

"OBJECT ANYWAY": Litigating *Batson* in North Carolina Trials

Hannah Autry & Lisa Miles

UNC School of Government – High Level Felony Defender Training

September, 2021

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Ugly truth

- 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.
- Peremptory strikes are rooted in a history of removing jurors based on stereotypes and discrimination

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

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BATSON Justifications: Articulating Juror Negatives

1. **Peremptory Strikes** - strikes may be made on the basis of respect for the system, opportunity or **discretion**.
2. **Peremptory Strikes** - strikes may be made on the basis of respect for the system, opportunity or **discretion**.
3. **Age** - Young people may lack the experience to avoid being misled or **confused** by the defense.
4. **Actual eye of defendant** - lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. **Black Language** - when asked, having been in question, obvious biasness may show and prosecution **discretion**.
6. **Rehabilitated Jurors** - or those who vacillated in answering D.A.'s questions.
7. **Juror Responses** which are inappropriate, non-responsive, **arbitrary**, **unconvincing**, may indicate juror **indecision**.
8. **Communication Difficulties** - because English is a second language, or because juror appeared to be **difficultly understanding** questions and the process.
9. **Unsettled Criminal History** - "not able to 'previous criminal justice system experiences'."
10. Any other age, **discretion**, **discretion** with the defendant, **discretion**, **discretion**, **discretion**.

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- 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**
- 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**."

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MSU Study (1990-2010)

$$\approx 2/1$$

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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
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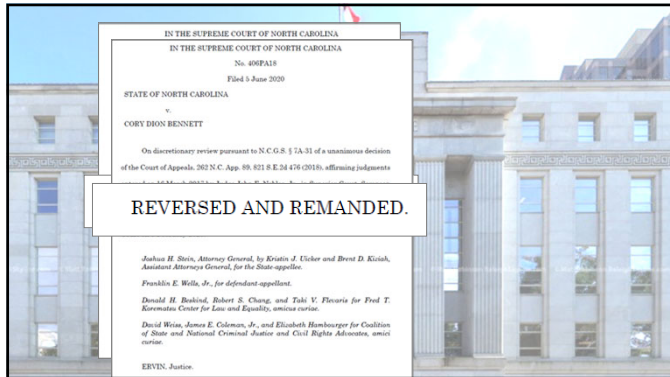
State v. Robinson

- "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



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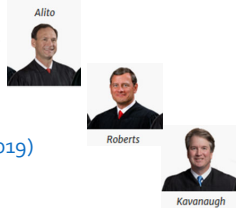
Batson remands

- State v. Clegg, 255 N.C.App. 449 (2017)
- State v. Hobbs, 347 N.C. 354 (2020)
- State v. Bennett, 374 N.C. 579 (2020)
- State v. Alexander, 274 N.C. App. 31 (2020)
- State v. Holden, 275 N.C. App. 421 (2020)
- State v. Hood, 273 N.C. App. 348 (2020)
- State v. Campbell, 376 N.C. 531 (2020)
- State v. Whiting, 852 S.E.2d 736 (2020)
- State v. Smith, 860 S.E.2d 51 (2021)
- State v. Hewitt, 857 S.E. 2d 147 (2021)

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Friendly SCOTUS caselaw

- 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)



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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

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Reasons to object, anyway!

- Create appellate issue (no need to exhaust peremptories)
- Get future jurors passed by State in your case
- Strengthen later *Batson* objections
- Alert attentive jurors to flawed, racially biased system
- Right thing to do/duty to the client

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When to use Batson?

ALWAYS

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Batson Objections

A Quick Guide | 2020

OBJECT

to any strike that could be viewed as based on race, gender, religion, or ethnicity
 "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. "Constitution forbids 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 member of same cognizable class as juror. *Powers v. Ohio*, 499 U.S. 400 (1991).
- You do not need to exhaust your peremptory challenges to preserve a *Batson* claim.
- *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*, 841 S.E.2d 492, 502 (N.C. 2020).

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 bias?
 - 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?

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Batson's Three Step Framework

1. Prima facie case
2. Race neutral justification
3. Purposeful discrimination

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STEP ONE: PRIMA FACIE CASE	
<p>You have burden to show an inference of discrimination</p> <p><i>Johnson v. California</i>, 545 U.S. 162, 170 (2005).</p> <p>"Not intended to be a high hurdle for defendants to cross." <i>State v. Hoffmann</i>, 348 N.C. 548, 553 (1998).</p> <p>"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." <i>Hobbs</i>, 841 S.E. 2d at 498.</p> <p>Establishing a <i>Batson</i> violation does not require direct evidence of discrimination. <i>Batson v. Kentucky</i>, 476 U.S. 79, 93 (1986) ("Circumstantial evidence of invidious intent may include proof of disproportionate impact.")</p>	<p>"All circumstances" are relevant, including history. <i>Snyder</i>, 552 U.S. at 478; <i>Hobbs</i>, 841 S.E.2d at 497.</p> <ul style="list-style-type: none"> Calculate and give the <u>strike pattern/disparity</u>. <i>Miller-El v. Dretke</i>, 545 U.S. 231, 240-41 (2005). <div style="border: 1px solid black; padding: 5px; margin: 5px;"> <p>"The State has struck ___% of African Americans and ___% of whites" or "The State has used 3 of its 4 peremptory strikes on African Americans"</p> </div> <ul style="list-style-type: none"> Give the <u>history of strike disparities and <i>Batson</i> violations in this DA's office/prosecutor</u>. <i>Miller-El</i>, 545 U.S. at 254, 264; <i>Flowers v. Mississippi</i>, 139 S.Ct. 2245 (2019); <i>Hobbs</i>, 841 S.E. 2d at 501 (Contact CDPL for data on your county to reference.) <u>State questioned juror differently or very little</u>. <i>Miller-El</i>, 545 U.S. at 241, 246, 255. <u>Juror is similar to white jurors passed</u> (describe how). <i>Foster v. Chatman</i>, 136 S.Ct. 1737, 1750 (2016); <i>Snyder</i>, 552 U.S. at 483-85. <u>State the racial factors in case</u> (race of Defendant, victim, any specific facts of crime). <u>No apparent reason for strike</u>.

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Example of objection at Step 1: *State v. Bennett*

Defense Counsel:

"the basis of my motion goes to the fact that in Seat Number[] 10, we had two jurors, [Mr. Smith] and [Ms. Brunson], both of whom were black jurors, and both of whom were excused."

"there was no overwhelming evidence, there was nothing about any prior criminal convictions, any feelings about—towards or against law enforcement, there's no basis, other than the fact that those two jurors happen to be of African[]American de[s]cent [and] they were excused."

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Example of objection at Step 1: *State v. Hobbs*

Your Honor, we would ask the Court to consider the defendant's motion under *Batson* challenge to the State's removal of these last 2 jurors, however, we believe in order to make a full and complete record, and be able to direct Your Honor to concrete examples of despaired treatment of the African-American jurors that have been struck so far we would ask the Court for an overnight recess, and for us to compile the data on the jurors that have so far been excused, that have so far not been excused by the State, in order to make a more complete showing for the Court.

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Example of objection at Step 1: *State v. Hobbs*

■ **Race of Parties:**

"there's a very real possibility that the only African American that you're going to see in this entire trial is the defendant. To my knowledge everyone else involved is white."

Another factor the Court can look at is the victim's race. I think in this case it's Caucasian, Mr. Harris. But we also have the other victims in this case Derrick Blackwell, Sean Collins, employees of Cumberland Pawn. All the victims in this case are Caucasian, they're all white.

In fact, if the Court were to sit through this trial, there's a very real possibility that the only African American that you're going to see in this entire trial is the defendant. To my knowledge everyone else involved is white.

So that would include the third factor, the race of the key witnesses in the case. Almost everyone, if not everyone, is white.

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Example of objection at Step 1: *State v. Hobbs*

- **Juror Comparisons:** "if you look at the substance of what the jurors have said in this particular case there is little to no difference between what the African American juror said and the white juror said in substance."

Another factor the Court can look at questions and statements of the prosecutor which tend to support or refute an inference of discrimination. It is our contention in this case that if you look at the substance of what the jurors have said in this particular case there is little to no difference between what the African American juror said and the white juror said in substance. The only difference was that the African Americans were excluded because they were African American.

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Example of objection at Step 1: *State v. Hobbs*

- **Strike Rate:** "Eight peremptory challenges have been registered by the State, six of those challenges were made against African Americans. I believe that's a 75 percent strike rate."

Another factor the Court can look at repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire. Eight peremptory challenges have been registered by the State, six of those challenges were made against African Americans. I believe that's a 75 percent strike rate. Now, I'm not proud of the fact that I'm not a great mathematician but I believe that's what it says. In fact, we've got some others we anticipate to point out to Your Honor that Ms. Miles will have for you.

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Example of objection at Step 1: *State v. Hobbs*

Your Honor by my count 31 death qualified jurors have come through the courtroom in this case. There have been eleven black death qualified jurors. There have been twenty white death qualified jurors. The number of death qualified blacks struck by the State is six. The number of death qualified white jurors struck by the State is two. In other words, the State has struck 55 percent of the death qualified black jurors as opposed to having struck 10 percent of the death qualified white jurors.

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$$\frac{6}{11} \div \frac{2}{20} = \text{"STRIKE RATIO"}$$

Qualified Black Jurors Qualified White Jurors

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$$\frac{\frac{6}{11} \text{ (55\%)}}{\frac{2}{20} \text{ (10\%)}} = 5.5$$

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$$\text{State Average} \cong 2/1$$

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Example of objection at Step 1: *State v. Hobbs*

- **History:** "This isn't a case with a clean slate, this is a case that already has history behind it from this particular county, this particular Judicial District."

matters the Superior Court Judge, that being Judge Gregory Weeks, found that there is both a historical finding of racial discrimination in jury selection that's happened in this county, he also found that there was racial discrimination in the actual jury selection of the particular cases. That was the *State v. Golphin* finding.

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WFU Jury Sunshine Project (2011)

Black/White Prosecutor Removal Ratios for Largest Cities in NC

Winston-Salem (Forsyth)	3.0
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County	Percent of Venue Members Removed by State Peremptory Strike						Number of Jury Venue Members Identified by Jury Summons						Black/Hispanic Disparity
	Black	White	Native American	Hispanic	Asian	Other	Black	White	Native American	Hispanic	Asian	Other	
Albemarle	18.3%	1.0%	NA	NA	NA	NA	33	57	0	0	0	0	44
Cleveland	3.0%	0.4%	NA	NA	0.0%	NA	39	521	0	0	1	0	129
Edgecombe	12.4%	2.1%	NA	NA	NA	0.0%	24,370	178	142	0	0	3	84
Henderson	75.0%	13.0%	NA	50.0%	NA	NA	27,370	4	100	0	2	0	44
Hallifax	26.7%	4.8%	0.0%	NA	NA	66.7%	13,130	176	145	8	0	3	137
Craven	34.5%	6.4%	NA	NA	NA	19.4%	29	109	0	0	0	0	11
Wilkes	53.3%	2.6%	NA	NA	NA	47.1%	6	102	0	0	0	0	17
Nash	17.9%	4.3%	NA	0.0%	NA	56.0%	151	305	0	4	0	0	2
Granville	21.1%	5.1%	NA	NA	NA	0.0%	5,370	19	29	0	0	0	15
Scotland	13.1%	1.3%	100.0%	NA	NA	100.0%	20,070	9	24	1	0	0	10
Iredell	15.5%	8.9%	NA	NA	0.0%	15.9%	31	257	0	0	2	4	63
Brunswick	13.3%	8.7%	NA	NA	NA	15.4%	9	103	0	0	0	0	19
Robeson	26.7%	7.1%	15.8%	NA	NA	0.0%	13,370	30	41	38	0	0	1
Randolph	13.3%	9.8%	0.0%	NA	0.0%	13.2%	3	215	1	0	2	2	10
Burke	17.1%	17.4%	NA	NA	NA	16.0%	7	155	0	0	0	0	25
Cabarrus	17.1%	11.8%	100.0%	NA	13.3%	42.9%	54,870	40	296	2	0	3	7
Hyde	16.7%	5.3%	NA	NA	NA	27.3%	6	38	0	0	0	0	11
Catawba	4.0%	1.5%	NA	NA	0.0%	NA	5,130	22	267	0	0	1	98
Person	13.0%	4.3%	NA	0.0%	NA	16.8%	23	46	0	0	1	0	16
Forsyth	27.5%	9.3%	33.3%	0.0%	NA	100.0%	12,570	120	474	6	1	0	1
New Hanover	26.5%	5.1%	NA	NA	0.0%	NA	14,370	49	153	0	0	1	0
Wayne	26.0%	5.2%	NA	NA	NA	16.4%	100	235	0	0	1	0	134
Chatham	25.0%	5.1%	NA	NA	NA	12.5%	4	66	0	0	0	0	16
Beaufort	22.9%	5.5%	NA	0.0%	NA	0.0%	15,370	38	175	0	1	0	3
Orange	17.5%	14.5%	NA	NA	0.0%	37.5%	8	76	0	0	2	1	8
Durham	22.2%	8.6%	40.0%	0.0%	0.0%	13.3%	212	313	5	2	2	6	240
Mecklenburg	25.0%	11.7%	14.3%	27.3%	17.6%	14.9%	725	1303	7	33	34	41	821
Columbus	16.4%	6.7%	NA	NA	NA	20.0%	26,770	87	208	0	0	0	5
Person	32.9%	11.0%	0.0%	NA	0.0%	NA	19,270	79	248	2	0	1	0

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STEP TWO: RACE-NEUTRAL EXPLANATION

Burden shifts to State to explain strike

- If the State volunteers reasons without prompting from the Court, the *prima facie* showing is assumed; move to step 3. *Hobbs*, 841 S.E. 2d at 500. *Hernandez v. New York*, 500 U.S. 352, 359 (1991).
- Prosecutor must actually give a reason. *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.

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STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove race was a significant factor

Argue the State's stated reasons are pretextual

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 each and every reason proffered by the State. *Foster*, 136 S. Ct. at 1754 (finding purposeful discrimination after debunking only three of eleven reasons given).

- The reason applies equally to white jurors the State has passed. *Miller-El*, 545 U.S. at 247, n.s. Jurors don't have to be identical; would leave *Batson* inoperable; "potential jurors are not products of a set of cookie cutters." See also *Hobbs*, 841 S.E.2d at 503.
- The reason is not supported by the record. *Foster*, 136 S.Ct. 1737, 1749.
- The reason is nonsensical or fantastic. *Foster*, 136 S.Ct. at 1752.
- The prosecutor failed to ask the juror any questions about the topic that the State now claims disqualified them. *Miller-El*, 545 U.S. at 241.
- State's reliance on juror's demeanor is inherently suspect. *Snyder*, 552 U.S. at 479, 488.
- A laundry list of reasons is inherently suspect. *Foster*, 136 S.Ct. at 1748.
- Shifting reasons are inherently suspect. *Foster*, 136 S.Ct. at 1754.
- State's reliance on juror's expression of hardship or reluctance to serve is inherently suspect. *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).
- Differential questioning is evidence of racial bias. *Miller-El*, 545 U.S. at 255.
- Prosecutor training and prior practices are relevant. *Miller-El*, 545 U.S. at 263-64.

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Example of ARGUMENT at Step 3: *State v. Hobbs*

State Claims They Struck the Juror Because:

Juror's Criminal Record

MS. MILES: Mr. Carter was passed by the State and lied about his criminal history; Ms. Bowman was struck by the State, a black female that was struck by the State and the State represented that they were concerned because of her criminal history, that being a reported assault on her daughter; the State also represented they were concerned about her own reported contact with the criminal system, and I would ask the Court to contrast that with their acceptance of Mr. Carter who frankly lied about his prior arrests.

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Example of ARGUMENT at Step 3: *State v. Hobbs*

State Claims They Struck
the Juror Because:

**Juror's
Experience with
Mental Illness**

statements offered as a race neutral reason that a number of these black jurors, jurors had mental health issues, had contact with mental health professionals, had some connections with the mental health field. That Mr. Stephens was in group therapy for eight years, suffers from depression.
Amber Williams suffers from anxiety and depression.

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Example of ARGUMENT at Step 3: *State v. Hobbs*

State Claims They Struck
the Juror Because:

**Juror Would
Sympathize with
Defendant**

MS. MILES: With regard to Mr. O'Hara, who is a seated white juror, Your Honor, the State has offered as one of its race neutral reasons as to one of the black jurors that had been excused, they were concerned that, I think Mr. Dedeaux would be likely to relate to our client because of his abandonment. Your Honor, Mr. O'Hara indicated that he was a foster child, he had been bounced around from home to home during his foster childhood. That he is now adopted. A situation that is also very much like our own client's.

The State offered as a race neutral reason they were concerned that Mr. Dedeaux would try to get into people's heads because of his interest in psychology.

Mr. O'Hara, the seated white juror, has a degree in sociology and he said he loves studying people. A very similar response to that given by Mr. Dedeaux.

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Batson Motions

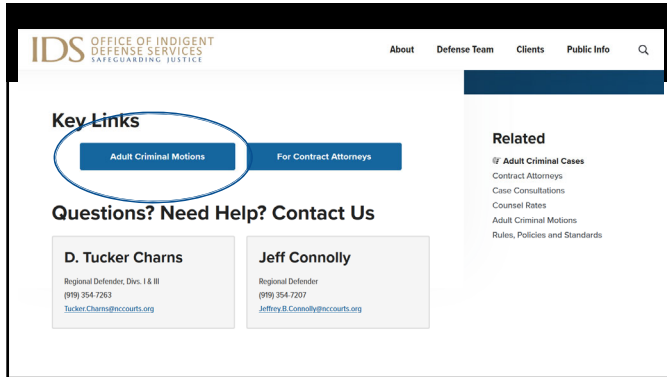
1. Record jury selection/complete recordation (15A-1241)

2. Record juror race (via questionnaire or self identify on record)

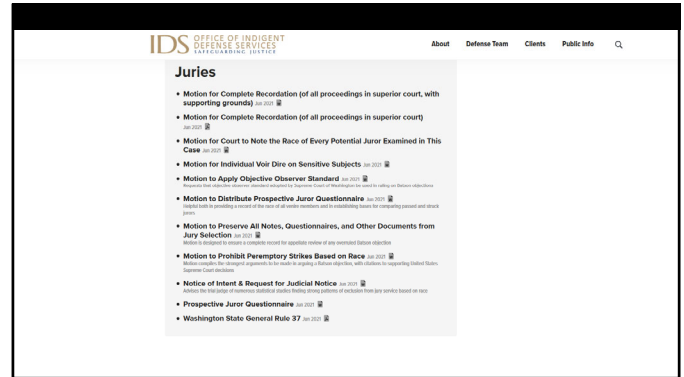
*electronic copies of these and other *Batson*-related motions available at <https://www.ncids.org/adult-criminal-cases/adult-criminal-motions/>

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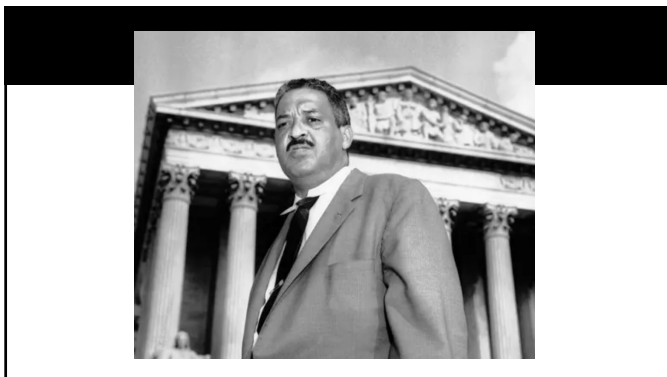
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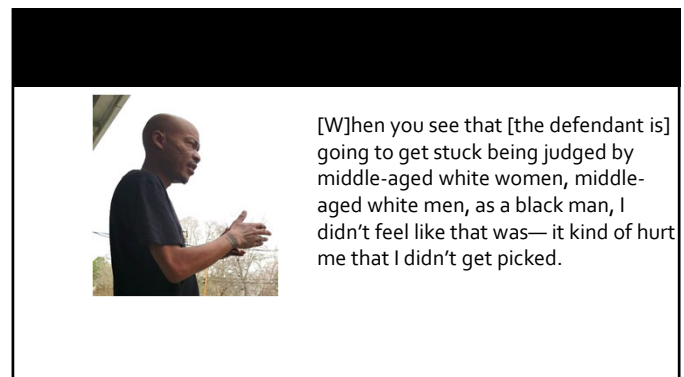
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Questions?

hautry@cdpl.org

Lisa.miles.atty@gmail.com