EXPLANATIONS FOR 5 OF THE STRIKES?

THE PLAIN LANGUAGE OF THIS COURT REQUIRES THE PROSECUTION TO OFFER A RACE-NEUTRAL EXPLANATION FOR EACH PEREMPTORY CHALLENGE AT ISSUE.

THE COURT CANNOT ASSESS THE VALIDITY OF THE EXPLANATION FOR THE STRIKE IF REASONS ARE NOT OFFERED.

State v. Wright, 189 N. C. App 346, 658 S. E. 2d 60 (2008).

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WHAT HAPPENS AT THE STEP THREE?

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Batson, of course, explicitly stated that the defendant ultimately carries the burden of persuasion to prove the existence of purposeful discrimination.

The burden of persuasion rests with and never shifts from the opponent of the strike.

Johnson v. California, 545 U.S. 162, 162 L. Ed 2d 129 (2005); State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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The objecting party has a right of sur-rebuttal to show that the State's race-neutral reasons are a pretext.

State v. Locklear, 349 N. C. 118, 505 S. E. 2d 277 (1998); State v. McQueen, 249 N. C. App. 543 790 S. E. 2d 897 (2019).

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CAN THE OBJECTING PARTY QUESTION THE LAWYERS EXERCISING THE STRIKE?

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NO.

We hold a defendant who makes a Batson challenge does not have the right to examine the prosecuting attorney.

State v. Jackson, 322 N. C. 251, 368 S. E. 2d 838 (1998).

Presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross-examination.

State v. Jackson, 322 N. C. 251.

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WHAT EVIDENCE IS CONSIDERED AT STEP THREE?

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FOR STARTERS, ALL OF THE FACTS PERTINENT TO THE PRIMA FACIE CASE APPLY.

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AT STEP THREE, YOU ALSO NOW HAVE AN EXPLANATION OF WHY THE CHALLENGE WAS EXERCISED.

This is the stage where the persuasiveness of the justification offered by the State becomes relevant.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020), State v. Headen, 206 N. C. App. 109, 697 S. E. 2d 407 (2010).

The prosecution's proffer of a pretextual explanation naturally gives rise to an inference of discriminatory intent. At the third stage, implausible or fantastic justifications may and probably will be found to be pretexts for purposeful discrimination.

Snyder v. Louisiana, 552 U. S. 472, 170 L. Ed 2d 175 (2008).

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When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent.

Flowers v. Mississippi, 588 U. S. ____, 204 L. Ed 2d 638 (2019); State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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COMPARATIVE ANALYSIS

If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise similar non-black panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.

Foster v. Chatman, 578 U. S. ____, 195 L. Ed. 2d 1 (2018); State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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We are mindful that more powerful than bare statistics, however, are the side-by-side comparisons of some black venire panelists who were struck, and white panelists allowed to serve.

State v. Waring, 364 N. C. 443, 701 S. E. 2d 615 (2010).

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In attempting to show that the State's explanation was pretextual, a defendant may proceed by showing that the reasons presented pertained just as well to some white jurors who were not challenged and who did serve on the jury.

State v. Headen, 206 N. C. App 109, 697 S. E. 2d 407 (2010).

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THE COURT'S OWN EXPLANATION SHOULD NOT BE CONSIDERED.

If the stated reason does not hold up, it's pretextual significance does not fade because a trial judge or an appeals court can imagine a reason that might not have been shown up as false.

Miller-El Dretke, 545 U. S. 231, 162 L. Ed 2d 196 (2005).

A Batson challenge does not call for a mere exercise in thinking up any rational basis.

State v. Waring, 364 N. C. 443, 701 S. E. 2d 615 (2010).

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CAN YOU RELY ON YOUR OWN EXPERIENCE?

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YES

The defendant contends the trial court erred by considering its past experience… We disagree. The trial court's experience bolsters its ability to discern matters like this.

State v. Hurd, 246 N. C. 281, 784 S. E. 2d 528 (2016).

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CAN YOU CONSIDER THE CREDIBILITY AND DEMEANOR OF THE ATTORNEY EXERCISING THE CHALLENGE?

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ABSOLUTELY.

Step three of the Batson inquiry involves an evaluation of the prosecutor's credibility and the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge.

Snyder v. Louisiana, 552 U. S. 472, 170 L. Ed 2d 175 (2008).

The trial court is in the best position to judge the prosecutor's credibility.

State v. McClain, 169 N. C. App. 657, 610 S. E. 2d 783 (2005).

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ARE THERE ACCEPTED RACE-NEUTRAL REASONS FOR EXERCISING PEREMPTORY CHALLENGES?

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YES.

SOME REASONS WHICH HAVE BEEN RECOGNIZED BY THE APPELLATE COURTS INCLUDE:

RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY – State v. McQueen, 249 N. C. App. 543, 790 S. E. 2d 897 (2016); State v. McClain, 169 N. C. 657, 610 S. E. 2d 783 (2005).

THE JUROR'S OWN OR A RELATIVE'S CRIMINAL HISTORY OR RELATIVES IN PRISON – State v. Locklear, 349 N. C. 118, 505 S. E. 2d 277 (1998); State v. McQueen, 249 N. C. App. 543

UNDUE SYMPATHY TOWARDS THE DEFENDANT – State v. Bell, 359 N. C. 1, 603 S. E. 2d 93 (2004).

KNOWING THE DEFENDANT – State v. Moore, 167 N. C. App. 495, 606 S. E. 2d 127 (2004).

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CAN I CONSIDER REASONS OFFERED THAT ARE BASED ON THE DEMEANOR OF THE JUROR AT ISSUE?

WHAT IF THE PROSECUTOR SAYS:

The juror was not paying attention…

The juror would not look us in the eyes…

The juror appeared nervous…

The juror appeared hostile to us…

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DO I HAVE TO OBSERVE THE BEHAVIOR MYSELF?

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NO.

Neither Snyder nor Batson held that a demeanor-based explanation for a peremptory challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor.

Thaler v. Haynes, 559 U. S. 43, 175 L. Ed. 2d 1003 (2010).

In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor making the trial court's first-hand observations of even greater importance. In this situation the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.

Snyder v. Louisiana, 552 U. S. 472, 170 L. Ed. 2d 175 (2008).

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TWO SUGGESTIONS FOR JUROR DEMEANOR EXPLANATIONS

KEEP YOUR EYES OPEN FOR JUROR BEHAVIOR.

BE SKEPTICAL!

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THE ULTIMATE DECISION IS MADE CONSIDERING THE TOTALITY OF ALL OF THE CIRCUMSTANCES BEARING ON THE ISSUE.

Snyder v. Louisiana, 552 U. S. 472, 170 L. Ed 2d 175 (2008).

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TO WHAT EXTENT DOES THE CHALLENGING PARTY'S DECISION HAVE TO BE BASED ON RACE TO VIOLATE BATSON?

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IT IS ENOUGH TO RECOGNIZE THAT A PEREMPTORY STRIKE SHOWN TO HAVE BEEN MOTIVATED IN SUBSTANTIAL PART BY DISCRIMINATORY INTENT CAN NOT BE SUSTAINED.

Snyder v. Louisiana, 552 N. C. 472, 170 L. Ed 2d 175 (2008).

The third step in a Batson analysis is the less stringent question whether the defendant has shown race was significant in determining who was challenged and who was not.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020); State v. Waring, 364 N. C. 443, 701 S. E. 2d 615 (2010).

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THE TRIAL COURT MUST MAKE SPECIFIC FINDINGS OF FACT AT EACH STAGE OF THE BATSON INQUIRY.

State v. Carter, 212 N. C. App. 516, 711 S. E. 2d 515 (2011).

A summary denial of a Batson challenge recently was remanded to the trial court for factual findings.

State v. Hood, (Court of Appeals September 1, 2020).

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WHAT HAPPENS IF YOU DETERMINE THAT A PARTY VIOLATED BATSON?

WHAT IS THE REMEDY?

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DO YOU FORCE THE PARTY TO ACCEPT THE JURORS THEY ATTEMPTED TO STRIKE?

DO YOU START JURY SELECTION AGAIN WITH A NEW PANEL?

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AS BATSON VIOLATIONS WILL ALWAYS OCCUR AT AN EARLY STAGE OF THE TRIAL BEFORE ANY EVIDENCE HAS BEEN INTRODUCED, THE SIMPLER, AND WE THINK FAIRER, APPROACH IS TO BEGIN THE JURY SELECTION ANEW WITH A NEW PANEL OF PROSPECTIVE JURORS WHO CANNOT HAVE BEEN AFFECTED BY ANY PRIOR BATSON VIOLATION.

State v. McCollum, 334 N. C. 208, 433 S. E. 2d 144 (1993).

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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 EITHER 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.

State v. McCollum, 334 N. C. 208, 433 S. E. 2d 144 (1993).

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ANOTHER SUGGESTION – HAVE THE PARTIES PASS EACH OTHER A NOTE BEFORE THEY ATTEMPT TO EXERCISE A STRIKE SO THAT THE BATSON OBJECTION CAN BE MADE OUTSIDE THE PRESENCE OF THE JURY AND THE JURORS REMAIN UNAWARE OF THE ATTEMPTED STRIKE.

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WHAT IS THE STANDARD OF REVIEW FOR TRIAL COURT RULINGS ON BATSON ISSUES?

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The trial court's ruling will be sustained unless it is clearly erroneous.

State v. Waring, 364 N. C. 443, 701 S. E. 2d 615 (2010); State v. Augustine, 359 N. C. 709, 616 S. E. 2d 515 (2005).

We give this determination great deference. Overturning it only if it is clearly erroneous.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020).

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Under this standard, the factfinder's choice between two permissible views of the evidence cannot be considered clearly erroneous.

State v. Carter, 212 N. C. App. 516, 711 S. E. 2d 515 (2011); State v. Headen, 206 N. C. App. 109, 697 S. E. 2d 407 (2010).

We reverse only when, after reviewing the entire record, we are left with the definite and firm conviction that a mistake has been committed.

State v. Taylor, 362 N. C. 514, 669 S. E. 2d 239 (2008); State v. Headen, 206 N. C. App. 109.

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SO, WHAT DID WE LEARN FROM STATE v. HOBBS?

State v. Hobbs, 374 N. C. 345 (S Ct. May 1, 2020)

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The Supreme Court opined that:

There are three LEGAL ERRORS with the trial court's analysis at this point (on the third step).

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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ISSUES OF LAW ARE REVIEWED DE NOVO.

State v. Hobbs, 374 N. C. 345 (S. CT. MAY 1, 2020)

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First, peremptory challenges exercised by the defendant are not relevant to the State's motivations.

The trial court erred by considering the peremptory challenges exercised by the defendant.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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Second, the trial court did not explain how it weighed the totality of the circumstances, including the historical evidence that the defendant brought to the court's attention.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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Third, the trial court misapplied Miller-El by focusing only on whether the prosecution asked jurors different questions, rather than also examining comparisons in the answers.

State v. Hobbs, 374 N. C. 345 S. Ct. May 1, 2020

DID NOT ANALYZE BOTH QUESTIONS ASKED AND COMPARE THE ANSWERS GIVEN.

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In Hobbs, the Supreme Court concluded that the trial court failed to apply the correct legal standard and remanded the case for a new Batson hearing.

State v. Hobbs, 374 N. C. 345 (S. Ct. May 1, 2020)

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HOW SHOULD I APPLY OR INTERPRET THE HOBBS CASE?

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The "Clearly Erroneous" standard of review was cited and not explicitly overruled.

But, your rulings will now be scrutinized for "LEGAL ERRORS" on a DE NOVO review standard.

DOES THE EXCEPTION SWALLOW THE RULE????

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IS THIS A DIRECTIVE TO TRIAL COURT JUDGES TO MAKE MORE DETAILED WRITTEN ORDERS TO SHOW YOUR WORK???

IS THIS DECISION THE EQUIVALENT OF AN INSIDE FASTBALL TO COMMUNICATE THAT THE SUPREME COURT TAKES BATSON SERIOUSLY???

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