UNC SCHOOL OF GOVERNMENT

2020 Public Defender Attorney Virtual Conference

August 19-21 – Zoom Webinar

ELECTRONIC CONFERENCE MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC | SCHOOL OF GOVERNMENT

2020 Public Defender Attorney Virtual Conference

August 19-21, 2020

Co-Sponsored by the UNC-Chapel Hill School of Government,
North Carolina Office of Indigent Defense Services,
North Carolina Association of Public Defenders, &
North Carolina Association of Public Defender Investigators

****

ATTORNEY AGENDA

(This conference offers 10.25 hours of CLE credit. All hours are general credit hours unless otherwise noted.)

Wednesday, August 19

1:05 p.m.	**Welcome & Announcements** John Rubin and Phil Dixon UNC School of Government, Chapel Hill, NC
1:15 p.m.	**A View from the Executive Director** [15 min.] Mary Pollard, IDS Executive Director Durham, NC
1:30 p.m.	**Ethical Obligations to Other Attorneys** [60 min.] [ethics] Tucker Charns, IDS Regional Defender, Durham, NC Timothy Heinle, SOG Civil Defender Educator, Chapel Hill, NC
2:30 p.m.	*Break*
2:45 p.m.	**First Amendment Defenses in Criminal Cases** [60 mins.] Glenn Gerding, Appellate Defender Jim Grant, Assistant Appellate Defender Office of the Appellate Defender, Durham, NC
3:45 p.m.	*Break*
4:00 p.m.	**Racial Justice Litigation Update [60 min.]** Emily Coward, Project Attorney, Public Defense Education Elizabeth Hambourger, Attorney, Center for Death Penalty Litigation
5:00	*Adjourn*

Thursday, August 20

9:30 a.m.	**Understanding the Victim's Rights Amendment** [45 mins.] Mary Stansell and Molly Hanes, Assistant Public Defenders Office of the Public Defender, Raleigh, NC
10:15 a.m.	*Break*
10:30 a.m.	**Criminal Case Update** [75 min.] John Rubin and Phil Dixon UNC School of Government, Chapel Hill, NC
11:45 a.m.	*Lunch* [60 min.]
12:45 p.m.	**COVID Legal Issues and Strategies** [60 min.] Ian Mance, Legal Resource Attorney UNC School of Government, Chapel Hill, NC
1:45 p.m.	*Break*
2:00 p.m.	**Bringing Justice to Our Communities** [60 min.] Dawn Blagrove, Attorney, Executive Director Emancipate NC
3:00 p.m.	*Adjourn*

Friday, August 21

9:00 a.m.	**Bail Reform in North Carolina** [60 mins.] Jessica Smith, Kenan Distinguished Professor of Public Law and Government UNC School of Government, Chapel Hill, NC
10:00 a.m.	*Break*
10:15 a.m.	**Restorative Justice** [60 mins.] [Ethics] Jon Powell, Director, Restorative Justice Clinic Campbell University School of Law, Raleigh, NC
11:15 a.m.	*Break*
11:30 a.m.	**Identifying and Challenging Digital Surveillance** [60 mins.] [Technology] Mark Rumold, Senior Staff Attorney Electronic Frontier Foundation, San Francisco, CA
12:30 p.m.	*Adjourn*

CLE HOURS
General: Up to 7.25
Ethics: Up to 2.0
Technology: 1.0
Total CLE Hours: 10.25

2019-20 OFFICE ACCOMPLISHMENTS

(50th PD Anniversary & Coronavirus Edition)

SUCCESS FOR CLIENTS

Trial victories

APDs **Natasha Adams** and **Carter Thompson** in Orange County tried a case involving unlawful athlete agent inducement charges, perhaps the only one that has ever been tried. One of the witnesses was a person who was a Dallas Cowboys player who had health issues that legitimately prevented him from coming to court in NC. The witness was going to appear virtually (prior to Covid 19). Natasha and Carter got the judge to give them a lawyer to be present when he testified in a room at the Dallas Cowboys training center and thought of everything about aspects of virtual testimony, which was very unusual at that time. At the end of the case, they got a hung jury. In the interim, their client got a 20-year sentence in another state, but despite that the special prosecutor wants to retry it.
https://www.cbs17.com/news/local-news/orange-county-news/mistrial-declared-for-former-unc-football-player-in-nc-agents-case/

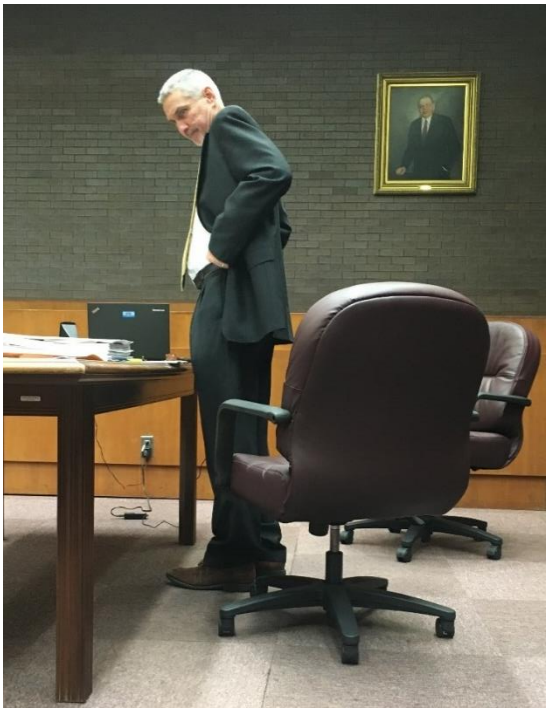
Guilford APD **John Davis** tried a case to a not guilty verdict despite two confessions. The judge sanctioned the prosecutor for yelling at the jury after the verdict, which resulted in Guilford prosecutors' being banned by the elected DA from speaking to jurors even after a trial is over.

John took all kind of guff from the State and the bench for trying an identity theft case. He was overruled on very basic rules of law, which the State did not seem to understand or know existed. An example from the bench, "You cannot *infer* evidence of a third party being guilty." Apparently, the jury thought otherwise, as they delivered a verdict of not guilty.

Living every defense attorney's nightmare, Guilford APD **Rip Fiser** represented a client charged with conspiracy to sell/deliver marijuana; maintaining a dwelling; and possession of a firearm by a felon. The client claimed to be of the Moorish Nation (need we say more) and not subject to the laws of the US, and he was very hostile to Rip and sought to remove Rip from representing him and to proceed *pro se*. Of course Rip was kept on as standby counsel, and after the State's second witness, the defendant relented to have Rip complete the trial. At the close of the State's evidence, the conspiracy charge was dismissed, and the client ultimately got supervised probation.

Guilford APD **Johnna Herron** tried 11 cases to a jury last year. In one, the jury stayed out until 10:30 PM on a Friday (about 7.5 hours) before the judge declared a mistrial. In that case, the client was on an audio recording confessing to trafficking amounts of heroin and cocaine, guns, etc., after the officer warned him that they would charge the mother of his newborn son if he didn't own up. It came in evidence that he attempted to provide substantial assistance twice (first as he was being arrested and later at the office of a private attorney he ended up not hiring), and there was also a trafficking amount of cocaine at another house associated with him, which came in as 404(b) evidence. The split was 11-1 not guilty on the drugs and 10-2 not guilty on the guns. While the jurors were deliberating, the judge ordered pizza for them and everyone in the

courtroom, including Johnna's client's family and even her client in the lock-up. Reportedly, the veteran drug prosecutor was quite befuddled, as is shown in this picture with former and original Chief PD Wally Harrelson gazing over him in the portrait.



Befuddled ADA and Wally

As of May 14, 2019, the **High Point APDs** were undefeated in jury trials for the previous year.

First District APDs **Jay Hollingsworth** and **John Raper** tried a sex offense with a child and indecent liberties case in Currituck County and received Not Guilty verdicts, after their client had turned down a time-served plea.

Carteret County APDs **Drew Jones** and **Josh Winks** recently got a not guilty verdict in a bench trial of a second degree rape case. The client had been in jail 765 days, and the issue was whether the contact was consensual. Not knowing when jury trials might resume, and believing the senior resident superior court judge would be at least as fair as any potential jury, Drew and Josh rolled the dice and won.

New Hanover APDs **Alexis Perkins** and **Lyana Hunter** each prevailed on juvenile delinquency matters on the same day. Alexis got the judge to dismiss an assault on a government official because her client was charged as a government official, and he was a contractor working at the school. Lyana won a juvenile trial where the court dismissed a sexual battery charge where the state failed to prove that the assault was for sexual gratification and /or sexual arousal.

On his very first day in the office, Guilford APD **Tom Smothers** agreed to assist an unrepresented defendant as a "friend of the court" on an assault on a female case involving a cross-warrant where the other party had retained counsel. The judge had denied the defendant's

requests for appointment of counsel and for a continuance to hire counsel, forcing the defendant to proceed to trial. Tom tried the case on the spot and got a not guilty verdict.

In a retrial of a second degree murder case, Buncombe ACD **Sam Snead** and his team got a voluntary manslaughter conviction. The DA had turned down an offer of voluntary manslaughter with a multiple-year sentence. Sam's client testified in his own defense and reportedly did very well.

It was just a "day in the life" (per his Chief PD) of Guilford APD **Juan Zuluaga**, wherein Juan got a not guilty verdict on a communicating threats and trespass case and nonsuits on an assault on a female case, and an AWDW and simple assault cases. PD John Nieman described Juan's achievement as "three trials in one day, and three amazing results."

Appellate victories

AAD **Emily Davis** prevailed in *State v. Keller*, in which the NC Supreme Court held that the requested entrapment defense instruction should have been given and ordered a new trial.

In *State v. Grady*, Appellate Defender **Glenn Gerding** succeeded in getting the NC Supreme Court to rule that lifetime SBM based solely on recidivism is unconstitutional. Glenn attributes his success to an OAD team effort and says that everyone contributed to it.

Flipping the bird at an officer is not reasonable suspicion to stop a person, per the NC Supreme Court's opinion in *State v. Ellis*, and on that basis AAD **Michele Goldman** convinced the court to reverse the denial of the motion to suppress.

AAD **Jim Grant** persuaded the Court of Appeals to hold that a 30-year SBM imposition was unreasonable and unconstitutional in *State v. Griffin*.

In *State v. Hobbs*, AAD **Sterling Rozear** achieved a rare *Batson* victory where the NC Supreme Court remanded to the trial court for a hearing to determine if the State used peremptory challenges based on race in violation of *Batson*.

AADs **Dan Shatz** and **Andy DeSimone** prevailed in *State v. Ramseur*, where the NC Supreme Court held that retroactively applying the repeal of the Racial Justice Act violated the constitutional prohibition of *ex post facto* laws. Credit is also due to former AAD **Ben Dowling-Sendor**, as he was on the case until his retirement.

AAD **Amanda Zimmer** won *State v. Courtney*, in which the NC Supreme Court established that double jeopardy clause principles preclude the State from recharging and prosecuting a person when the State has previously taken a voluntary dismissal of the same charge. Amanda successfully defeated the State's petition for *certiorari* to the US Supreme Court.

Good outcomes

Guilford APD **Erin Adler** represented a client on a misdemeanor probation violation for sexual battery. After speaking to the client, she asked him if had been told he would have to register as a

sex offender if he pled to sexual battery. He was insistent that he was never told until the probation intake officer told him. Erin filed an MAR and an evidentiary hearing was held. After the hearing, the client's conviction was vacated, and he has now been removed from the sex offender registry.

Hoke APD **Ian Bloom** used the pressure of a possible PC hearing to negotiate an excellent plea arrangement for his client. The case involved approximately 50 counts of breaking/entering and larceny; all of the breakings/entering charges were dismissed, and the larceny charges were consolidated into one active sentence of 20 to 34 months. Mitigating information concerning the client's difficult childhood was a significant factor in the successful negotiation. The plea arrangement enabled the client to avoid paying $60,000 in restitution that would have been owed in a probationary sentence.

Guilford APD **John Davis** was in the middle of a jury trial for common law robbery when after the lunch break, the victim told the ADA that the John's client was not the one who robbed him, admitting that he had spoken to the client during lunch. The ADA was furious, believing he had a case of witness tampering; however, investigation of the courthouse security camera footage revealed that it was the victim who initiated contact, and the ADA dismissed the case.

Orange County APD **Phoebe Dee** took a case to trial with a client charged as an habitual felon and charges of armed robbery, felony (habitual) larceny, and possession of cocaine. He pled to the Class H felony, non-habitual, after the state rested and will be released from prison this year.

Durham ACDs **Steve Freeman** and **Robert Singalese**, aided by investigators **Beth Winston** and **Richard McGough**, got LWOP for their client in a high-profile Chapel Hill triple murder case. As the late Frank Wells said of their work, "Lawyers who represent the most despised, marginalized, and hateful among us embody the essence of what criminal defense lawyers do every day, in cases big and small."
https://www.wral.com/chapel-hill-man-gets-3-life-sentences-for-gunning-down-muslim-neighbors/18447088/

Robert (far right) with his client.

Steve and co-counsel Emilia Beskind also got a life sentence in a capital trial for the shooting death of a 15-year-old in Lee County. Although the jury convicted the client of first degree

murder after deliberating for over a day, they returned a unanimous life verdict after around 45 minutes.

Orange County APDs **Dana Graves** and **Crista Collazo** presented compelling evidence of their client's longstanding mental health issues and breakdown, exacerbated by her two miscarriages, leading the judge to find their client not guilty by reason of insanity for the first degree murder and felony child abuse of her young son and attempted murder and AWDWIKISI of her husband. The client had killed her child and stabbed her husband and then cut her own throat, all while believing she was saving them all from the world.
https://www.newsobserver.com/news/local/crime/article240582321.html

Buncombe ACD **Vicky Jayne** and her co-counsel refused to quit, presenting evidence of juror misconduct, filing a motion to recuse the trial judge before sentencing, and making three motions for mistrial. In an unusual move, the DA abandoned the death penalty after the jury found the client guilty.
https://wlos.com/news/local/nathaniel-dixon-sentencing-underway-twists-turns-continue-judge-to-recuse-himself

Vicky with her client and the defense team

Vicky represented a client was bipolar without medication who had turned to meth. The client wound up fatally shooting a man with whom he had an altercation while trying to sell his gun to for meth, and then left the scene and hit a police car during a chase. Vicki's use of an expert to explain the effect of not having proper medication coupled with using meth, led the DA to offer a plea to second degree murder, which the client accepted.

In a Cleveland County cop-killing case that was transferred to Catawba County due to the publicity, despite the push for death by the DA, victim's family, and law enforcement, **Vicki** and fellow Buncombe ACD **Sam Snead** persevered and got the State to offer LWOP during jury selection. OCD Paralegal **Annie Benson-Greer** and Appellate Defender **Glenn Gerding** contributed to the hard work and good result.

Showing the importance of early fact investigation, Mecklenburg APD **Michael Kabakoff** and investigator **Percy Wilson** obtained video surveillance footage showing that their client was

working 5.5 miles away from the place where he was accused of committing a murder. The client was released from jail after a month and all charges were dismissed. https://www.newsobserver.com/news/state/north-carolina/article230473959.html

Mike and his fellow APDs **Jean Lawson** and **Carson Smith** represented a client who had shot six people, two fatally, on the last day of classes at UNC-Charlotte. Through long and dedicated effort and despite the national notoriety of the case and the objections of the victims' families' objections, the team was able to develop evidence of their client's mental heath condition and convince the DA to avoid the death penalty and rather to offer a plea to life.

Pitt APD **Ann Kirby** (but you can call her "Kirby") is retiring this year, but she is going out with a bang. In one case, Kirby was appointed to a murder case where three people were shot and one died with a description of the shooter that closely matched her client. Not so sure that the right man was being blamed, Kirby filed numerous motions to produce evidence and challenging the identification and lineup procedures. Ultimately, the State dismissed the charges against her client.

In another case, **Kirby** and co-counsel Dick McNeil, represented a client who was accused of murdering his wife, whom he believed was having an affair, and three young daughters, who had witnessed the attack on the wife, by beating them all with a hammer. The client then fled to Virginia. With AAD **Dan Shatz** on the team, the defense offered for the client to avoid the death penalty by pleading guilty to four counts with LWOP. The State resisted, but the defense continued to work the case and the ADA, eventually wearing the ADA down on the eve of trial to accept the defense offer.

Nash County ACD **Phil Lane's** client maintained from the beginning he was not involved in the home invasion and killing of four people that he was charged with. Thanks to diligent fact investigation, Phil was able to implicate someone else for what was probably an ordered hit, and on the morning of trial, the State dismissed the charges.

Robeson ACD **Brooke Mangum**, with assistance in viewing more than a hundred hours of video by ACD **Ann Whitehurst**, represented a client charged with first degree murder, numerous attempted first degree murders, Class C assault, and other offenses for firing into a crowd at a Halloween party, killing one person and injuring two others. The State contended that Brooke's client was a violent and repeated bad actor, which Brooke was able to refute, and she was able to get her client's bond reduced so that he could leave custody and help to prepare for the anticipated trial. Ultimately, Brooke was able to obtain a plea offer to Class B2 second degree murder and Class E assault. The client entered an *Alford* plea and the offenses were consolidated for a sentence of 144-185 months.

Guilford PD **John Nieman** had good results in a couple of first degree murder cases. One client pled to involuntary manslaughter and arson, to run concurrently with another arson sentence the client was serving out of another county, which resulted in the client's getting only two months additional time to what he was serving.

John's other case involved a first degree murder charge for the client's shooting his father in the head with a shotgun, 1st degree kidnapping of the client's grandparents, and five counts of

attempted murder on law enforcement from the client's shooting at five law enforcement officers and hitting one. Further complicating matters was the fact that the client was on probation for a previous assault on his father, who had inflicted a horrible childhood on the 21-year-old client. John secured a plea to one count of second degree murder and five counts of class E assaults, thereby allowing the client to avoid a 30-year minimum sentence.

Forsyth ACD **Vince Rabil** had a tough case where there was overwhelming evidence that his client fatally stabbed his two roommates and dismembered the corpses. The client was facing death, but Vince was able to negotiate pleas to two LWOP sentences. The plea took five hours in court due to the disruptions caused by the victim's family and friends, including attacking the client.

Vince and ACD **Bill Soukup** represented a client charged with 13 counts that included murder, attempted murder, burglary, kidnapping, AWDWIKISI, and first degree sex offense, all from a six-hour crime spree. The client had recently had a murder charge dismissed and had a long rap sheet, including a previous conviction for murder, and was facing the death penalty. Suspecting the client had mental health issues, they and investigator **Janet Holahan** obtained several years' worth of mental health records and received compelling and lengthy reports from their experts about the client's mental illness. The reports convinced the State to offer pleas to two counts of Class B2 second degree murder, for which the client was sentenced to 44 years.

APD **Rachel Smith** in Chatham County did a detailed brief on the inability of the SBI to determine if a substance was marijuana or hemp. Rachel engaged an expert, and finally, the State decided to dismiss rather than try future cases of possession of marijuana.

Guilford APD **Michael Troutman** represented a client on charges of felony fleeing to elude, possession firearm by felon, AWDW on a law enforcement officer, misdemeanor larceny, reckless driving, and larceny of a motor vehicle. Michael filed a demand for a probable cause hearing after numerous district court settings without any prosecution summary being made available or any plea offers being made. The State was unprepared to make an evidentiary presentation and moved to continue the hearing, citing an administrative mix-up within their office. The court denied the State's motion to continue, and the State took a dismissal.

Guilford APD **Richard Wells** tried a RWDW/felony assault case involving a pitchfork (you read that right). The State offered the client five years active, and the client's exposure was 5-15 years. After Richard had filed and won numerous motions *in limine* and had conducted a lengthy cross examination of the victim, the State relented and offered the client a plea to AWDWISI for probation, which the client accepted. Jury selection took more than a day, and Richard was forced to keep on the jury an investigative reporter who was good friends with the former local sheriff and whose brother was the head of security at Gitmo. Richard was granted an extra peremptory challenge due to issues in jury selection, leading him to advise, "Sometimes the most important thing is being awake for all the little things."

Another of **Richard's** clients was classified as a recidivist and was required to wear a lifetime SBM device as a sex offender. The client was charged with failing to register as a sex offender, tampering with a SBM device used for sex offender monitoring, and habitual felon. Much of the State's evidence came from the SBM digital data. Using the recent *Grady* case (see Appellate

victories, above), Richard obtained a court order permanently removing the SBM device, suppressing the use of SBM digital data at trial; and dismissing the tampering with SBM device charge. While still pending, the dynamic of the case has changed considerably.

In Hoke County, Robeson ACD **Ann Whitehurst's** client was charged with first degree murder, first degree burglary, two counts of first degree kidnapping, and robbery with a dangerous weapon. The client's co-defendant shot and killed a man they were trying to buy marijuana from in the man's yard, and then they went into the man's trailer, tied up two elderly women, and ransacked the place, leaving with two big screen TVs. With the help of OCD investigator **Kelvin Hewitt**, Ann was able to get a plea to mitigated second degree murder.

Going the extra mile/fighting the good fight

After securing a not guilty on his client's attempted murder charge (file under Trial Victory), Guilford APD **Wayne Baucino** did the paperwork and legwork to secure a stimulus check for his client, getting her out of a shelter and into a place of her own.

Gaston PD **Stuart Higdon** had the unusual experience of representing a client who jumped out of the courthouse's second-story window during the client's rape and kidnapping trial. While the client had his broken bones treated in the hospital, the jury went on to convict him in absentia. https://www.wsoctv.com/news/local/man-trial-rape-kidnapping-reportedly-jumps-gaston-county-jail/XMRGZJYE2JBRTM7CWCI6UPIS6I/

The "loquacious and fastidiously prepared" Forsyth Chief PD **Paul James** pulled out all the stops in a bond hearing in a contentious, charged murder case, convincing the judge to set bond in the amount of $500,000.
https://journalnow.com/news/local/bond-hearing-for-accused-killer-robert-granato-sets-in-motion-uncomfortable-comparisons-to-other-shootings/article_f4aceb36-bb68-54e3-a7d0-59bfa33e2099.html#2

Robeson APD **Troy Peters** was likewise successful in getting his client's bond reduced from $1.5 million to $250,000 in a vehicular homicide case.
https://www.robesonian.com/news/136487/judge-lowers-bond-for-fatal-hit-and-run-suspect-from-1-5-million-to-250000

At a Christmas party attended by his wife's social worker colleagues, Guilford APD **Roger Rizo** told them about a client with two kids who was in a shelter, which resulted in $500 in donations for her family. Further, Roger got toys and gifts and essentials for the family . . . and also got her charges dismissed.

Special Counsel **Rob Stranahan** will be retiring September 1st with over 27 years of service. Rob gave the Office of Special Counsel many dedicated years at both the Dorothea Dix and Central Regional offices, becoming an expert in forensic commitments. He deserves a special thank you for coming to the aid of commitment clients at UNC Hospital in Chapel Hill. Early in the pandemic, local Orange County private assigned counsel (PAC) were unable to serve their clients due to lack of remote services. Rob, in addition to handling his regular caseload at Central Regional Hospital, went to UNC for three weeks and represented all clients, including

conducting in-person interviews, and did "real" court. He helped implement virtual services for both client interviews and court, which allowed PAC to return to their duties. Observes Chief Special Counsel Dolly Whiteside, “This was truly ‘above and beyond’ service!”

Guilford APD **Richard Wells**’ client was convicted of two habitual DWIs. No prison time was imposed due to Richard’s getting the court to sentence the client to and count the time in an inpatient treatment center. Richard’s client went on to post-release supervision during the pandemic and was able to secure a $60,000/year job, but the client got an OFA for allegedly not reporting to PRS during pandemic. Richard contacted the Post-Release Commission, which canceled the OFA, and the client was able to begin her job.

COLLABORATION

Serving as the on-call attorney at OAD, AAD **Jane Allen** came through in the pinch. Says Chief Regional Defender Tucker Charns, “An attorney was in jury selection and had an issue come up with a juror’s qualification. The lawyer wanted to kick the juror without using a peremptory. Within MINUTES, Jane came up with the right case and the brief from that case in support of the motion. The juror was excused for cause!”

In another case, **Jane** provided trial counsel with case law and briefs for use in arguments to keep as a juror a woman had tenuous residency in Durham. Jane cited case law as to the lack of definition of “resident.” Although the judge excused the juror, again per Tucker, “Did it make a difference? The client LOVED the fight.”

The **APD listserv** was again alive with the sound of assistance as answered their interoffice colleagues’ questions and helped out when issues arose in their – and even other – jurisdictions.

Durham APD **Jeb Dennis** and AAD **Sterling Rozear** combined forces in *State v. Fields* to help a client charged with DWI. The client was found guilty in district court and sentenced to 36 months active time and assessed $36,000 dollars in jail fees. The case was appealed to superior court and the client was given a $50,000 secured bond. In superior court, Jeb successfully argued a motion to suppress the video from the convenience store and lack of probable cause to arrest his client based on the unreliability of the officer’s testimony and lack of any corroborating eyewitness testimony. The client was released from custody, and the State appealed the court’s ruling. The Court of Appeals found the State’s appeal was without merit and affirmed the trial court’s decision.

Hoke Chief Assistant APD **Jim Hedgpeth’s** success story relates to a 2017 case in which his client pled guilty to several armed robbery and kidnapping charges but preserved his right to appeal the denial of a suppression motion based on a defective search warrant and a Hoke County deputy’s unconstitutional foray onto the curtilage which enabled him to look in the windows of the client’s Kia Optima and viewing evidence linking him to that and another offense. The client was represented on appeal in *State v. Lewis* by AAD **Kathryn VandenBerg**, who persuaded the NC Supreme Court and the NC Court of Appeals to overturn the client’s convictions. Along the way, she managed to get a 10-year sentence for probation violations thrown out on jurisdictional grounds. Jim says, “I find this outcome particularly rewarding,

because the trial judge ruled against our client in a rather conclusory manner and because the case bounced between the two appellate courts for many months until the final decision was rendered."
https://www.fayobserver.com/news/20191112/copsrsquo-errors-could-free-hoke-man-serving-decades-for-kidnappings-robberies

Upon being reached out to by the IDS office because a defendant had been jailed in Washington County for a month with no court appearances or appointment of counsel, First/Second District PD **Tommy Routten** quickly looked into the matter, found that the defendant had never been put on the first available administrative superior court calendar to address counsel, and appointed counsel.

SERVICE TO THE COMMUNITY

This past Fall, the **Gaston County Office** partnered with Woodhill Elementary School to mentor and help the youth in their community. Their goal was to make a difference by trying to improve the youths' self-esteem, attitudes, and attendance and to offer motivation to stay in school and to plan ahead. Most of the office members were each matched with a child and met with the child every week; others in the office worked behind the scenes in collecting school supplies, clothes, and hygiene items. By Christmas time, other people in the courthouse had heard about the office's mentorship program and were eager to assist. Many members of the courthouse as well as the Gaston County Law Enforcement Association donated money to purchase, bikes, food, toys, and clothes for families at this school. Says AA Elizabeth Lutz, "The Public Defender's Office partnered with Woodhill Elementary to help the youth in our community, when in fact, they truly helped us. They give us a purpose. They made us feel loved. To see the world through the eyes of child was a true blessing to us all."

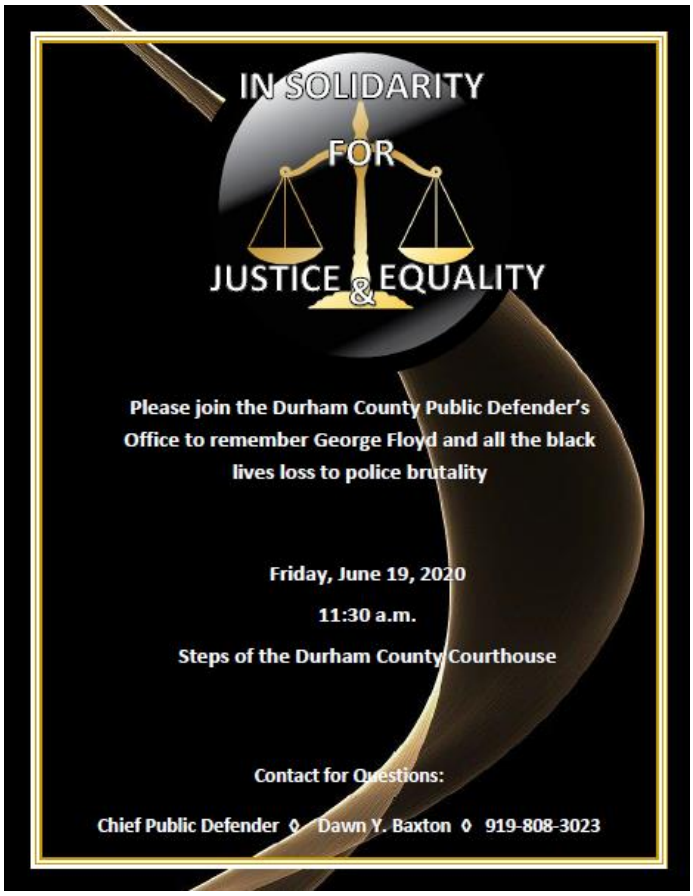
Donations for mentorship program

BLACK LIVES MATTER

The **Greensboro, Dare, Durham, Mecklenburg,** and **New Hanover Offices** joined Public Defenders for Racial Justice and other PD offices across the nation in demonstrations and events to show that Black Lives Matter to Public Defenders. The Greensboro and Durham Offices knelt for eight minutes and 45 seconds in protest of the murder of George Floyd by Minneapolis police.
https://www.wwaytv3.com/2020/06/08/local-public-defenders-office-joins-others-across-the-country-for-peaceful-protest/

New Hanover Office protesters

Dare Office protesters



Durham flyer

Durham Office protest

Wake County public defenders, led by APD **Kelly DeAngelus**, in conjunction with local private attorneys, formed the Wake County Racial Equity Network.

Wake APD **Sharif Deveaux** reflected on his experiences with race and the judicial system to *Lawyer's Weekly.*
https://nclawyersweekly.com/2020/07/06/not-immune-racism-in-the-justice-system-and-the-legal-profession/

Mecklenburg APD and State Senator **Mujtaba Mohammed**, along with IDS Executive Director **Mary Pollard**, was appointed to serve on the North Carolina Task Force for Racial Equity in Criminal Justice.
https://governor.nc.gov/news/governor-cooper-appoints-members-north-carolina-task-force-racial-equity-criminal-justice

Mujtaba was also quoted in an article about a venire person's being struck from a jury panel for being a Black Lives Matter protester, noting the difficulty of winning *Batson* challenges.
https://www.newsobserver.com/news/politics-government/article244431232.html

Spearheaded by 15B Public Defender **Susan Seahorn**, all the chief public defenders and statewide defenders signed *A Resolution Denouncing the Murder of George Floyd and Addressing the Crisis of Disproportionate Policing, Justice System and Health Inequities and Structural Racism*.
https://www.einnews.com/pr_news/518953933/chief-public-defenders-and-state-defenders-of-north-carolina-adopt-resolution-denouncing-the-murder-of-george-floyd

Susan has also organized a series of Orange and Chatham County online citizen listening sessions called "Eyewitness! First-hand Accounts of Policing, Race, and Justice." The first session was on June 29th and the second was on July 27th, with more planned.
https://www.dailytarheel.com/article/2020/07/eyewitness-event-0701

Orange & Chatham listening session flyer

Wake APD **Deonté Thomas** was appointed to serve on the newly formed Raleigh Police Advisory Board.
https://www.newsobserver.com/news/local/counties/wake-county/article243585957.html

IMPROVING THE SYSTEM

AAD **David Andrews**, in collaboration with AADs **Jim Grant** and **Aaron Johnson**, drafted sample motions to dismiss based on various free speech arguments under the US and NC Constitutions to use in cases involving making a false report of mass violence on educational property under NCGS 14-277.5 or communicating a threat of mass violence on educational property under NCGS 14-277.6, The motions are available on the Juvenile Defender and Appellate Defender websites.

Pitt APD **Michael Cavanaugh** was a member of the team that started Pitt County's First Mental Health Court.

Likewise, Second District APD **Galo Centenera** has been heavily involved in getting the district-wide Recovery Court off the ground. The court recently began having sessions after a multi-year process to build it from scratch.

The **First District APDs**, specifically those in Dare and Currituck Counties, are attending misdemeanor administrative court, which is designed to make sure those with misdemeanors are brought to court prior to the officers' next scheduled court dates. Counsel issues and bonds are addressed in this setting to help keep people from unnecessary pretrial detainment.

In May 2020, the **Guilford Office** co-sponsored an online CLE on Working with Mental Health Experts: Psychological Testing in Criminal Cases.

Mecklenburg APDs **Katie Hoffman**, with assistance from her colleagues Elizabeth Gerber and **Nathan Rubenson**, wrote and successfully argued a motion to dismiss the case of a 15-year-old who was charged in adult court prior to the effective date of Raise the Age on the grounds that continued prosecution of juveniles in adult court violates the Constitution.

Although the voters ultimately chose one of his opponents, Forsyth APD **Andrew Keever** was in the running with four others for a vacant district court judge seat.
https://journalnow.com/news/local/five-lawyers-vie-for-soon-to-be-vacant-district-court-seat/article_8e537631-d547-54c2-a147-0fc5ee114bb6.html

Andrew and his lovely family

Wake APD/Driver's License Guru **Emily Mistr** arranged for all PD offices statewide to be able to request and receive driving records electronically. Through her effort, DMV created a dedicated email address to receive these requests, dlrecords@ncdot.gov.

APD **Anthony Monaghan** and the **Mecklenburg Office** were quite busy this year hosting CLEs for the local bar, including subjects such as: Cell Location Evidence for Legal Professionals; Juvenile Court Basics & Raise the Age; Treating Kids-as-Kids: Raise the Age and the Eighth Amendment; How Am I Going to Read All of This? A Survivalist Guide to Voluminous Discovery; Raise the Age: Understanding Juvenile Mandatory Transfers and Sentencing in Adult and Juvenile Court; the Reach Out Court Diversion Program; a video replay of part of the 2019 NC Opioid Summit; and Setting My Client's Case Up for the Possibility of a Successful Appeal.

Guilford PD **John Nieman** joined his senior resident and chief district court judges in explaining the new local recommended bond guidelines, meant to reduce the number of people in jail. Said John, "This initiative . . . is a great step in the right direction towards helping people not be sitting in jail just for want of money,"
https://www.wxii12.com/article/judge-public-defender-explain-changes-made-to-guilford-county-recommended-bond-guidelines/30571168

Pitt APD **Alex Paschall**, seeing summary orders to show cause in child support contempt cases, looked at the underlying motions and created a Motion to Dismiss for Lack of Probable Cause for OTSC motions containing summary conclusions with no supporting facts. Alex's work resulted in the dismissal of all his cases based on barebones OTSC motions. (Alex sent out the motion on the APD listserv, and if you don't have it and want it, you should contact him.)

Alex also arranged for a tour of the TROSA substance abuse rehab center in Durham for any interested APD in the state.

Mario Perez, an APD in the Second District Office, will be elected as a district court judge in Pitt County in November, as he is running unopposed.

All of the APDs in the **Second District Office** have helped with the establishment of first appearances for misdemeanors in district court. Everyone has a county to attend and works to make sure defendants are not sitting in custody for unnecessary lengths of time because of inability to post unreasonable bonds.

Durham APD **Zach Thayer** gave remarks in a press conference about a report showing that misdemeanor arrests in Durham had dropped in recent years, but African Americans still accounted for most of the arrests. Zach was quoted as saying, "It is our hope that this report will influence decision makers that determine how individuals are treated after arrest and that [it] will affect those individuals making those arrest decisions. This report is a start on the right path of creating a justice system where all people are treated fairly."
https://www.newsobserver.com/news/local/article230516879.html?

First District APD **Jennifer Wells** has been instrumental in in the establishment of Recovery Court in Dare County. She has been the office contact person and been to every session over the last year.

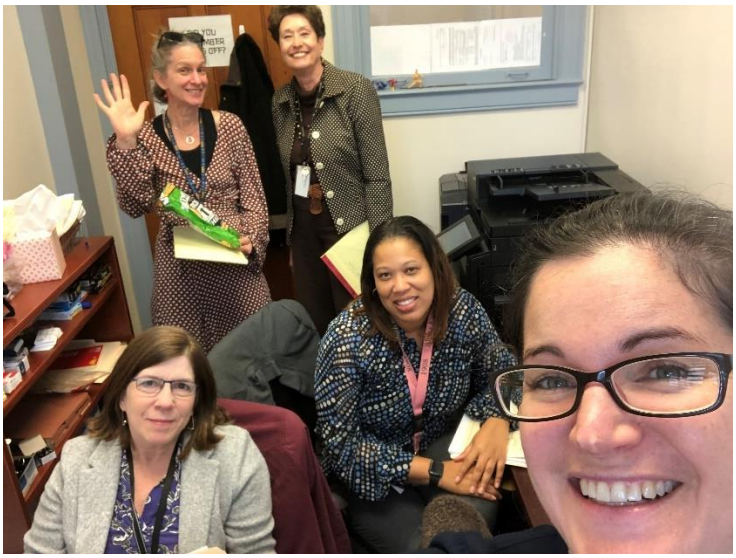
OFFICE SPACE AND OTHER CALAMITY SURVIVAL (Non-COVID)

In Buncombe County, a bear violated the stay-at-home order, apparently thinking he had a court date. Buncombe APD **Tim Henderson** was eating lunch a block away, which is an appropriate social distance from a bear.
https://wlos.com/news/local/people-obey-asheville-stay-home-order-bear-ignores-it

Smokey

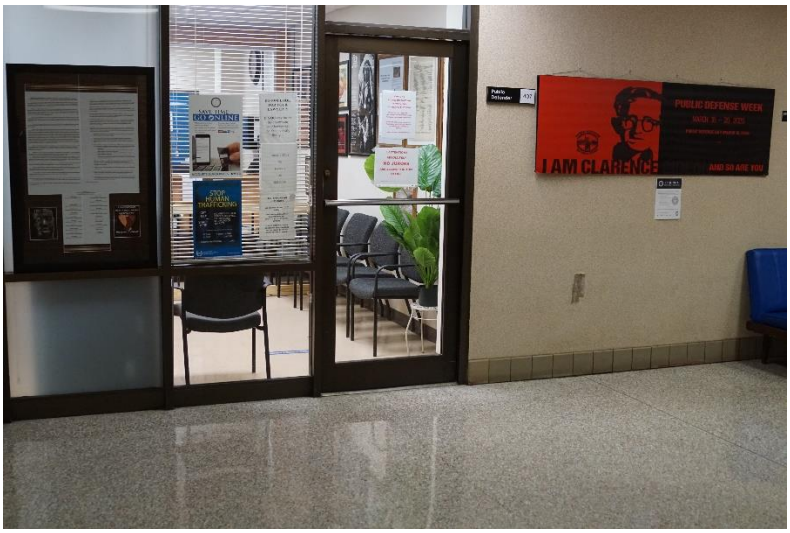
Tim and friend, eating lunch at a social distance

The **Orange County Office** has led a nomadic existence of late, moving four times in the past two years and at one point being pulled out of their office space because of black mold. They were literally homeless for a little more than two months and then had to spend some time in two rooms in the courthouse, finally locating back to King Street before being displaced again by COVID. Having moved four times in the past year, they are hoping to keep their semi-permanent home for a while. Reports Chief PD **Susan Seahorn** about their tiny temporary office in November, "There wasn't room for more than two or three at a time. . . . There are 10 people in the Orange office. So, it was very bad." But, Susan adds, they "managed not to lose hope and were supportive of each other."



The Orange County Office in their wee, cramped November 2019 office "space"

The **Robeson Office** has posted images of what the office stands for at its entrance, including a full copy of the Resolution Denouncing the Murder of George Floyd and the graphic from Public Defense Week this year, to greet visitors. Says Chief PD Ronald Foxworth, "I like the way it represents us and I am proud of what we did, what we all stand for, and do every day, to help and try to make a difference."



Robeson Office entrance

SPECIAL RECOGNITION

APD **Cindy Black** was picked to lead the Cumberland Office as Interim PD. https://www.fayobserver.com/news/20190306/amid-uncertainity-and-controversy-judge-appoints-interim-cumberland-public-defender

Durham Chief Assistant APD **Dawn Baxton** was selected as the new Chief PD upon the retirement of PD **Lawrence Campbell**.

Lawrence

From Dawn's Induction Program

Wake PD **Chuck Caldwell** retired as of June 30, 2020. APD **Mike Howell** was named as Interim PD.

Guilford Chief PD John Nieman reports:

> Due to the pandemic, our office was unable to suitably commemorate the retirement of **David Clark**, the first recipient of the prestigious Wally award. Over his more than 28-year career with our office, David handled the most serious felony cases, taught attorneys both in our office and around the State, provided valuable advice and mentoring for everyone, and was instrumental in the selection process for the attorneys and staff of our office. When this crisis is over, we plan on a fitting celebration of his service to our office and his innumerable clients.

Buncombe APD **Yolanda Fair** received the Buncombe Bar's 2020 Distinguished Young Lawyer Award.

After serving for 18 years in the Gaston Office, APD **Stuart Higdon** was selected to be the Chief PD**.**
https://www.gastongazette.com/news/20190625/meet-gaston-countys-new-public-defender

Gaston County Office team with their newly appointed PD, Stuart (fourth from right, seated)

Guilford PD **Fred Lind** retired after more than 45 years of service to the State in that office. One hundred thirty-three current and former Guilford APDs, around 75 staff and investigators, district and superior Court judges, former Guilford County Public Defender Office intern Supreme Court Justice Paul Newby (!), and other dignitaries from around the State were invited to "FredFest," a reunion/pig picking/celebration to honor Fred and his long career.
https://greensboro.com/news/local_news/guilford-county-public-defender-fred-lind-s-retirement-marks-end/article_9654b24a-2393-51ca-92a2-1b1688ddd649.html

Fred was presented with the 2019 Chief Justice's Professionalism Award in honor of his career and work.
https://www.linkedin.com/posts/cheri-beasley-a60b663_tonight-it-was-my-honor-to-present-the-2019-activity-6625925196098355200-63vk

The Chief Justice and Fred

After 11 years on the job and a long career in criminal defense, IDS Executive Director **Tom Maher** left to begin work at the newly formed Duke Center for Science and Justice. The Chief Justice presented Tom with the highest Judicial Branch award, the Friend of the Court award, on Tom's last day as Director, which happened to coincide with a quarterly IDS-PD meeting (the last one in person, in fact).
https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-presents-the-supreme-courts-highest-award-to-thomas-k-maher-for-his-dedication-to-the-office-of-indigent-defense-services

Tom, the Chief Justice, and AOC Director McKinley Wooten

AA **Debbie Maschinot** sent along this effusive praise for the **Guilford Office**:

> The Greensboro and High Point Offices have had changes this year. Starting with both offices getting a new Chief Public Defender and Chief High Point APD, who both are doing a great job. . . . I have seen the Assistant Public Defenders going

the extra mile/fighting the good fight for their clients. Also, if the assistant PDs needed input on a case or just wanted to talk, both chiefs' doors were always open. I have been in the Greensboro office for over 20 years and have helped out in High Point when needed and have seen a lot of changes happen. Both offices have assistant PDs that are very compassionate for their clients, and to me that is what it takes to be a public defender.

As for me being the Administrative Assistant, I have a great support staff in Greensboro; while I have been out of the office dealing with cancer, they have stepped up and worked as a team, and for that I am very proud. In High Point, the support staff is great to work with when I've had to go over and help when needed.

Our former Public Defender **Fred Lind**, I have never seen him get upset or get in a hurry. But he was there to back up the assistant PDs as well as the support staff, and his door was always open.

Well, now let me talk about **David Clark**. What can I say, well I remember a murder case he had (one of many) that went to trial. It was a horrible case, but he put everything he had into it. The compassion he had for his client, talking about fighting the good fight, David did. I'm going to miss him but want to congratulate him on his retirement.

I want to thank both offices for being who they are, for having compassion and going the extra mile/fighting the good fight for their clients.

Cumberland APD **Frances McDuffie** was appointed to the district court bench. https://www.fayobserver.com/news/20200506/former-teacher-public-defender-appointed-to-fill-cumberland-judgeship

Frances

Robeson Chief PD Ronald Foxworth recognizes departing APD **Matthew McGregor** in this way:

> The Public Defender Office would like to inform that one of our Assistant Public Defenders, Matthew McGregor, will be leaving us for other opportunities. Matthew has been an outstanding and dedicated lawyer for us and we want to thank him for eight years of valuable and competent service. We will miss him, but wish him nothing but the best in his future endeavors. We know that he will always do well. His character will insure that. Thank you, Matthew.

Wake APD **Emily Mistr** was featured in the Fourth Quarter 2019 edition of the *Wake Bar Flyer* (p. 17) (also see if you can pick out Emily's tattoo on page 15). https://cdn.ymaws.com/www.wakecountybar.org/resource/resmgr/bar_flyer/bflyer_q4_2019_final.pdf

Emily

After 41 years of service to the State, including 26 years as the Chief PD in Gaston County, **Kelly Morris** retired. **Rocky Lutz**, long time lawyer in Kelly's office, reflected on Kelly's generosity, concluding his trips to Peru to support children and the elderly in return for their support of Morris's beloved Blue Devils. The event was capped by the presentation of the Order of the Long Leaf Pine to Kelly by AA **Elizabeth Lutz**.

Kelly and Elizabeth

High Point Senior Assistant APD **John Nieman** was chosen to be the Guilford Chief PD, only the third in the office's 50 years of existence.

Mary Pollard was appointed to be IDS Executive Director in May 2020 by the IDS Commission and started in the position on August 3rd.
https://nccriminallaw.sog.unc.edu/meet-mary-pollard-the-new-director-of-the-office-of-indigent-defense-services/

Mary

In District 29B, APD **Beth Stang** took the helm after PD **Paul Welch** retired.
https://www.transylvaniatimes.com/story/2020/02/13/news/beth-stang-appointed-chief-public-defender-transylvania-county-nc/43780.html

Beth and proud hubby at her swearing-in

After the untimely passing of District 3B Chief PD **Jim Wallace**, **Dan Potter** was picked to head the office. Read Jim's obituary here: https://www.legacy.com/obituaries/newbernsj/obituary.aspx?n=james-quimby-wallace-iii&pid=194265027&fhid=6256

After serving 22 years and representing more than 100 clients facing homicide charges, Cumberland APD **David Smith** retired. https://www.fayobserver.com/news/20190728/meet-david-smith-lawyer-retires-after-22-years-as-public-defender

David (center) and the current and former Cumberland Crew

Wake APD **Deonté Thomas** was interviewed by the State Bar *Journal* about being a board-certified specialist in state criminal law. https://www.nclawspecialists.gov/news-publications/specialists-profiles/deonte%E2%80%99-thomas/

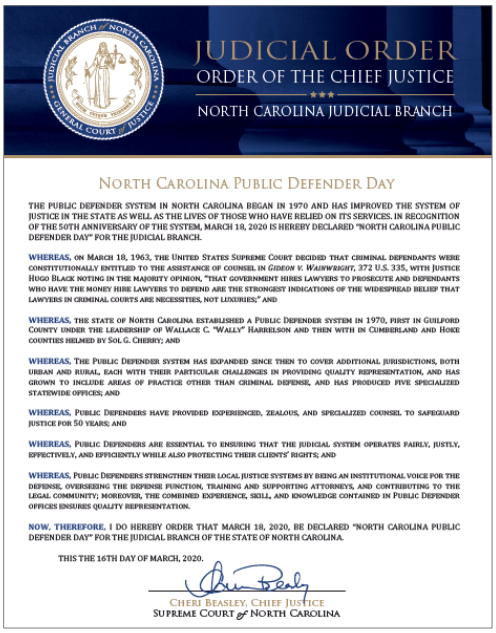
Deonté

Deonté also wrote a piece called "Fight (for) Your Clients" for the Second Quarter 2020 edition of the Wake Bar Flyer (p. 19).
https://cdn.ymaws.com/www.wakecountybar.org/resource/resmgr/bar_flyer/bflyer_q2_2020_pages.pdf

Juvenile Defender **Eric Zogry** was presented the Children's Champion Award by the Juvenile Justice & Children's Rights Section of the North Carolina Bar Association
https://www.ncbar.org/news/zogry-receives-section-award/

50TH PD ANNIVERSARY

The North Carolina Public Defender System is celebrating its 50th year in 2020. The first office was established in **Guilford County** under the stewardship of Wallace C. "Wally" Harrelson on January 1, 1970, and the then **Cumberland-Hoke Office** began operating soon thereafter under Sol G. Cherry. The Chief Justice issued an order and the Governor made a proclamation declaring March 18, 2020 as NC Public Defender Day, recognizing the 50th anniversary of NC PD offices, and lauding the contributions the PD system has made to our state; furthermore, the Council of the Criminal Justice Section of the NCBA put out a resolution with those same recognitions and advocating for better funding for the public defense system in NC. Though many of the planned celebratory activities had to be scuttled due to the COVID-19 pandemic, it is still worth commemorating 50 years of NC PDs' safeguarding justice.



JUDICIAL ORDER
ORDER OF THE CHIEF JUSTICE
NORTH CAROLINA JUDICIAL BRANCH

NORTH CAROLINA PUBLIC DEFENDER DAY

THE PUBLIC DEFENDER SYSTEM IN NORTH CAROLINA BEGAN IN 1970 AND HAS IMPROVED THE SYSTEM OF JUSTICE IN THE STATE AS WELL AS THE LIVES OF THOSE WHO HAVE RELIED ON ITS SERVICES. IN RECOGNITION OF THE 50TH ANNIVERSARY OF THE SYSTEM, MARCH 18, 2020 IS HEREBY DECLARED "NORTH CAROLINA PUBLIC DEFENDER DAY" FOR THE JUDICIAL BRANCH.

WHEREAS, ON MARCH 18, 1963, THE UNITED STATES SUPREME COURT DECIDED THAT CRIMINAL DEFENDANTS WERE CONSTITUTIONALLY ENTITLED TO THE ASSISTANCE OF COUNSEL IN *GIDEON V. WAINWRIGHT*, 372 U.S. 335, WITH JUSTICE HUGO BLACK NOTING IN THE MAJORITY OPINION, "THAT GOVERNMENT HIRES LAWYERS TO PROSECUTE AND DEFENDANTS WHO HAVE THE MONEY HIRE LAWYERS TO DEFEND ARE THE STRONGEST INDICATIONS OF THE WIDESPREAD BELIEF THAT LAWYERS IN CRIMINAL COURTS ARE NECESSITIES, NOT LUXURIES;" AND

WHEREAS, THE STATE OF NORTH CAROLINA ESTABLISHED A PUBLIC DEFENDER SYSTEM IN 1970, FIRST IN GUILFORD COUNTY UNDER THE LEADERSHIP OF WALLACE C. "WALLY" HARRELSON AND THEN WITH IN CUMBERLAND AND HOKE COUNTIES HELMED BY SOL G. CHERRY; AND

WHEREAS, THE PUBLIC DEFENDER SYSTEM HAS EXPANDED SINCE THEN TO COVER ADDITIONAL JURISDICTIONS, BOTH URBAN AND RURAL, EACH WITH THEIR PARTICULAR CHALLENGES IN PROVIDING QUALITY REPRESENTATION, AND HAS GROWN TO INCLUDE AREAS OF PRACTICE OTHER THAN CRIMINAL DEFENSE, AND HAS PRODUCED FIVE SPECIALIZED STATEWIDE OFFICES; AND

WHEREAS, PUBLIC DEFENDERS HAVE PROVIDED EXPERIENCED, ZEALOUS, AND SPECIALIZED COUNSEL TO SAFEGUARD JUSTICE FOR 50 YEARS; AND

WHEREAS, PUBLIC DEFENDERS ARE ESSENTIAL TO ENSURING THAT THE JUDICIAL SYSTEM OPERATES FAIRLY, JUSTLY, EFFECTIVELY, AND EFFICIENTLY WHILE ALSO PROTECTING THEIR CLIENTS' RIGHTS; AND

WHEREAS, PUBLIC DEFENDERS STRENGTHEN THEIR LOCAL JUSTICE SYSTEMS BY BEING AN INSTITUTIONAL VOICE FOR THE DEFENSE, OVERSEEING THE DEFENSE FUNCTION, TRAINING AND SUPPORTING ATTORNEYS, AND CONTRIBUTING TO THE LEGAL COMMUNITY; MOREOVER, THE COMBINED EXPERIENCE, SKILL, AND KNOWLEDGE CONTAINED IN PUBLIC DEFENDER OFFICES ENSURES QUALITY REPRESENTATION.

NOW, THEREFORE, I DO HEREBY ORDER THAT MARCH 18, 2020, BE DECLARED "NORTH CAROLINA PUBLIC DEFENDER DAY" FOR THE JUDICIAL BRANCH OF THE STATE OF NORTH CAROLINA.

THIS THE 16TH DAY OF MARCH, 2020.

CHERI BEASLEY, CHIEF JUSTICE
SUPREME COURT *of* NORTH CAROLINA

The Chief Justice's Order

State of North Carolina
ROY COOPER
GOVERNOR

NORTH CAROLINA PUBLIC DEFENDER DAY
2020
BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA
A PROCLAMATION

WHEREAS, on March 18, 1963, the United States Supreme Court held in Gideon v. Wainwright, 372 U.S. 335, that the Sixth and 14th Amendments of the U.S. Constitution guarantee the right to assistance of counsel in state courts to criminal defendants who cannot afford to hire counsel, noting, "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours"; and

WHEREAS, the State of North Carolina recognizes the right to counsel and has extended it to more than criminal cases; and

WHEREAS, North Carolina decided that a public defender system could ensure quality representation through experienced, competent, and specialized counsel, and established the first public defender office on January 1, 1970 in Guilford County, led by Chief Public Defender Wallace C. "Wally" Harrelson, and the second soon thereafter in Cumberland and Hoke counties, under Chief Public Defender Sol G. Cherry; and

WHEREAS, the public defender system has since expanded to cover 18 defender districts and 33 counties, as well as five statewide offices, covering many areas of practice; and

WHEREAS, the public defender offices have been dedicated to safeguarding justice for 50 years, achieving favorable outcomes for clients, working to ensure that our judicial system operates fairly, and strengthening their local legal and citizen communities; and

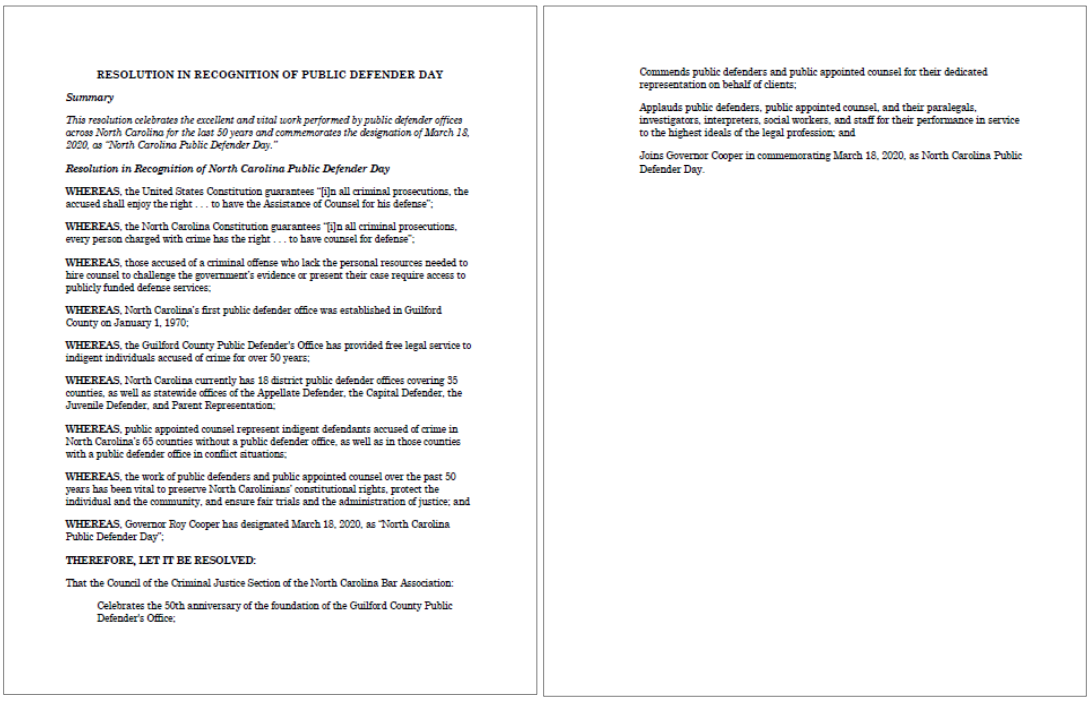
WHEREAS, by protecting the rights of their clients, the public defender offices protect the rights of everyone who calls North Carolina home;

NOW, THEREFORE, I, ROY COOPER, Governor of the State of North Carolina, do hereby proclaim March 18, 2020, as **"NORTH CAROLINA PUBLIC DEFENDER DAY"** in North Carolina, and commend its observance to all citizens.

Roy Cooper
Governor

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of North Carolina at the Capitol in Raleigh this ninth day of March in the year of our Lord two thousand and twenty and of the Independence of the United States of America the two hundred and forty-fourth.

The Governor's Proclamation



RESOLUTION IN RECOGNITION OF PUBLIC DEFENDER DAY

Summary

This resolution celebrates the excellent and vital work performed by public defender offices across North Carolina for the last 50 years and commemorates the designation of March 18, 2020, as "North Carolina Public Defender Day."

Resolution in Recognition of North Carolina Public Defender Day

WHEREAS, the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense";

WHEREAS, the North Carolina Constitution guarantees "[i]n all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense";

WHEREAS, those accused of a criminal offense who lack the personal resources needed to hire counsel to challenge the government's evidence or present their case require access to publicly funded defense services;

WHEREAS, North Carolina's first public defender office was established in Guilford County on January 1, 1970;

WHEREAS, the Guilford County Public Defender's Office has provided free legal service to indigent individuals accused of crime for over 50 years;

WHEREAS, North Carolina currently has 18 district public defender offices covering 35 counties, as well as statewide offices of the Appellate Defender, the Capital Defender, the Juvenile Defender, and Parent Representation;

WHEREAS, public appointed counsel represent indigent defendants accused of crime in North Carolina's 65 counties without a public defender office, as well as in those counties with a public defender office in conflict situations;

WHEREAS, the work of public defenders and public appointed counsel over the past 50 years has been vital to preserve North Carolinians' constitutional rights, protect the individual and the community, and ensure fair trials and the administration of justice; and

WHEREAS, Governor Roy Cooper has designated March 18, 2020, as "North Carolina Public Defender Day";

THEREFORE, LET IT BE RESOLVED:

That the Council of the Criminal Justice Section of the North Carolina Bar Association:

Celebrates the 50th anniversary of the foundation of the Guilford County Public Defender's Office;

Commends public defenders and public appointed counsel for their dedicated representation on behalf of clients;

Applauds public defenders, public appointed counsel, and their paralegals, investigators, interpreters, social workers, and staff for their performance in service to the highest ideals of the legal profession; and

Joins Governor Cooper in commemorating March 18, 2020, as North Carolina Public Defender Day.

The NCBA Resolution

Special thanks to Hoke APD **Ian Bloom** for designing the 50th Anniversary logo. Also thanks to the committee making all the celebration plans and decisions, comprising Ian, 16A PD **Jonathan McInnis**, Guilford PD **John Nieman**, and Cumberland APD **Adam Phillips**, with the assistance of SOG Defender Educator **Phil Dixon**.

The Pitt Office, led by Chief PD **Bert Kemp**, celebrated PD Day on March 18th.

Pitt County PD attorneys and staff celebrate PD Day

Pitt Chief PD Bert Kemp reading the Governor's proclamation on PD Day

IDS staff also celebrated PD Day.

IDS PD Administrator Susan Brooks

IDS Financial Staff Nancy Johnson, Lea Anne Murphy, Lucy Owens (kneeling), and Amy Ferrell

IDS CFO Elisa Wolper

COVID-19 ADAPTATION

The **Forsyth Office** has worked with the local court system to implement several initiatives to help people during the pandemic. They have instituted an online and telephone process for defendants/respondents to obtain counsel prior to the first court date, which also allows the person not to appear on the next scheduled court date and thereby reduces the number of people in the courthouse potentially exposed or exposing others to COVID-19. They have also instituted a process of essentially only calling in clients to court when both sides expect to do something of substance, and then they schedule a specific time for it. They have also set up a site on the clerk's website where all plans for each of their courtrooms' operations are detailed and where the complete dockets and the actual "trial dockets" are posted in advance. Only the cases on the "trial dockets" need to appear in court, and then only at their scheduled times. Lastly, they have created an email communication list for all counsel in the county who practice criminal law so they can receive direct updates on any of the everchanging procedures implemented to deal with the COVID-19 response.

Many PD offices have worked hard to get people released from jail to protect them from contracting COVID, and some have been recognized for their efforts in this regard:

- **Buncombe:** https://wlos.com/news/local/wnc-jails-try-to-stop-coronavirus-from-getting-into-facilities
- **Forsyth:** https://journalnow.com/news/local/the-aclu-of-north-carolina-and-others-are-urging-efforts-to-reduce-jail-and-prison/article_fdbd318b-eea0-5355-a7cb-b95aba130588.html
- **Mecklenburg:** https://www.wbtv.com/2020/03/18/mecklenburg-begins-releasing-jail-inmates-avoid-cellblock-outbreak-covid-/
  https://www.charlotteobserver.com/news/local/crime/article244527552.html

Members of the **Gaston Office** were featured in an article in the *Gaston Gazette* about the strange phenomenon of conducting court while wearing masks. https://www.gastongazette.com/news/20200609/masked-men-women-hold-court-at-gaston-courthouse?rssfeed=true

Who are these masked men? None other than APD Chip Harrison and PD Stuart Higdon

The **Gaston Office** (according to AA **Elizabeth Lutz)** went above and beyond to assist clients when the stay at home order was first issued. Says Elizabeth,

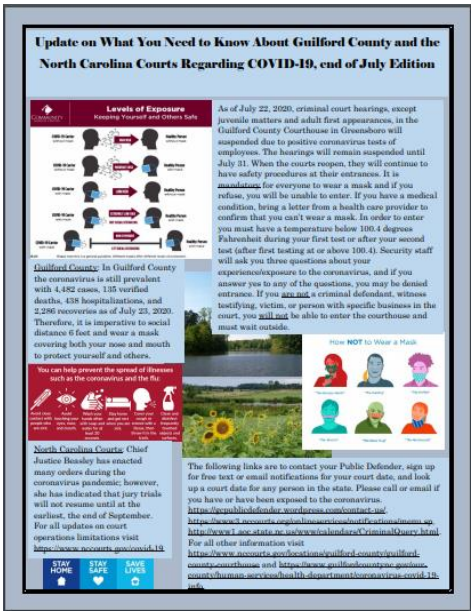
> While many counties were not having court, Gaston County continued to push forward and had district court and superior court one day a week, with the focus being on clients that were in custody. The Public Defender's Office prepared criminal calendars as well as oversaw the entire process. It was our hope to avoid our clients unnecessarily staying in custody and suffering during this pandemic.
>
> **Stuart Higdon** was busy with coming up with ideas to protect his office staff by building "COVID corner". As you can see below, attorneys can do more than go to court, they can also build! COVID Corner was built for staff to have a safe isolated spot to speak with clients.
>
> The attorneys, investigators, and legal staff have been and continue to be amazing during this time. We have a very talented staff, that work through anything. The support of IDS and our local courthouse staff has been amazing as well. We are forever grateful!

PD Stuart Higdon and APD Kevin Bowie

Former Eagle Scout Kevin Bowie showing off his mad construction skillz

Gaston's completed "Covid Corner"

The **Guilford Office** has been trying to keep clients and the public informed through the pandemic by posting information on its website on the Covid-19 information for Public Defender clients page.



Guilford July 24th update

The **District 29B McDowell County Office** staffed a tent to direct traffic and to answer clients' questions. Here they are on the first day back in superior court:

29B AA Kandy Hoyle and APD David Norris

Mecklenburg Chief Investigator **Marvin Jeffcoat** was interviewed by Law360 about the challenges presented by COVID in investigating cases.
https://www.law360.com/access-to-justice/articles/1264910/how-defense-sleuths-are-forging-ahead-despite-a-pandemic

New Hanover AA **Kim Whitehouse** was interviewed by a local news station about the importance of social distancing to protect people at high risk of catching COVID. https://www.wect.com/2020/04/03/cancer-doesnt-take-back-seat-covid-ovarian-cancer-patient-urges-community-follow-social-distancing-guidelines/

. . . AND A SPECIAL WORD OF THANKS

People commend healthcare workers, doctors, first responders, and others who are on the front lines every day dealing with people who are sick and hurting and potentially infectious. Very rarely does anyone mention public defenders in that litany, but you should be included and praised as well for your work for those who are sick and hurting and potentially infectious. You are putting yourselves on the line, for and with your clients and often in the midst of others who seem not to care or to realize we are in a pandemic or that it would be nice for you to know if you have interacted with someone who has tested positive. So even if no one else will do it, we at IDS want to recognize and thank you for your steadfast dedication and commitment, always and especially in this most difficult of times. As Civil Rights hero and US Representative John Lewis once said at a public defender event, "Thank you for not giving up. Thank you for not giving in. Thank you for keeping the faith. Thank you for keeping your eyes on the prize. Thank you for helping the least; the ordinary people in our society."

Thank you.

-- Your humble (and humbled) PD Administrator

Video of John Lewis at PD event

ONE CLIENT, MANY LAWYERS: ETHICAL AND PRACTICAL APPROACHES TO SUCCESSIVE AND CONCURRENT REPRESENTATION

D. Tucker Charns
Chief Regional Defender
N.C. Office of Indigent Services

Timothy E. Heinle
Civil Defender Educator
UNC School of Government

2020 Virtual North Carolina Public Defender Conference

UNC SCHOOL OF GOVERNMENT

I. Introduction

This will be a discussion about the ethical and practical considerations of successor counsel and concurrent counsel. These situations arise when an attorney withdraws, when a client moves on to another attorney as the case moves to a different stage, or when the client is charged in different jurisdictions. An attorney needs to be aware of the relevant North Carolina Rules of Professional Conduct (RPC) in order to provide client-centered advocacy. Attorneys best serve their clients when they are aware of their own as well as other attorneys' obligations in the cases of their mutual clients. The ethical issues are the same for successor and concurrent counsel regarding competence, confidentiality, terminating representation and the duties owed to former clients. We will start with successor counsel.

II. Successor Counsel

We define successor counsel as the attorney who is representing a client in a pending case after another attorney has withdrawn or after the case has moved to another jurisdiction, such as when a juvenile case is being bound over to superior court or a case is appealed to an appellate court.

III. Successor Counsel: Withdrawal/New Appointment

Let's start with the most common situation that we face: one trial attorney withdraws and a new trial attorney is appointed.

For the attorney who withdraws, it may be a happy resolution: your client hires counsel, for example, and you both go on your way. Alternatively, it may be that you withdraw because you discover a conflict or your client insists on an illegal strategy. No matter how it happens, the RPC rules are the same.

A. Duty to Turn Over the Client File. Counsel who are terminating representation have a duty to turn over the client's file. Upon withdrawal, some attorneys turn over a well-prepared file: full discovery, motions, pleadings, drafts of future filings, a timeline of events and an outline of the investigation so far. Some attorneys do not. The RPC make it clear the file belongs to the client:

Rule 1.16 Declining or Terminating Representation:

. . . (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, **surrendering papers and property to which the client is entitled**. . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment: *Assisting the Client upon Withdrawal*

[10] . . . Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

The exceptions to this rule are “personal notes and unfinished work product”. Note that emails may be disclosed:

Opinion #3

. . . If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained e-mail communication . . .

PRACTICE TIP: MANDATORY FILE ITEMS TO BE TURNED OVER

-all discovery, electronic or paper

-copies of any filed pleadings, including motions, warrants and indictments

-copies of ex parte motions and orders, including appointments of experts

-correspondence from the State

-plea offers from the State

-trial date discussions from the State

-results of investigations if reduced to writing

-expert reports if reduced to writing

-all correspondence (potentially email)

This is just the bare bones of what is required. You may have your own list as successor counsel.

PRACTICE TIP: ITEMS TO CONSIDER TO BE TURNED OVER

-timeline of court proceedings

-outline of investigations

-a list of action items already done, including investigations and motions

-a list of things still needing to be done, including investigations and motions

-an impression of the case

B. Successor Attorneys and Confidentiality

We know the client gets the file. But who *really* gets it? And what can the first attorney tell the successor? Let's go to the RPC!

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

CPR 300. An attorney, after being discharged, cannot discuss the client's case with the client's new attorney without the client's consent.

RPC 117. Opinion rules that a lawyer may not reveal confidential information concerning his client's contagious disease.

CPR 313 An attorney may not voluntarily disclose confidential information concerning a client's criminal record

Rule 1.9 Duties to Former Clients

(c) A lawyer who has formerly represented a client . . . shall not thereafter:

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[9] The provisions of this Rule . . . can be waived if the client gives informed consent, which consent must be confirmed in writing.

This means that you cannot speak to successor counsel or get the file without the written consent of the client.

PRACTICE TIPS FOR WRITTEN WAIVERS/CONSENT

1. At the start of the representation, you may want to have the client sign a consent form to transfer the file and a release to talk to successor counsel along with other waivers and releases. People sign this consent form in medical offices all the time.
2. When you prepare your motion to withdraw, prepare the file and the waiver.
3. Attach the signed waiver to the motion to withdraw or ask the client to sign the waiver at the hearing on the motion to withdraw.
4. Give the file to the client.
5. Have the successor attorney prepare the waiver and consent form.

A sample waiver is included in the materials.

.

NOTES: Who Pays for copying the File?

Not the client. As the file belongs to the client, the attorney is responsible for making any copies.

See IDS Policies Governing Attorney Fee and Expense Applications in Non-Capital Criminal and Non-Criminal Cases at the Trial Level:

> Because the State Bar obligates a terminated attorney to turn over the file and does not allow an attorney to charge a client if the attorney wants to keep a copy of the file], IDS generally will not compensate an appointed attorney for time spent scanning or preparing copies of an original paper file or reimburse an appointed attorney for scanning or copying expenses.

There is an exception for clients in custody when you have electronic discovery that was never transferred to paper.

http://www.ncids.org/Rules%20&%20Procedures/Fee%20and%20Expense%20Policies/Atty%20Fee%20policies,%20non-capital.pdf

IV. Juvenile Cases

Raise the Age has not just taken most 16- and 17-year-olds out of juvenile court (not traffic cases or clients who were "once an adult always an adult") but has also provided a way for them to find their way to superior court. And a way to go back again to juvenile court.

Confidentiality: As a the attorney for the juvenile does not withdraw from a case and, as the potential of a Reverse Waiver exists until the case is disposed in Superior Court, the relationship between attorneys representing clients in juvenile and adult court is unique. Under Comment 5 to Rule 1.6, Confidentiality of Information, "[D]isclosure is impliedly authorized in order to carry out the representation" unless the client explicitly states otherwise.

Working Together with OJD and the attorneys: The attorney representing the client bound over to superior court who is not familiar with juvenile court should review the outstanding website put together by Juvenile Defender Eric Zogry and the Office of the Juvenile Defender (OJD) for access to all kinds of training, support and resources: https://ncjuveniledefender.com

PRACTICE TIPS FOR THE ATTORNEY WITH THE CLIENT BOUND OVER FROM JUVENILE COURT:

1. Contact the juvenile attorney and get the file.
2. If your client is in custody, they will be in a juvenile detention facility until they turn 18.
3. Know where to take any orders modifying your client's bond.
4. Understand and prepare for Reverse Waiver.

PRACTICE TIPS FOR THE ATTORNEY WHO REPRESENTED THE CLIENT IN JUVENILE COURT:

-Need to give client file, meet attorney representing the client in adult court.

-Need to consider how to help with Reverse Waiver.

V. Successor Counsel: Appeals from the Trial Court to the Appellate Courts

Trial attorneys rarely see the appellate attorneys on their cases, and appellate attorneys rarely see the trial attorneys. Still, both attorneys represented or represent the same client on the same charges and share the same goal of getting the client the best outcome. IDS has adopted protocols regarding successor counsel in appeals in **IDS Performance Guidelines in Non-Capital Criminal Cases at the Trial Level:** See: http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf

Guideline 9.3 Right to Appeal to the Appellate Division

(e) . . . trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court, and should timely respond to reasonable requests from appellate counsel for additional information about the case.

Guideline 9.4 Bail Pending Appeal

(b) . . . trial counsel should cooperate with appellate counsel in providing information if appellate counsel pursues a request for bail.

A. Duty to Turn Over the Trial and Appellate File

The same RPC that govern the trial attorney's duties to turn over the client file are, of course, the same here. Additionally, at the close of the appeal, the Comment to Rule 1.16, Declining or Terminating Representation, states that the trial transcript furnished by the state must be turned over to the client.

B. Confidentiality

As a direct appeal to the appellate courts is solely based on the record from the proceedings, there is not usually a need for appellate counsel to seek the client's file. The IDS Guidelines call for trial counsel "to cooperate in providing information . . ." to appellate counsel as noted above, and this must be done mindful of the RPC. In a discussion of successive representation between appellate counsel, there is a note that in the 2015 Formal Ethics Opinion 5, "Authority to Discuss Former Client's Appellate Case with Successor Lawyer, that ". . . lawyers representing a client in the pre-conviction stages of a case have more personal contact and receive confidential information that is not relevant to or shared with post-conviction lawyers." It appears that the RPC recognizes that appellate and post-conviction attorneys have a different type of relationship with clients from trial attorneys and holds trial attorneys to a stricter standard of confidentiality. This is important, as clients meeting trial attorneys need to know that everything is held in confidence until they waive that privilege in writing. See those requirements, as discussed above in Section III B.

VI. Successor Appellate Attorneys

The RPC make clear that "In appellate or post-conviction proceedings, a discharged lawyer may discuss a former client's case and turn over the former client's file to successor counsel if the former client consents or the disclosure is impliedly authorized." nless the client specifically instructs first counsel not to discuss the case or turn the files over to successor counsel.

2015 FORMAL ETHICS OPINON 5

Authority to Discuss Former Client's Appellate Case with Successor Lawyer

. . . in appellate or post-conviction proceedings, a discharged lawyer may discuss a former client's case and turn over the former client's file to successor counsel if the former client consents or the disclosure is impliedly authorized**.** That is, unless the client specifically instructs their first counsel not to discuss the case or turn the files over to successor counsel, such actions are permissible without the client's express consent.

NOTE: As a general rule, lawyers representing a client in the pre-conviction stages of a case have more personal contact and receive confidential information that is not relevant to or shared with post-conviction lawyers. While the Rules of Professional Conduct are the same for each, the application of the relevant rules must be guided by the unique relationship that both the pre-conviction and the post-conviction lawyer have with the client. As a result, this opinion only applies to the situation where this issue arises between a discharged appellate lawyer and the subsequent appellate lawyer. (Emphasis added)

VII. Successor Counsel: Motions for Appropriate Relief

When another attorney files or prepares to file a Motion for Appropriate Relief alleging ineffective assistance of trial or appellate counsel, the RPC make limited exceptions regarding confidentiality. A limited disclosure of confidential information is permitted by statute and the RPC.

> N.C. Gen. Stat. § 15A-1415(e): . . where a defendant alleges ineffective assistance of prior . . . counsel, . . . the client "shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness."

The statute further provides that the waiver of the attorney-client privilege "shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege."

Rule 1.6 (b) (6) states that a lawyer may disclose confidential information:
to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

The RPC make clear that this exception is very limited:

2011 Formal Ethics Opinion 16:
[a claim] of ineffective assistance of counsel. . . does not give the lawyer *carte blanche* to disclose all information contained in a former client's file. . . Disclosure should be no greater than what is reasonably necessary to accomplish the purpose . . . [and] the lawyer still has a duty to avoid the disclosure of information that is not responsive to the specific claim.

VII. Concurrent Counsel

We define concurrent counsel as one of at least two attorneys representing a client in different pending matters that are in a different courts or jurisdictions. They are not co-counsel, because that implies that bothsattornys represent a client on the same matter. These attorneys share a client with pending charges in different counties or different courts, such as adult criminal, DSS, juvenile, federal and immigration courts. This also includes clients with capital and factually separate non-capital cases.

A. Confidentiality

Concurrent counsel have implied authorization to consult with each other absent contrary instructions from the client. See Comment 5 to RPC 1.6:

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.

B. Working for the Best Outcome

Again, in order to provide the best representation and practice client-centered advocacy, all counsel representing the same client need to consult with each other. A client needs an informed attorney to make an informed decision about their case.

See the following RPC:

Rule 1.1 Competence:

. . . Competent representation requires the legal knowledge, skill, *thoroughness, and preparation* reasonably necessary for the representation.

Rule 1.4 Communication

. . . (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

VIII. Parent Representation Courts (to be supplemented)

IX. Concurrent Counsel: Cases Across County and State Lines

Attorneys find it very frustrating when a client is charged in different counties. Clients don't seem to find the situation favorable either. There are some steps that an attorney can take to find the best outcome for the client.

A. Find the client and the other charges.

The first steps are to find the client and to discover if the client does have pending charges. While it may seem very basic to look for a client, sometimes we assume that if a client is not in custody in our local jail, the client is not in custody anywhere.

A quick inquiry to VineLink can reveal the custody status: https://vinelink.vineapps.com/

Here are some practice tips on discovering if your client has any other pending charges:

PRACTICE TIP: FIND ANY OTHER CHARGES

CIPRIS	https://cis1.nccourts.org/ciprsweb/#/
AOC Calendar	https://www.nc.gov/services/court-dates
VineLink	https://vinelink.vineapps.com/state
PACER	https://pacer.uscourts.gov/
JWISE	https://ncjuveniledefender.com/?s=JWISE

B. Working with the Out-of-County Trial Attorney

For your client to get the best possible outcome, it is important for all counsel work together. It will also make each attorney's job easier and give you both an advantage over the assistant district attorneys, who rarely consult with each other.

An incomplete list of the benefits:

- **Jail visits**: if your client is incarcerated in another county, the assigned counsel in that county help tremendously with communication
- **Bond conditions**: you can work with the attorney to find solutions to release the client and not use limited resources on only one bond
- **Sentencing points**: coordination can help save your client sentencing points
- **Possible admission to elements**
- **Share discovery**
- **Coordinate trial dates**
- **Concurrent and consecutive sentences**
- **Jail credit**

X. Capital Cases and Non-Capital Cases

Like other cases of concurrent counsel, capital and non-capital clients get the best possible outcome for their clients when they work together. Failure to do so when a client has a pending capital case can have catastrophic consequences.

While capital attorneys may only offer to the non-capital attorney to just continue the cases and "let it be", that is not always enough. For example, a court may push an attorney to resolve a misdemeanor jail assault that the non-capital attorney has "let be" for many months. That attorney may not understand how a jail assault conviction, while only a misdemeanor, could affect a jury's decision about life versus death.

XI. Commitment Hearings

See IDS Performance Guidelines in Non-Capital Criminal Cases at the Trial Level

> **3.2 Client's Competence and Capacity to Proceed**
> (e) If the court enters an order finding the client incompetent and orders involuntary commitment proceedings to be initiated, defense counsel ordinarily will not represent the client at those proceedings, but should cooperate with the commitment attorney upon request.

http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf

XII. Federal Charges

Sometimes federal charges on the same conduct will cause an assistant district attorney to dismiss the state charges, especially in bank robbery charges as well as cases in repeated gun and drug and gang alleged offenders. The client may benefit from the state counsel sharing any information they obtained before the state took a dismissal, including discovery, jail credit or information about co-defendants.

Often, however a client may have federal charges unrelated to the pending state charges. The state attorney needs to be aware of the same considerations in Section IX. The state attorney needs to be particularly educated in jail credit regarding state and federal convictions and consulting with the federal defender. This includes issues like running state time concurrent with a federal sentence. The best outcome for many clients is to remain in federal custody as those facilities have more resources. This can be a tricky situation as it matters who has primary custody over a client and it may involve dismissing and reinstating state charges.

For starters, see:

https://nccriminallaw.sog.unc.edu/federal-state-sentence-interaction-concurrent-and-consecutive-sentences/

XIII. Immigration Attorney

In order to give clients with immigration issues the best advice, trial attorneys need to consult with the client's immigration counsel. As most of our clients do not have the resources for separate immigration counsel, and according to *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) and *State v. Nkiam,* 243 N.C. App. 777 (2015), the trial attorney needs to provide proper advice about immigration consequences.

IDS provides counsel free consults with expert immigration attorneys. As in most cases, it is better for the attorney to seek a consult as early in the case as possible. Counsel should complete the form for a consult here: http://www.ncids.org/ImmigrationConsult/Links.htm?c=Immigration%20Consultations

XIV. Conclusion

We understand that appointed counsel are overworked and underpaid. We understand that some of the topics covered here may be asking some of you to do even more. For those of you who may be reluctant to make changes to your practice, we urge you to consider that our clients deserve the protection of the RPC and the same respect as retained clients or clients in civil court. Timothy and I are available for questions and concerns. Thank you for all you do for your clients.

Timothy Heinle
Civil Defender Educator
Heinle@sog.unc.edu

Tucker Charns
Chief Regional Defender
tucker.charns@nccourts.org
919-354-7263

RELEASE OF CLIENT FILE TO SUCCESSOR ATTORNEY

Client Name: _____

File Nos.: _____

_____

Charges: _____

_____

County: _____

Attorney: _____

Successor Attorney (if known) _____

As listed above, I am the client charged in these files numbers in this county. The court has ordered that my attorney withdraw and new counsel be appointed. By my signature and on the date below, I give permission for my attorney to provide my new attorney with my complete file, with the exception of my attorney's work product, such as my attorney's notes, and to communicate with my new attorney about my cases listed above. I understand that my attorney may or may not retain a copy of this complete file and, in the future, should I request a copy of my file, that request should be made of my successor attorney.

_____

Client signature

_____

Date of release

Speak Up!

Identifying, Arguing, and Preserving First Amendment Issues

Jim Grant &
Glenn Gerding
Office of the
Appellate Defender

1

Preserve Issues For Appeal

- If you do not raise 1st Amendment and state constitution issues, they cannot be raised on appeal.
  - Except on appeal in Superior Court
- Many statutes that implicate the 1st Amendment contain terms or phrases that are vague – a 5th Amendment due process challenge is also needed.

2

Preserve Issues For Appeal

- Consult with the Office of the Appellate Defender.
- Be creative.
- Don't wait until trial!

3

1st Amendment: Sword & Shield

- First Amendment issues can be raised in adult criminal and juvenile delinquency cases.
- Can be raised in Superior Court and District Court.
- But – Can't preserve in a guilty plea like a MTS – have to try the case!

4

1st Amendment: Sword & Shield

- You can challenge a stop or arrest.
  - No RAS or PC? *State v. Ellis*
- You can challenge the statute your client is charged with violating.
  - "Overbreadth" -> more on that later
- You can raise the 1st Amendment as a defense to the charge.
  - Application of the statute is unconstitutional "as applied" to your client's speech

5

1st Amendment: Sword & Shield

- Was your client *Terry*-stopped or arrested because of something he said or somewhere he went?
- Does the statute prohibit a communication?
  - To, **or even just about**, a person?
  - In a particular manner? About a topic?

6

1st Amendment: Sword & Shield

- Is your client's speech the basis for the charge, regardless of what the statute purports to prohibit?
- Was your client in a protected place?
- Is the State seeking a sentence enhancement or greater punishment because of something your client said or did that is speech-related?

7

What is "speech?"

- Oral communications
- Communicating with written words
  - Hand-delivered
  - Sent by mail
  - Sent by electronic means:
    - Email
    - Text
    - Facebook
    - Twitter
    - Etc.

8

What is "speech?"

- Sending a message through a third party
- Being somewhere to gather or receive information – library, fair, a park
- Putting a sign or symbol in your yard, on your clothing, on your car

9

Speech That Might Be Restricted

- "Fighting words" - very limited
- Child pornography
- "Obscenity"
- "True Threats"
- Time, place, manner restrictions
- Caveat: Let a judge or jury decide if the speech is protected.

10

Repulsive, but protected

- Even if the speech is reprehensible, repulsive, and contrary to your values, it is protected, and you must raise the issue.
- Ex. SCOTUS has said that virtual child pornography is protected and the State must prove it is real.

11

Repulsive, but protected

- Virtual/simulated child pornography
  - State must prove it is real
- Revenge porn?
- Animal torture videos
- Racist Speech
  - "Hate Speech" is not a category of unprotected speech

12

Example - Cyberbullying

- *Bishop,* 368 N.C. 869 (2016)
  - Statute criminalizing "cyberbullying"
  - Defined as posting online "personal, private, or sexual information about a minor" with the intent to "intimidate or torment"
  - COA found statute regulated "conduct"
  - SCONC disagreed, finding statute prohibited speech, was "content-based," and didn't survive strict scrutiny
  - Invalidated the portion of the statute at issue

13

"Overbreadth"

- A Special Rule for 1A cases:
- An individual may challenge an overbroad statute that infringes on protected speech even if that statute might constitutionally be applied to him. *United States v. Stevens*, 559 U.S. 460, 472–73 (2010).
- A challenge to the statute itself, not necessarily its application.

14

"Content Based"

- Restrictions on speech based on the content of the speech receive "strict scrutiny" - **the State** must show statute is **least speech-restrictive means** of accomplishing a **compelling** government interest.
- "Strict in theory, fatal in fact"

15

"Content Based"

- How do you know if a restriction is "content-based?"
  - Does it make facial reference to particular subject matter or is based on the function or purpose of the speech?
  - Is it based on the impact of the speech on third parties?
  - Is it based on government's disagreement with the speech?
  - Can it be justified without reference to the content of the regulated speech? If not....

16

"Time, Place, and Manner"

- If the statute isn't content-based, is it a "time, place, and manner" restriction?
  - For example: "Unlawful for lawn signs (regardless of content) to be larger than 5' x 7'."
  - If so, then intermediate scrutiny applies.
  - Does the law provide ample other opportunities for speaker to get out his or her message?

17

"As-Applied" Challenges

- Challenging the *application* of an otherwise valid statute to your client's speech.

18

Example - Cyberstalking

- *Shackelford*, 825 S.E.2d 689 (COA 2019)
  - Mentally ill client became obsessed with fellow parishioner. Began sending letters, gifts, etc.
  - Told to stop. Did so but continued to make Google+ posts *about* the object of his affection.
  - Charged with stalking for the Google+ posts – indictment alleged client was engaged in a "course of conduct," to wit, two or more "communications to ***or about*** a person that the defendant knows or should know would cause a reasonable person to suffer emotional distress"

19

Example - Cyberstalking

- *Shackelford*, 825 S.E.2d 689 (COA 2019)
  - On appeal, client argued *application* of stalking statute to posts violated 1st Amendment
  - Emotional impact = content-based
  - Failed strict scrutiny – State could have enforced lawful protective order, etc.
  - Although direct communication <u>to</u> a person is punishable, merely talking <u>about</u> a person generally cannot be punished
  - "one to one vs. one to many" speech

20

Is NC's stalking statute overbroad?

- HB 558 (2019) - proposed amending 14-277.3A(b)(1): "communicates to ~~**or about**~~ a person"
- Did not pass:

@NCCapitol

Stalking code rewrite delayed over domestic violence concerns

Tags: domestic violence, cyberstalking, stalking
Posted 2:05 p.m. today
Updated 2:15 p.m. today

21

Is NC's stalking statute overbroad?

- If you have a client charged with stalking, and you are going to trial, raise a First Amendment challenge to 14-277.3A, no matter what the client actually did!
- There is a decent chance the appellate courts will find the statute overbroad and facially unconstitutional.

22

Example – Threats to a court official

- *Taylor*, 841 S.E.2d 776 (COA 2020)
  - Client was angry at the way the elected DA handled a high-profile case
  - Made several angry comments about the DA, including wishing "the death" on her and saying that it was time for "mountain justice," references to "having ammo," etc.
  - Client quickly deleted the arguably intemperate comments. Someone took a screenshot, referred to DA
  - Client prosecuted for "threatening to kill a court officer" under 14-16.7(a)

23

Example – Threats to a court official

- *Taylor*, 841 S.E.2d 776 (COA 2020)
  - On appeal, client argued his motion to dismiss should have been granted – the statute could only prohibit "true threats" as defined by SCOTUS:
  - Speaker means to communicate a serious expression of an intent to commit an act of unlawful violence. *Virginia v. Black*, 538 U.S. 343, 358 (2003).

24

Example – Threats to a court official

- *Taylor*, 841 S.E.2d 776 (COA 2020)
- Court agreed – posts were "political hyperbole," no specifics that suggested an actual intent to kill the DA, the State never proved that defendant owned any firearms, the district attorney testified that she did not feel the need to have personal protection, none of the responses to the posts indicated concern that defendant might be planning to kill the DA, and defendant's deletion of the posts was strong evidence that he did not intend the posts to constitute a true threat.

25

Example – Jury tampering

- *Mylett*, No. 6A19 (N.C. 2020)
  - Defendant allegedly confronted jurors after his brother's assault trial. Charged with conspiracy to harass a juror under 14-225.2(a)(2)
  - Argued statute overbroad and vague
  - SCONC didn't reach 1A issue – found that client's conduct didn't meet statutory definition – didn't "threaten or intimidate." An example of how sufficiency can sometimes avoid 1A challenges.

26

Statutes and Facts to Challenge

- Remember: facial and as-applied challenge
- Cyberstalking – overbroad?
  - 14-196.3
  - (e) This section does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others. This section shall not be construed to impair any constitutionally protected activity, including speech, protest, or assembly.
- Stalking
  - 14-277.3A

27

Statutes and Facts to Challenge

- Cyberbullying - 14-458.1 – other subsections similar to *Bishop* subsection
- "Threats" of Mass Violence on educational property – 14-277.5, 277.6
  - Especially those of you with juvenile practices
  - There's a MTD on 1A grounds on the OAD website

28

Statutes and Facts to Challenge

- Disclosure of private images – 14-190.5A
  - aka "Revenge porn"
- Sex offender internet restrictions – new
  - 14-202.5
  - *Packingham*
- Sex offender premises restrictions
  - 14-208.18
  - currently a pending federal court challenge
  - Going to church – as-applied challenge

29

Statutes and Facts to Challenge

- "Soliciting Alms" - local ordinances
- Disorderly Conduct – 14-288.4
- Obscenity – always challenge – *Miller*
  - 14-190.20. Warrants for obscenity offenses. A search warrant or criminal process for a violation of G.S. 14-190.1 through 14-190.5 may be issued only upon the request of a prosecutor.

30

Statutes and Facts to Challenge

- Displaying, or Distributing " harmful material" to minors
  - 14-190.14 and 14-190.15
- Contempt
  - Did the content of the client's speech result in contempt finding?

31

Quick Tips

- Read the statute!!!
  - Consider if there are aspects of the statute that are vague or would lead a person to not know what is prohibited.
    - If so then raise a 5th Amendment due process challenge based on vagueness
- Research, brainstorm, and consult with OAD
- File a motion for a Bill of Particulars.
  - State v. Mazur (COA 2018)

32

Quick Tips

- Write and file a motion challenging the constitutionality of the statute on its face and as-applied. Both should be raised.
- Cite the First Amend. AND Art. I, sec. 14 of the state constitution: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained"
- Witnesses could help build the record.

33

Quick Tips

- Move to dismiss for insufficient evidence that the conduct is not protected.
- Once all evidence is submitted, reassert the as-applied challenge.
- Submit proposed jury instructions in writing that require the jury to find the speech is not protected. - *Taylor*
- Argue to the jury

34

Quick Tips

- If you win a motion and a judge declares a statute unconstitutional, even if the State does not appeal, notify us.
- If the State appeals from a ruling that a statute is unconstitutional, ask the judge to appoint OAD, notify us, and ensure the clerk sends the Appellate Entries to OAD.

35

Resources

- IDS website
  - Training Presentations
  - http://www.aoc.state.nc.us/www/ids/
- SOG website
  - Defender Manual
  - http://defendermanuals.sog.unc.edu/
- OAD on-call: 919–354-7210

36

Questions?

37

"*Batson* Toolkit" Index

Below you will find a list of six motions we urge all defenders to file in support of *Batson* objections made at trial. A brief description of each motion is included. Also, whether the motion is "essential" or "discretionary," is also designated beside each motion. "Essential motions" are motions that must be filed in order to effectively litigate and preserve any *Batson* motions made at trial. "Discretionary" motions are motions that are encouraged and helpful, but should not be given priority over "essential" motions.

1. Defendant's Motion for Complete Recordation of All Pretrial and Trial Proceedings. **Essential Motion**

    - The judge **must** grant this motion if filed, so it is an easy motion to win! Having all proceedings recorded, including jury selection, is necessary in order for *Batson* objections to be fully litigated on appeal. In fact, the appellate courts have found it impossible to reach *Batson* issues on their merits without a transcript of jury selection. *See North Carolina v. Campbell*, No. COA18-998 (Jan. 21, 2020) (""[If] a defendant anticipates making a *Batson* discrimination argument, it is extremely difficult to prevail on such grounds without a transcript of jury selection.")("Without such information, it is highly improbable that such a challenge will succeed.").

2. Defendant's Motion to Distribute Juror Questionnaire and to Note Race and Gender of Every Potential Juror Examined in this Case. **Essential Motion**
    a. Exhibit A
    b. Exhibit B

    - It is imperative that a juror's race and gender is recorded in order for *Batson* objections to be fully addressed on appeal. The cases cited in the motion explain that the jurors self-identified race (and gender) is the best source of their race (and gender). We encourage you to request that the Court distribute some version of the questionnaire in "Exhibit A" because having these questionnaires as part of the record on appeal is helpful for *Batson* litigation, especially when it comes to comparative juror analysis. However, if the Court is reluctant to distribute the long-form questionnaire, ask that "Exhibit B" be distributed instead.

3. Defendant's Motion to Prohibit Impermissibly-Motivated Peremptory Strikes and for the Court to Take Consider Historical Evidence of Jury Discrimination (3 exhibits attached). **Essential Motion**

    - In *State v. Hobbs* (2020), the NC Supreme Court held that the history of peremptory strikes in a jurisdiction is relevant to the question of whether jury discrimination has occurred in a particular case. This motion is your opportunity to present that history to

the court. The sample motion includes statewide data showing that, for decades, North Carolina prosecutors have consistently struck Black jurors at much higher rates than white jurors. For data specific to your jurisdiction, please contact the Center for Death Penalty Litigation.

- This motion also lays out all of the relevant *Batson* law that the court should consider when ruling on any *Batson* objections. This motion helps the attorney become familiar with *Batson* law, educates the Court and prosecutor, and puts the prosecutor on notice that the attorney intends to make proper *Batson* objections, which may consciously or subconsciously dissuade the prosecutor from making disproportionate strikes based on race and gender, thereby leading to a more diverse jury. Filing this motion prior to trial also takes out the potential uncomfortableness of making the objection. *Batson* objections can be uncomfortable, but making this motion a regular part of your practice will make *Batson* objections more routine, and perhaps more comfortable for all involved.

4. Defendant's Motion for Discovery of Information Pertaining to Batson Litigation
   Discretionary Motion

   - This motion seeks to identify any training the prosecution has attended related to *Batson*, as well as if the prosecutor has ever been found to have struck a juror based on race or gender during a *Batson* hearing. This information, as explained in the motion, is relevant for the Court's *Batson* analysis, so you should seek it ahead of time as part of discovery.

5. Defendant's Motion to Apply Objective Observer Standard When Ruling on Objections to Peremptory Strikes
   Discretionary Motion

   - This motion seeks to ask the Court to apply a new standard when ruling on *Batson* objections. It is a preservation motion.

6. Defendant's Motion to Preserve All Notes, Questionnaires and Other Documents from Jury Selection
   Discretionary Motion

   - While discretionary, we highly encourage the filing of this motion. Prosecutor's notes regarding jury selection have led to helpful findings of *Batson* violations and reversals of convictions (see discussion in Motion). As a matter of strategy, it is suggested that this motion is filed in Court immediately after jury selection ends.

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA v. DEFENDANT	) **DEFENDANT'S MOTION FOR**) **COMPLETE RECORDATION**) **OF ALL PRETRIAL AND TRIAL**) **PROCEEDINGS**)

NOW COMES the Defendant, _____, and respectfully moves the Court for an order directing the Court Reporter to take down and record all hearings on motions, all bench conferences, all jury voir dire, opening statements, closing arguments, all testimony and each and every proceeding involved in pretrial and trial proceedings in the above-numbered case.

Such complete recordation is required under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19, 23, 24, and 27 of the North Carolina Constitution and N.C. Gen. Stat. § 15A-1241. In the absence of complete recordation, unrecorded errors may not be preserved for appeal. Indeed, failure to request complete recordation may constitute ineffective assistance of counsel.

In *State v. Campbell*, ____ N.C.App. ___ (2020), defense counsel explicitly declined to request recordation of jury selection. During the course of voir dire, the prosecutor exercised three of four peremptory strikes against African Americans, and defense counsel made an objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), which was overruled. On appeal, the Court of Appeals noted that "if a defendant anticipates making a *Batson* discrimination argument, it is extremely difficult to prevail on such grounds without a transcript of jury selection," *Campbell*, ___ N.C.App. at ____, and held:

> From the transcript of the hearing, we… do not know the

> victim's race, the race of key witnesses, questions and statements of the prosecutor that tend to support or refute a discriminatory intent, or the State's acceptance rate of potential African American jurors. Finally, we see nothing in the record from which we can ascertain the final racial composition of the jury...
>
> Without more information… defendant has not shown us that the trial court erred in its finding that no *prima facie* showing had been made. Therefore, we uphold the trial court's ruling on the merits of defendant's *Batson* claim.

Id. at ____. The Court concluded by "urgently" counseling Defendants to request recordation:

> Defendants are entitled to have their *Batson* claims and the trial court's rulings thereon subjected to appellate scrutiny. To do so, it is incumbent on counsel to preserve a record from which the reviewing court can analyze the *Quick* factors. **Thus, we urgently suggest that all criminal defense counsel follow the better practice and request verbatim transcription of jury selection.**

Id. at ___ (emphasis added).

Thus, in order to properly preserve all potential trial errors for any appellate proceedings and to ensure Defendant receives effective assistance of counsel, Defendant requests complete recordation of these proceedings.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion for Complete Recordation Of All Pretrial and Trial Proceedings has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____

COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____

STATE OF NORTH CAROLINA	)	
	)	**DEFENDANT'S MOTION**
v.	)	**TO DISTRIBUTE**
	)	**JUROR QUESTIONNAIRE AND TO**
	)	**NOTE RACE AND GENDER OF**
	)	**EVERY POTENTIAL JUROR**
	)	**EXAMINED IN THIS CASE**

DEFENDANT

COMES NOW the Defendant, _____, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 19 and 26 of the North Carolina Constitution and respectfully moves the Court to allow the Defendant to distribute the one of the proposed attached questionnaires to be answered by jurors who have been called for jury duty at the time of the Defendant's trial and prior to any voir dire of those jurors. In support of this motion, the Defendant shows unto the Court:

1. The attached questionnaire (Exhibit A) would simplify the questioning of jurors, as well as save valuable court time by eliminating the necessity of questioning jurors concerning basic factual information.
2. A defendant may not protect his rights under *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994), in the absence of a clear record of the race and gender of each juror examined during voir dire. *See State v. Mitchell*, 321 N.C. 650 (1988); *State v. Brogden*, 329 N.C. 534 (1991).
3. A questionnaire is less intrusive and more efficient than asking each juror to identify his or her race and gender in open court and consequently is the best

method of establishing a clear record. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great").

4. Further, the questionnaire would enable both the State and the Defendant to focus their voir dire of prospective jurors on any issues raised by the questionnaire regarding a juror's qualifications to serve in this particular case.
5. At a minimum, the defendant requests the distribution of the attached questionnaire (Exhibit B) in order to record the race and gender of each prospective juror.
6. If a juror neglects to fill in his or her race, Defendant requests that the Court make inquiry of the juror as to his or her race and gender prior to either party questioning that juror.
7. In the alternative, should the Court decide not to have a questionnaire, Defendant requests that the Court inquire as to the race and gender of every juror prior to the questioning of that juror by either party.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Distribute Juror Questionnaire has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

SUPERIOR COURT
_____ COUNTY

JUROR QUESTIONNAIRE

TO THE PROSPECTIVE JUROR:

Please answer each of the following questions as fully and as accurately as possible. There is no right or wrong answer. You should simply answer each question honestly and conscientiously. You must not discuss the questionnaire or the answers with anyone else.

Your answers will not be public knowledge, but will be given to the lawyers in the case for which you are being considered a juror. If you cannot answer a question because you do not understand it, write "DO NOT UNDERSTAND" in the space after the question. If you cannot answer a question because you do not know the answer, write "DO NOT KNOW" in the space after the question. If you need extra space to answer any question, please use the other side of the questionnaire. Be sure to indicate the number of the question you are answering.

If there is information that is so personal and private that you want to discuss with the judge and the attorneys in the judge's office, please write "I NEED TO SPEAK IN PRIVATE" and give a brief description of the information. Please keep in mind that all individual conferences are time consuming. However, if you believe such a private conference is necessary, indicate as set forth above.

This questionnaire is to be answered as though you were under oath. Your honesty in answering these questions is essential. Please make sure your answers are legible. Please print and use dark ink (no pencils).

The purpose of this questionnaire is to encourage your full expression and honesty, so that all parties will have a meaningful opportunity to select a fair and impartial jury to try the issues in this case. Thank you for your cooperation. It is of vital importance to the Court.

JUROR QUESTIONNAIRE

(Please print and make sure your answers are legible)

1. Last Name: _____ First: _____ Middle: _____

2. Age: _____ 3. Gender: _____

4. Race: _____ 5. Ethnicity: _____

6. Area of county where you currently live (**Not your address**): _____
   a. Zip code: _____
   b. How long have you lived at your current address: _____
   c. How long have you lived in this county: _____

7. Place of Birth: _____

8. Are you: ☐ Employed ☐ Employed, part time ☐ Unemployed ☐ Student ☐ Retired
   ☐ Full-Time Parent ☐ Disabled ☐ Other

   If you are employed or retired:
   a. What type of work do/did you do? _____
   b. Where do/did you work? _____
      i. When did you begin work there? _____
   c. Do/did you have any supervisory responsibilities? _____
      i. How many people do/did you supervise? _____

9. What is the single highest grade of high school or college you have completed? _____
   School: _____ major/minor_____

10. Marital status: ☐ single ☐ married ☐ divorced ☐ separated ☐ widowed ☐ Other

11. Do you have children (biological, adopted, step)? ☐ Yes ☐ No. If yes, please continue:

    Number of boys: ____ ages: _____ Employment: _____

    Number of girls: ____ ages: _____Employment: _____

12. If presently married or sharing a household with someone (other than a child), is he/she:
    ☐ Employed, full time ☐ Employed, part time ☐ Unemployed ☐ Student ☐ Retired
    ☐ Full-Time Parent ☐ Disabled ☐ Other

    If employed:
    a. Where does he/she work? _____
    b. What does he/she do? _____
    c. How long has he/she worked there? _____

13. Have you or any close friends/relatives been employed in law enforcement? ☐ Yes ☐ No

    If yes, what agency and position? _____

14. Have you ever been charged with a crime of theft or violence? ☐ Yes ☐ No. If yes,

When? _____ Where? _____

15. Have you ever been a defendant in a jury trial? ☐ Yes ☐ No
    a. If yes, what was the offense? _____

16. Has a family member or friend been charged with a crime of theft or violence? ☐ Yes ☐ No
    a. If yes, when? _____ where? _____
    b. Offense? _____
    c. What is your relationship to that person? _____

17. Have you ever been a witness in a criminal case? ☐ Yes ☐ No
    a. If yes, was it for the ☐ State? ☐ Defense?

18. Have you ever been sued or called as a witness in a civil case? ☐ Yes ☐ No

19. Have you ever served on a jury in State or Federal court? _____
    a. If so, when and where was the most recent time? _____
    b. Was it a civil or a criminal case? _____
    c. Were you the foreperson of any jury on which you served? _____
    d. Was the jury able to reach a verdict? **(Do Not State the Verdict)** ☐ Yes ☐ No

20. Have you or any member of your family been the victim of a crime? ☐ Yes ☐ No. If yes:
    a. Who was the victim? _____
    b. What was the crime? _____
    c. Was anyone arrested, charged, or convicted? _____

21. Have you ever served in the armed forces? ☐ Yes ☐ No
    a. If yes, list branch and highest rank: _____
    b. Dates and duties: _____

22. What are you favorite TV programs?: _____
    _____

23. What is your source of news?: _____

24. What are your hobbies and recreational activities?:_____
    _____

25. If you attend a place of worship, please provide the name: _____

Print Your Full Name: _____ Date: _____

JUROR QUESTIONNAIRE

Please make sure your answers are legible.

1. Name: _____
(First) (Middle) (Last) (Maiden)

2. Age: _____

3. Gender: _____ Male _____ Female

4. Are you of Hispanic, Latino, or Spanish origin? (Mark (X) ONE box)

____ **No,** not of Hispanic, Latino, or Spanish Origin

____ Yes, Mexican, Mexican Am., Chicano

____ Yes, Puerto Rican

____ Yes, Cuban

____ Yes, another Hispanic, Latino or Spanish Origin – *Print origin, for example, Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on:*

_____

5. What is your race? (Mark (X) one or more boxes).

____ White

____ Black or African Am.

____ American Indian or Alaska Native – *Print name of enrolled or principal tribe:*_____

____ Asian Indian ____ Japanese ____ Native Hawaiian ____ Chinese ____ Korean

____ Guamanian ____ Filipino ____ Vietnamese ____ Samoan or Chamorro

____ Other Asian- *Print race, for example, Hmong, Laotian, Thai, Pakistani, Cambodian, and so on*: _____

____ Other Pacific Islander – *Print race, for example, Fijan, Tongan, and so on:*_____

____ Some other race – *Print race:* _____

6. Today's Date: _____

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NOS. __ CRS _____

STATE OF NORTH CAROLINA

v.

DEFENDANT

****

DEFENDANT'S MOTION TO PROHIBIT IMPERMISSIBLY-MOTIVATED PEREMPTORY STRIKES AND FOR THE COURT TO TAKE CONSIDER HISTORICAL EVIDENCE OF JURY DISCRIMINATION

****

NOW COMES the Defendant, _____, and respectfully moves the Court to prohibit the exercise of peremptory strikes motivated by race, gender, or any other impermissible motivation. Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice."); and *State v. Hobbs*, 841 S.E.2d 492 (2020).

Defendant also moves that this Court consider the evidence outlined below regarding the history of jury discrimination in [this county and] the State of North Carolina.

In support of the motion, Defendant shows the following:

I. THIS COURT MUST APPLY THE PRECEDENTS OF THE NORTH CAROLINA AND UNITED STATES SUPREME COURTS IN ADJUDICATING THE CONSTITUTIONALITY OF ANY CHALLENGED PEREMPTORY STRIKES

Defendant intends to object to the use of any peremptory challenges exercised in violation of the Constitutions of the United States or of the State of North Carolina, or otherwise in violation of the law, and asks this Court to disallow any such impermissible strikes. The United States and North Carolina Constitutions prohibit the consideration of race in exercising peremptory strikes. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). The state and federal constitutions likewise prohibit discrimination on the basis of gender in the exercise of peremptory strikes. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); N.C. Const. Art 1, Sec. 26.

Diverse juries have been found to focus more on the evidence, make fewer inaccurate statements, and make fewer uncorrected statements – all factors which heighten the reliability of verdicts. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1180 (2012) (discussing Samuel R. Sommers, *On Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Delib*eration, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006)).

Defendant draws the Court's attention to the following rules set forth by the Supreme Courts of North Carolina and the United States:

- **A single race-based strike violates the Constitution**. "Striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, even when other black jurors are seated and even when valid reasons are articulated for challenges to other black prospective jurors." *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (citing *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989)); *see also Snyder*, 552 U.S. at 478 (citing *Lane*); *Flowers*, 139 S.Ct. at 2244

("The Constitution forbids striking even a single prospective juror for a discriminator reason), *citing Foster*, 136 S.Ct. at 1747.

- **The Defendant's prima facie burden is light**. "[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." *Hobbs*, 841 S.E.2d at 497, *quoting Johnson v. California*, 545 U.S. 162, 170 (2005); *State v. Hoffman*, 348 N.C. 548, 553 (2008) ("Step one of the *Batson* analysis . . . is not intended to be a high hurdle for defendants to cross."). "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*, 841 S.E.2d at 498.

- **At the prima facie stage, the court must consider all relevant circumstances, including history.** "A defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Hobbs*, 841 S.E.2d at 497. *quoting Miller-El II*, 545 U.S. at 240. Specifically, in determining whether the prima facie case has been met, "a court must consider historical evidence of discrimination in a jurisdiction." *Hobbs*, 841 S.E.2d at 498.

- **The ultimate question under *Batson* is not whether race was the sole factor for the strike, but whether race was significant in the decision**. The question before the Court is whether race is "significant in determining who was challenged and who was not." *Miller-El II*, 545 U.S. at 252 (2005). Put another way, "the ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Hobbs*, 841 S.E.2d at 499, quoting *Flowers*, 139 S.Ct. at 2244 and *Foster*, 136 S.Ct. at 1754. A defendant need <u>not</u> show race was the <u>sole</u> factor for the strike. *State v. Waring*, 364 N.C. 443, 480 (2010); *Hobbs* 841 S.E.2d at 513, n. 2.

- **Establishing a *Batson* violation does not require direct evidence of discrimination.** *See Batson*, 476 U.S. at 93 (noting that "circumstantial evidence," including "disproportionate impact" may establish a constitutional violation); *Flowers*, 139 S.Ct. at 2243 ("Our precedents allow criminal defendants raising Batson challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race.")

- **Disparate treatment of similarly-situated jurors is evidence of racial bias**. When prospective jurors of another race provided similar answers but were not the subject of a peremptory challenge, this is evidence the strike is motivated by race. *See Hobbs*, 841 S.E.2d at 502 (trial court erred in failing to "examin[e] the comparisons in the white and black potential jurors'answers."); *Flowers*, 139 S.Ct. at 2248 ("comparison of

[prospective jurors who were struck and not struck] can suggest that the prosecutor's proffered explanations for striking black prospective jurors were a pretext for discrimination."); *Miller-El II*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.").

- **The Defendant does not have the burden of proving an exact comparison**. When comparing white venire members who were passed with jurors of color sought to be struck, the Court must not insist the prospective jurors are identical in all respects. Indeed, a "per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 247 n. 6; *see also Flowers* 139 S.Ct. at 2249 ("a defendant is not required to identify an identical white juror for the side-by-side comparison to be suggestive of discriminatory intent.")

- **A prosecutor's misrepresentation of the record is evidence of racial bias.** When prosecutors justify their strikes with statements about black prospective jurors that are factually inaccurate, this is evidence of pretext. *See Flowers*, 139 S.Ct. at 2243, 2250 ("When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent…. The State's pattern of factually inaccurate statements about black prospective jurors suggests that the State intended to keep black prospective jurors off the jury."); *Foster*, 136 S.Ct. at 1754 (discounting prosecutor's explanation where the "trial transcripts clearly indicate the contrary").

- **Differential questioning is evidence of racial bias**. When jurors of different races are asked significantly more questions or different questions, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 255 ("contrasting *voir dire* questions" posed respectively to black and white prospective jurors "indicate that the State was trying to avoid black jurors").

- **An absence of questioning is evidence of racial bias**. When the juror is not questioned on the area of alleged concern, this is evidence the strike is motivated by race. *See Miller-El II*, 545 U.S. at 246 ("failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination") (internal citation omitted).

- **Evidence that prosecutors were trained in how to evade the strictures of *Batson* is evidence of racial bias.** *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for excluding minorities from jury service); *Foster v. Chatman*, Brief of

Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8 (describing North Carolina prosecution seminar in 1994 that "train[ed] their prosecutors to deceive judges as to their true motivations").

- **Historical evidence that prosecutors discriminated in other cases is evidence of racial bias.** In *Hobbs*, the North Carolina Supreme Court held the trial court had erred at *Batson*'s third step when it failed to weigh "the historical evidence that Mr. Hobbs brought to the trial court's attention." 841 S.E.2d at 502; *see also Flowers*, 139 S.Ct. at 2245 (considering "the history of the prosecutor's peremptory strikes in Flowers' first four trials"); *Miller-El II*, 545 U.S. at 263-64 (considering policy of district attorney's office of systematically excluding black from juries, which was in place "for decades leading up to the time this case was tried").

- **The peremptory challenges exercised by the defendant are not relevant to the question of whether the State discriminated.** *Hobbs*, 841 S.E.2d at 502 (finding the trial court erred in considering the pattern of defense strikes because "the peremptory challenges exercised by the defendant are not relevant to the State's motivations").

- **The Defendant does not bear the burden of disproving each and every reason proffered by the prosecutor**. In *Foster*, the petitioner challenged the prosecution's strikes of two African Americans. As to both potential jurors, the prosecution offered a "laundry list" of reasons why these two African Americans were objectionable. 136 S.Ct. at 1748. The Court did not analyze all of the reasons proffered by the State. Rather, after unmasking and debunking three of eleven reasons for the strike of one venire member and five of eight reasons for the other strike, the Court concluded that the strikes of these jurors were "motivated in substantial part by discriminatory intent." *Id*. at 1754, quoting *Snyder* v. *Louisiana*, 552 U.S. at 485. *See also State v. Montgomery*, 331 N.C. 559, 576-77 (1992) ("To allow an ostensibly valid reason for excusing a potential juror to 'cancel out' a patently discriminatory and unconstitutional reason would render Article 1, Section 26 [of the North Carolina Constitution] an empty vessel.") (Frye, J., Exum, C.J., and Whichard, J. concurring in the result).

Defendant asks this Court to apply these principles in adjudicating any objections under *Batson*,[1] and thereby prohibit race discrimination in the selection of Defendant's jury.

[1] The same principles apply to challenges to strikes impermissibly based on gender. *J.E.B.*, 511 U.S. at

II. THIS COURT MUST CONSIDER HISTORICAL EVIDENCE OF JURY DISCRIMINATION

In *Hobbs*, the North Carolina Supreme Court held "a court must consider historical evidence of discrimination in a jurisdiction" when determining whether defendant has established a prima facie case of discrimination. *Hobbs*, 841 S.E.2d at 498 (emphasis added). The *Hobbs* court further held that the trial court had erred in failing to consider, at *Batson*'s third step, "the historical evidence that Mr. Hobbs brought to the trial court's attention." *Id.* at 502.

Therefore, Defendant requests that the court consider the following studies showing racial disparities in jury selection in North Carolina criminal cases, including capital cases. These studies include:

- A 2010 Michigan State University (MSU) study of North Carolina capital cases from 1990-2010. The MSU researchers analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010. The study showed prosecutors struck 53 percent of eligible African-American jurors and only 26 percent of all other eligible jurors in those capital proceedings. The researchers found that the probability of this disparity occurring in a race-neutral jury selection was less than one in 10 trillion. After adjusting for non-racial characteristics that might reasonably affect strike decisions, for example, reluctance to impose the death penalty, researchers found prosecutors struck black jurors at 2.5 times the rate they struck all other jurors. The study findings are described in Grosso, Catherine and O'Brien, Barbara, *A Stubborn Legacy: the Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012), a copy of which is attached to this notice as Exhibit A.
- A 2017 study conducted by Wake Forest University School of Law professors found that in North Carolina felony trials in 2011– which included data on nearly 30,000 potential jurors in just over 1,300 cases – prosecutors struck non-white potential jurors at a disproportionate rate. In these cases, prosecutors struck non-white jurors about twice as often as they excluded white jurors. The Wake Forest findings are discussed in Wright, Ronald F. and Chavis, Kami, Parks, Gregory Scott, *The Jury Sunshine Project: Jury*

144-45 (holding that *Batson*'s protections and framework apply equally to gender discrimination).

Selection Data as a Political Issue (June 28, 2017), a copy of which is attached as Exhibit B.

- A 1999 study of the use of peremptory strikes in Durham County showed that African Americans were much more likely to be excused by the State. Approximately 70 percent of African Americans were dismissed by the State, while less than 20 percent of whites were struck by the prosecution. The Durham findings are detailed in Mary R. Rosel, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 698-99 (1999), a copy of which is attached as Exhibit C.

Add any other history regarding this prosecutor or your county, for example prior sustained Batson objections, county-specific MSU or WFU data, or a pattern of prior cases with disparate strike rates. Call CDPL for more information:

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

Certificate of Service

I hereby certify that Defendant's Motion to Prohibit Peremptory Strikes Based on Race has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

Michigan State University College of Law
Digital Commons at Michigan State University College of Law

Faculty Publications

1-1-2012

A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials

Catherine M. Grosso
Michigan State University College of Law, grosso@law.msu.edu

Barbara O'Brien
Michigan State University College of Law, obrienb@law.msu.edu

Follow this and additional works at: http://digitalcommons.law.msu.edu/facpubs

Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, Criminal Law Commons, Criminal Procedure Commons, and the Other Law Commons

Recommended Citation
Catherine M. Grosso & Barbara O'Brien, A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 Iowa L. Rev. 1531 (2012).

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.

A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson* North Carolina Capital Trials*

*Catherine M. Grosso & Barbara O'Brien***

---

* This research was made possible through the financial support of the AJ Fletcher Foundation, Butler Family Foundation, Center for Death Penalty Litigation, Maverick Lloyd Foundation, Open Society Institute, Proteus Action League, Vital Projects Fund, Winston-Salem Community Foundation, Z. Smith Reynolds Foundation, and an anonymous funder. We also wish to thank each of the staff attorneys who worked with us on this project, with special thanks to Abijah Taylor and Ibrahim Ayyub for their dedication and commitment to ensuring a complete and accurate database. Our statistical analyses were greatly aided by Deborah Kashy and especially George Woodworth, whose assistance and advice was invaluable. We also owe a debt to the outstanding research librarians at our John F. Schaefer Law Library, and recognize in particular the role of the Michigan State University College of Law in hosting our jury-study research team and in absorbing all indirect costs relating to this study without hesitation. Finally, we wish to acknowledge the considerable guidance of the late David Baldus, who both inspired and motivated us with his advice and exemplary scholarship.

** Catherine Grosso and Barbara O'Brien are associate professors at the Michigan State University College of Law.

I. INTRODUCTION

Among those who laud its mission, it seems that the only people not disappointed in *Batson* are those who never expected it to work in the first place. Scholars, judges, and practitioners have criticized the decision for its failure to curb the role of racial stereotypes in jury selection.[1] Likewise, previous research in North Carolina has suggested both that race continues to play a role in jury selection and that courts are reluctant to enforce *Batson* rigorously.[2] Recently, however, the North Carolina General Assembly passed legislation aimed at curing this defect by providing trial courts a unique opportunity to consider the role of race in peremptory challenges from a different angle.

The North Carolina Racial Justice Act of 2009 ("RJA") created a state claim for relief for defendants currently on death row who can show that race was a significant factor in the exercise of peremptory challenges in their cases.[3] A defendant who makes such a showing is entitled to have a death sentence reduced to life without parole.[4] The RJA expressly deems a broad range of evidence relevant by allowing claimants to prove their cases using "statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both."[5] This Article presents the results of a study undertaken in order to evaluate the potential for statistical evidence to support claims under this part of the RJA.

In particular, we examined how prosecutors exercised peremptory challenges in capital trials of all defendants on death row in North Carolina as of July 1, 2010, to assess whether potential jurors' race played any role in those decisions.[6] We found substantial disparities in which potential jurors prosecutors struck. Over the twenty-year period we examined, prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black. These disparities remained consistent over time and across the state, and did not diminish when we

---

1. *See infra* notes 19–21 and accompanying text.

2. *See* Amanda S. Hitchcock, Recent Development, *"Deference Does Not by Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina Supreme Court's highly deferential approach to reviewing Batson claims in capital cases); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (studying jury selection in one North Carolina county).

3. *See* N.C. GEN. STAT. §§ 15A-2010–12 (2011) (creating a cause of action if the court finds race was a significant factor in the prosecutor's decision to seek or impose a death sentence).

4. *Id.* § 15A-2012(a)(3).

5. *Id.* § 15A-2011(b).

6. A list of current death row inmates is available at http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm.

controlled for information about venire members that potentially bore on the decision to strike them, such as views on the death penalty or prior experience with crime.[7]

In Part II, we review the prior research on jury selection, particularly on the issue of racial bias. In Part III, we present our study methodology and design. Part IV presents the statewide unadjusted racial disparities in prosecutors' exercise of peremptory strikes, and Part V presents the results of analyses controlling for other factors potentially relevant to jury selection.

II. THE STUBBORN LEGACY OF RACE IN JURY SELECTION: THE RULES AND THE REALITY

The Supreme Court has grappled with barriers to racial diversity in juries for decades.[8] Indeed, even while characterizing the peremptory challenge as a tool vital to the accused, the *Swain v. Alabama* Court held that a prosecutor's systematic exclusion of black jurors was "at war with our basic concepts of a democratic society and a representative government."[9] Jurors, the Court asserted, "should be selected as individuals, on the basis of individual qualifications, and not as members of a race."[10] The Court elaborated this view in *Batson v. Kentucky*, when it noted that purposefully excluding people from jury service based on their race undermines public confidence in our justice system.[11] The Court later clarified that excluding jurors because of their race harmed not only the defendant, but the wrongly excluded jurors as well,[12] and that defense counsel must abide by the same rules as prosecutors.[13] The Court has extended the doctrine to prohibit gender-based strikes,[14] and some lower courts have prohibited strikes based on religious affiliation.[15]

While the Court established an elaborate three-step process for challenging a peremptory challenge as based on race (or gender), parties

---

7. Please see Part III.E and Appendix A for more information on this coding.

8. Duren v. Missouri, 439 U.S. 357 (1979); Castaneda v. Partida, 430 U.S. 482 (1977); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (juries exist "to guard against the exercise of arbitrary power"); Glasser v. United States, 315 U.S. 60, 86 (1942) (juries must not be "the organ of any special group or class"), *superseded on other grounds by rule*, FED. R. EVID. 104(a), *as recognized in* Bourjaily v. United States, 483 U.S. 171 (1987).

9. Swain v. Alabama, 380 U.S. 202, 204 (1965) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) (internal quotation marks omitted), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

10. *Id.* (quoting Cassell v. Texas, 339 U.S. 282, 286 (1950)) (internal quotation marks omitted).

11. *Batson*, 476 U.S. at 87.

12. Powers v. Ohio, 499 U.S. 400, 425 (1991).

13. Georgia v. McCollum, 505 U.S. 42 (1992).

14. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

15. United States v. Brown, 352 F.3d 654 (2d Cir. 2003); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998).

can readily defeat the challenge by proffering a plausible race-neutral reason for the strike decision.[16] Trial courts rarely reject these explanations (in the third step) as disingenuous, or "pretextual."[17] Moreover, the Court designed the *Batson* regime to counter intentional discrimination. Significant psychological research suggests that racial bias can operate below the level of conscious awareness to affect people's perceptions and behaviors.[18] As a result, a party who is subconsciously influenced by a juror's race might offer in good faith a race-neutral reason for the strike. *Batson*'s focus on the credibility rather than reasonableness of the proffered explanation authorizes trial courts to uphold such strikes even though they may be actually (if unintentionally) driven by race.

The difficulty of uncovering racial bias—whether deliberate or unconscious—has led many to conclude that the *Batson* regime cannot counter discrimination in jury selection.[19] Many scholars and several judges have called for the wholesale abolition of peremptory challenges.[20] Others have suggested less drastic reforms, such as reducing the number of peremptories available to each side, so as to limit the opportunity for race-

16. In the first stage, the defendant carries the burden of establishing a prima facie case. In the second, the prosecution carries a burden of producing a race-neutral explanation for the strike or strikes. Finally, in the third stage, the defendant carries the burden of proving that the explanations offered by the prosecution with respect to one or more venire members were pretextual, thereby supporting an inference that one or more was racially motivated. *Batson*, 476 U.S. at 96–98.

17. Miller-El v. Dretke, 545 U.S. 231, 278 (2005) (Thomas, J., dissenting); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 483–84 (1996).

18. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357–411 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

19. *Batson*, 476 U.S. at 102–08 (Marshall, J., concurring); Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 706–07 (1998); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501; Sheri Lynn Johnson, Batson *Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475 (1998); Deborah Ramirez, *Affirmative Jury Selection: A Proposal To Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 173–74.

20. *Batson*, 476 U.S. at 102–08 (Marshall, J., concurring); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 199–211 (1989); William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49 (1999); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 809 n.2 (1997) (listing and citing judges and academics who have voiced strong concerns about peremptory challenges); Vivien Toomey Montz & Craig Lee Montz, *The Peremptory Challenge: Should It Still Exist? An Examination of Federal and Florida Law*, 54 U. MIAMI L. REV. 451 (2000); Arielle Siebert, Batson v. Kentucky*: Application to Whites and the Effect on the Peremptory Challenge System*, 32 COLUM. J.L. & SOC. PROBS. 307 (1999).

based jury selection.[21] The RJA adopts none of these policy recommendations. Rather, it authorizes a new approach to examining the role of race in the exercise of peremptory challenges based on a broad range of evidence.

As noted earlier, the RJA created a state statutory claim for defendants facing a death sentence who can show that race was a significant factor in the exercise of peremptory challenges "in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed."[22] The geographical scope of a potential claim makes it distinct from a typical *Batson* claim as does the range of evidence expressly authorized. Claimants may prove their cases using "statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both."[23]

This Article presents evidence relevant to a claim under the RJA. Anecdotal evidence suggests that race weighs heavily in decisions to exercise peremptory strikes[24]—a conclusion bolstered by systematic research. Previous research on jury selection generally, and the role of race in the exercise of peremptory studies more specifically, typically evaluates different aspects of *Batson*'s legal framework. While this framework does not apply directly to an RJA claim, the central question remains constant: Did race play a significant role in the exercise of peremptory challenges?

A. EXPERIMENTAL AND MOCK-JURY STUDIES

Experimental and other laboratory work with mock jurors lends support to those who suspect that race continues to play a role in jury selection.[25] For example, a number of studies conducted before the *Batson* Court prohibited consideration of race in jury selection demonstrated its importance in decision making. George Hayden, Joseph Senna, and Larry Seigel examined the types of information relevant to prosecutorial decision making in voir dire among twenty randomly selected prosecutors from four Boston-area

21. Adams & Lane, *supra* note 19; Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363 (2009).

22. N.C. GEN. STAT. § 15A-2011(a) (2011).

23. *Id.* § 15A-2011(b).

24. In a 1986 training video, Philadelphia District Attorney Jack McMahon emphasized the importance of striking certain black venire members, such as "blacks from low-income areas" and blacks who are "real educated." Videotape: Jury Selection with Jack McMahon (DATV Prods. 1987), *available at* http://video.google.com/videoplay?docid=-5102834972975877286, *cited in* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 41–43 (2001).

25. Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 533 (2008).

counties.[26] The researchers presented the prosecutors with categories of information about potential jurors for two hypothetical cases, one involving a black defendant and the other a white defendant.[27] Prosecutors could seek information about potential jurors from one category at a time, and then decide whether to strike the juror or to seek more information.[28] Prosecutors typically sought information about potential jurors' gender, age, residence, occupation, demeanor, and appearance.[29] In the case involving the black defendant, however, prosecutors sought information on race of the venire member significantly more often than they did in the case involving the white defendant.[30]

More recently, Michael Norton and Samuel Sommers presented three groups of study participants—college students, law students, and trial attorneys—with the facts of a criminal case involving a black defendant.[31] The researchers told participants to assume the role of the prosecutor, and that they had only one peremptory strike left to use in deciding which of two prospective jurors to strike.[32] The prospective jurors each had qualities that pretesting suggested would be troubling to prosecutors: one was a journalist who had investigated police misconduct and the other had indicated skepticism about statistics relevant to forensic evidence that the state would offer.[33] Participants were randomly assigned to one of two conditions: one in which the first prospective juror was black and the second white, and another in which the race of the prospective jurors was reversed.[34]

Participants challenged the black juror more often than the white juror, regardless of whether the juror was presented as the journalist or the statistics skeptic.[35] Yet, when asked to explain why they struck the juror they did, the study participants almost never mentioned race; participants tended to offer the first juror's experience writing about police misconduct when

---

26. George Hayden, Joseph Senna & Larry Siegel, *Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Information Use in the Massachusetts Jury Selection Process*, 13 NEW ENG. L. REV. 768 (1978).

27. *Id.* at 781–82.

28. *Id.* at 782–83.

29. *Id.* at 784–85, 784–85 tbl.II.

30. *Id.*

31. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 266 (2007).

32. *Id.*

33. *Id.* at 265–66.

34. *Id.* at 266–67.

35. *Id.* at 267, 267 tbl.I. The effect was statistically significant for college ($n = 90$) and law students ($n = 81$) ($p < .05$), and marginally significant in the smaller attorney sample ($n = 28$). *Id.* at 266–67.

striking him, and cited the second juror's skepticism about statistics when striking him.[36]

In another study, Norbert Kerr and colleagues had attorneys view videotaped voir dire of mock jurors in a criminal case, and assigned each the role of judge, defense attorney, or prosecutor—usually based on their current position or past experience in the respective role.[37] They asked participants to rate the desirability of the potential jurors and to indicate which ones they would strike.[38] The researchers found that attorneys assigned the role of prosecutor were far more likely to strike black prospective jurors than jurors of another race.[39]

Studies that examine jury selection in hypothetical settings are limited by the artificial nature of the decision making.[40] Their strength, however, is that they allow researchers greater control over the variables in question in order to identify causal factors. These studies offer substantial evidence that race plays a significant role in jury selection, especially when considered in light of the research on jury selection in real trials set forth below.[41]

B. STUDIES EXAMINING JURY SELECTION IN ACTUAL TRIALS

Only a handful of published studies have examined how parties exercise peremptory challenges in actual trials. In one study, Billy Turner and colleagues examined strikes by both the prosecution and defense in 121 criminal trials in one Louisiana parish from 1976–1981.[42] The authors compared the percentage of struck jurors who were black (44%) to the percent of the population in the Louisiana parish that was black at the time of the study (18%), and inferred from this twenty-six-point disparity that jury selection was not race neutral.[43]

John Clark and colleagues analyzed jury selection in twenty-eight trials in two adjacent counties in a southeastern state.[44] Across the eleven criminal

---

36. *Id.* at 267–68.

37. Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll & James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 676 (1991).

38. *Id.* at 677–78.

39. *Id.* at 692.

40. *See* Sommers & Norton, *supra* note 31, at 270–71 (noting limitations of experimental jury-selection studies).

41. *See id.* at 270 (noting convergence of experimental and archival data analysis of the effect of race in jury selection).

42. Billy M. Turner, Rickie D. Lovell, John C. Young & William F. Denny, *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 63 (1986).

43. *Id.*

44. John Clark, Marcus T. Boccaccini, Beth Caillouet & William F. Chaplin, *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 647 (2007).

trials they examined, race was a statistically significant predictor of both prosecution and defense strikes, but in reverse patterns: the state struck disproportionally more black potential jurors while the defense struck disproportionally fewer.[45]

Mary Rose examined peremptory strike decisions in thirteen non-capital felony trials in North Carolina.[46] Prosecutors used 60% of their strikes against black jurors, who constituted only 32% of the venire.[47] In comparison, defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire.[48]

A third study conducted by Richard Bourke and Joe Hingston at the Louisiana Crisis Assistance center examined jury selection in 390 jury trials involving 13,662 prospective jurors in Jefferson Parish, Louisiana.[49] In both six- and twelve-person juries, prosecutors struck "black prospective jurors at more than three times the rate" they struck their white counterparts.[50]

David Baldus and colleagues examined strike decisions over a seventeen-year period in 317 Philadelphia County capital murder trials.[51] They found that prosecutors struck on average 51% of the black jurors they had the opportunity to strike, compared to only 26% of comparable non-black jurors.[52] Defense strikes exhibited a nearly identical pattern in reverse: defense counsel struck only 26% of the black jurors they had the opportunity to strike, compared to 54% of comparable non-black jurors.[53] The disparate effect of race on jury selection held even when the researchers controlled for various non-racial characteristics of the jurors, such as age, occupation, education, and responses to certain questions asked in voir dire.[54]

Journalists at the *Dallas Morning News* replicated the methodology of the Philadelphia study to examine the exercise of peremptory challenges in 108 of 381 non-capital felony trials in Dallas County, Texas, during the first ten months of 2002.[55] Like Baldus and colleagues, the journalists considered in

---

45. *Id.* at 651.

46. Rose, *supra* note 2, at 697.

47. *Id.* at 698–99.

48. *Id.*

49. RICHARD BOURKE & JOE HINGSTON, BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 5 (2003).

50. *Id.* at 7–8.

51. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001).

52. *Id.* at 53.

53. *Id.*

54. *Id.* at 70–72.

55. Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, but Analysis Shows They Are More Likely To Reject Black Jurors*, DALL. MORNING NEWS, Aug. 21, 2005, at 1A [hereinafter *A Process of Juror Elimination*], *available at* 2005 WLNR

the analyses the impact of non-racial characteristics of potential jurors.[56] The *Dallas Morning News* study found that prosecutors "excluded eligible blacks from juries at more than twice the rate they rejected eligible whites."[57] The disparate effect of race on jury selection held even when they controlled for non-racial characteristics of the jurors. The journalists concluded that "being black was the most important personal trait affecting which jurors prosecutors rejected."[58]

A major strength of the Philadelphia and Dallas County studies was the inclusion of race-neutral factors about jurors that might bear on a party's decision to strike.[59] One possible explanation for racial disparities in strike rates is that race is associated with other race-neutral factors that drive strike decisions. If members of one race are disproportionately less supportive of the death penalty, for example, prosecutors' disproportionately high strike rates against that group may be driven by group members' views rather than their race. Controlling for various race-neutral factors that may bear on the decision to strike allows the researcher to rule out at least some alternative explanations of racial disparities.

C. STUDIES ANALYZING APPELLATE DECISIONS REVIEWING BATSON *CLAIMS*

We are aware of no study directly assessing *Batson*'s effectiveness in countering consideration of race in jury selection, such as by comparing strike rates against black jurors in trials before *Batson* was decided to those that came after. However, the consistency of researchers' findings of racial disparities in studies spanning several decades suggests that *Batson* has not

---

24658335 (presenting part of the findings of the study). The *Dallas Morning News* published the results of this research in a set of feature stories between Sunday, August 21 and Tuesday, August 23. *See About the Series*, DALL. MORNING NEWS, Aug. 21, 2005, at 19A, *available at* 2005 WLNR 24658085 (describing the series); *How the Analysis Was Done*, DALL. MORNING NEWS, Aug. 21, 2005, at 19A, *available at* 2005 WLNR 2457224 (reporting study design and methodology). The *Dallas Morning News* published a similar study on jury selection in Dallas County in 1986. *See* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, DALL. MORNING NEWS, Mar. 9, 1986, at 1A, *available at* 1986 WLNR 1683009. This study analyzed the impact of peremptory strikes on jury composition in "100 randomly selected felony" jury trials in 1983 and 1984 and found blacks largely excluded from jury service. *Id.* We are aware of one other study on peremptory challenges by journalists. This study reached similar results. Douglas Frantz, *Many Blacks Kept Off Juries Here*, CHI. TRIB., Aug. 5, 1984, at 1 (reporting on jury selection for all 31 criminal jury trials in Cook County Circuit Courts in July 1984).

56. *A Process of Juror Elimination*, *supra* note 55. The journalists consulted with David Baldus and George Woodworth, the principle authors of the Philadelphia study, in conducting this research. *Id.*

57. *Id.*; *see also* Steve McGonigle et al., *Jurors' Race a Focal Point for Defense: Rival Lawyers Reject Whites at Higher Rates*, DALL. MORNING NEWS, Aug. 22, 2005, at 1A, *available at* 2005 WLNR 24659140 (presenting findings with respect to jury selection by defense attorneys).

58. *A Process of Juror Elimination*, *supra* note 55.

59. Baldus et al., *supra* note 51, at 65–72, tbls.6 & 7.

been especially successful in purging consideration of race from jury selection.

One possible reason *Batson* has been so ineffective is the ease with which parties can generate race-neutral explanations for challenged strike decisions. Research on the exercise of *Batson* challenges indicates that courts commonly accept reasons proffered to justify challenged strikes based on little more than stereotyping and guesswork.[60] Kenneth Melilli analyzed all published *Batson* decisions from 1986 to 1993, and concluded that proffered explanations were often grounded in stereotypes and, to a lesser degree, attorneys' intuition about favorability of a potential juror.[61] A second similar study concluded that the reasons courts often find acceptable may merely obfuscate race discrimination. Jeffrey Beilin and Junichi Semitsu surveyed all published and unpublished federal decisions from 2000 to 2009 that reviewed state or federal trial courts' denials of *Batson* challenges.[62] After reviewing decisions in 269 cases, they reported that their "most revealing discovery was the substantial list of acceptable reasons that could conceivably implicate a juror's likelihood of being impartial but were likely to disproportionately impact specific racial or ethnic groups."[63]

Two papers examining the implementation of *Batson* in North Carolina concluded that the significant deference the North Carolina Supreme Court gives to trial courts weakened *Batson*'s impact in that state.[64] The first paper evaluated the first five years of *Batson* appeals in North Carolina and found that "[n]either the North Carolina Supreme Court nor the North Carolina Court of Appeals ever ha[d] held for a defendant on the merits of a *Batson* claim."[65] In particular, the paper documents the court's almost complete

60. *See* Melilli, *supra* note 17, at 484–502; *see also* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1116–20 (2011). We are aware of one other study of appellate opinions concerning *Batson* challenges. This study noted that most litigants lose *Batson* appeals and that most of the venire members reviewed in *Batson* challenges were black. Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59 (2008).

61. Melilli, *supra* note 17, at 487, 497 tbl.III-R (noting that 52.48% of the explanations involved group stereotypes); *id.* at 498 tbl.III-S (listing the group stereotypes employed and the frequency with which they were employed).

62. Bellin & Semitsu, *supra* note 60, at 1092.

63. *Id.* at 1092, 1096. The authors noted, for example, that overrepresentation of black males in prison and the finding that 32% of black men are likely to be imprisoned at least once during their lifetime (compared to much lower rates for white men, for example) suggest that "striking all persons with a relative who is or has been in prison will disproportionately exclude minority venirepersons." *Id.* at 1097.

64. Hitchcock, *supra* note 2, at 1356; Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1577 (1991).

65. Schwartz, *supra* note 64, at 1535.

deference to prosecutors' proffered explanations.[66] In the second paper, Amanda Hitchcock reached a similar conclusion based on her analysis of North Carolina Supreme Court rulings in all sixty-one capital cases involving a *Batson* claim between 1986 and 2005.[67] The North Carolina court deferred to trial courts in almost every case "because *Batson* determinations often turn on the credibility of the prosecutor's stated reasons for the objectionable challenges."[68] Hitchcock documents the court's reluctance to rely upon statistical evidence to state a claim, its strict requirement of a complete match in side-by-side comparisons of jurors, and its lack of interest in claims based on disparate questioning.[69]

While the Supreme Court has established a framework intended to limit the consideration of race in the exercise of peremptory challenges, the research reviewed here suggests that it continues to play a role. The study we present below provides further evidence that race not only weighs in jury selection, but weighs heavily. Moreover, its influence cannot be explained by ostensibly race-neutral factors that happen to correlate with race.

III. METHODOLOGY

The North Carolina RJA study follows the methodology used in the Philadelphia and Dallas County studies discussed above[70] by including analysis of race-neutral factors about jurors that might bear on a party's decision to strike. It improves on the Philadelphia study with more complete race and strike information.[71] In addition, unlike any of the studies presented above, this study includes cases from multiple counties. In fact, it includes data about jury selection in more than one-half of the counties in North Carolina.

We analyzed the role of race in strike decisions in two phases. First, we compared the rate at which prosecutors struck eligible black venire members to the rate at which they struck eligible venire members of other races. We then analyzed the role that characteristics other than race played in prosecutors' decisions to strike or pass potential jurors, and whether any of those characteristics could account for racial disparities in who gets struck.

A. STUDY POPULATION

We examined jury selection in at least one proceeding for each inmate who resided on North Carolina's death row as of July 1, 2010, for a total of

66. *Id.* at 1561–63.
67. Hitchcock, *supra* note 2, at 1328–30.
68. *Id.* at 1344.
69. *Id.* at 1345–47, 1349–50.
70. *See supra* text accompanying notes 51–59.
71. Baldus et al., *supra* note 51.

173 proceedings.[72] For each proceeding, we sought to include every venire member who faced a peremptory challenge as part of jury selection. For the purposes of this study a "venire member" included anyone who was subjected to voir dire questioning and not excused for cause, including potential alternates. Each proceeding involved an average of 42.9 strike-eligible venire members, producing a database of 7,421 strike decisions. Of these, 3,952 (53.3%) were women, and 3,469 (46.7%) were men. The venire members' racial composition was as follows: white (6,057, 81.6%); black (1,211, 16.3%); Native American (79, 1.1%); Latino (21, 0.3%); mixed race (20, 0.3%); Asian (13, 0.2%); other (11, 0.1%); Pacific Islander (2, 0.03%); and unknown (7, 0.1%).

B. DATA COLLECTION

We created an electronic and paper case file for each proceeding in the study. The case file contains the primary data for every coding decision. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys' or clerks' notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race coding decision.

C. OVERVIEW OF DATABASE DEVELOPMENT

Staff attorneys completed all coding and data entry at Michigan State University College of Law in East Lansing, Michigan, under the direct supervision of the primary investigators.[73] Staff attorneys received detailed training on each step of the coding and data entry process.

We collected information about the proceeding generally, including the number of peremptory challenges used by each side, and the name of the judge and attorneys involved in the proceeding, as well as basic demographic and procedural information specific to each venire member.

Coding also required staff attorneys to determine strike eligibility for each potential juror. "Strike eligibility" refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. For instance, if the prosecution struck someone before the defense had a chance to question that person, that juror would be strike eligible to the prosecution only. Likewise, if a party had exhausted its peremptory challenges by the time it reached a potential juror, the failure to strike reveals nothing about how that party exercised its discretion. This

72. We included proceedings for all current death-row inmates to ensure the inclusion of every defendant with a potential claim under the Racial Justice Act. We also focused our analysis on defendants with an active death sentence because of the availability of data in such cases. In addition, we were confident that the decision making in 173 proceedings would provide a large enough sample for meaningful statistical analysis. We were able to include all but one proceeding, Jeffrey Duke's 2001 trial, in which the case materials are unavailable.

73. A total of twelve staff attorneys and five law students worked on this project.

determination refines the analysis of strike decisions to examine only those instances in which that party actually had a choice to pass or strike a juror, and excludes those when the decision was out of the party's hands.[74]

In the second part of the study, staff attorneys used juror questionnaires (when available) and jury selection transcripts to code information relating to the following: (1) demographic characteristics (e.g., gender, marital status, employment, and educational background); (2) prior experiences with the legal system (e.g., prior jury service and experience as a criminal defendant or victim); and (3) attitudes about potentially relevant matters (e.g., ambivalence about the death penalty[75] and skepticism about, or greater faith in, the credibility of police officers).

D. RACE CODING

In order to analyze potential racial disparities in peremptory strikes, it was necessary to identify the race of each venire member. Any potential findings about racial disparities in strike decisions would turn on the accuracy of this coding. Strike information was straightforward in that it could be extracted directly from the transcripts. As explained more fully below, race information was equally straightforward in a good number of cases. But for the cases that required the staff attorneys to look deeper to determine the race of venire members, we implemented a rigorous protocol to produce data in a way that is both reliable and transparent.

We obtained information about potential jurors' race from three sources. First, we collected juror questionnaires for many of the venire members in our study. These questionnaires almost always asked the venire member's race, and the vast majority of respondents provided that information. We considered potential venire members' self-reports of race to be highly reliable and were able to get this information from juror questionnaires for 62.3% (4,623/7,421) of the eligible venire members.

For a second group of venire members, race was noted explicitly in the trial record. More than six percent (6.4%, 478/7,421) stated their race on

74. In one case (Gary Trull), the defense successfully challenged the prosecution's exercise of a peremptory strike against a black venire member, and the court seated him as an alternate juror. Thus, although this venire member ultimately served on the jury, we nevertheless treated him as struck by the prosecution in the analysis.

75. A court could properly remove for cause a venire member who expressed unwillingness to impose the death penalty under any circumstances under *Lockhart v. McCree*, 476 U.S. 162 (1986), *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Witt v. Wainwright*, 470 U.S. 1039 (1985), and thus such venire members are not included in our analysis. Sometimes, however, a venire member expressed reservations or ambivalence about the death penalty that fell short of outright opposition. Such a venire member would still be eligible to serve on the jury, but a prosecutor could reasonably base a decision to exercise a peremptory strike on this basis. *See* Witherspoon v. Illinois, 391 U.S. 510, 519–20 (1968). Accordingly, this is one of the many venire member characteristics we included in our analysis.

the record in a manner that appears in the voir dire transcript.[76] Similarly, a court clerk's chart noting the race of potential jurors that was officially made part of the trial record or a statement by an attorney on the record provided race information for a smaller percent of the venire members (0.5%, 40/7,421).[77]

Finally, for the remaining 30.6% (2,273/7,421) of venire members, we used electronic databases to find race information and record the race and source of race information. Staff attorneys used the North Carolina State Board of Elections website, LexisNexis "Locate a Person (Nationwide) Search Non-regulated," LexisNexis Accurint, and the North Carolina Department of Motor Vehicles online database. Many of the case files included juror-summons lists with addresses, which allowed staff attorneys to match online records to the information about the potential juror with a high level of certainty.

The primary investigators prepared a strict protocol for use of these websites for race coding and trained staff attorneys on that protocol in a half-day session. One objective of this protocol was to minimize the possibility of researcher bias. In addition, staff attorneys who searched for venire members' information on electronic databases were (whenever possible) blind to strike decisions.[78]

Throughout this process, we instructed staff attorneys to code a venire member's race as "unknown" unless they were able to meet strict criteria ensuring that the person identified in the public record was in fact the venire member and not just someone with the same name.[79] Staff attorneys were not to rely on a record containing information that was not wholly consistent with whatever information we had about a particular venire member. For instance, staff attorneys would not rely on a public record in which the person's middle initial was inconsistent with that of the venire

76. In these instances, the judges asked potential jurors to state their race for the record.

77. Importantly, we did not rely on clerks' or attorneys' observations about potential jurors' race unless incorporated into the record and thus subject to dispute if a party or the court objected to the classification. For instance, we considered reliable an attorney's mention of a potential juror's race during an argument regarding a *Batson* challenge with the assumption that the other party or the court would challenge that assessment if the attorney was mistaken. In contrast, we did not rely on a clerk's notes about the race of potential jurors on a jury chart unless it was clear that the parties had a chance to review that document and challenge any perceived inaccuracies.

78. Staff attorneys seeking race information from public sources knew about strikes only when they had to turn to the transcript for information to help them find that venire member's race. For instance, venire members often indicated during voir dire precisely where they lived and for how long. For cases lacking a summons list with addresses, this information was useful in public records searches where we lacked direct information about race.

79. For instance, staff attorneys were instructed to use information such as the venire member's middle name or year of birth to link the venire member to records of someone with the same name. When at all in doubt, staff attorneys were instructed to code the venire member's race as unknown.

member, unless they were able to document a name change to account for the discrepancy (for instance, a record that indicated that a venire member started using her maiden name as a middle name). If staff attorneys found someone with the same name as the venire member but with a different address, they were to use that record only if they could trace the person's address back to that of the venire member. Staff attorneys saved an electronic copy of all documents used to make race determinations.[80]

Because of the importance of the race coding, we conducted a reliability study on this methodology. Staff attorneys and law students used public records to code race for 1,897 venire members for whom we also had juror questionnaires reporting race or express designations of race in a voir dire transcript.[81]

We then compared the data from public records to the presumably more reliable self-reported data in the jury questionnaires. Staff attorneys using public records were unable to determine a venire member's race to the level of reliability required by the study protocol in 242 of 1,897 cases (12.8%).[82] In the remaining 1,655 cases, the race extracted from the public records matched that taken from the presumably more reliable sources for 97.9% of the venire members. This suggests that the method we used is highly reliable.

---

80. For instance, if a staff attorney identified the race of a venire member through the North Carolina Board of Elections website, he or she would save the record with the venire member's race designation (usually as an Adobe Acrobat file but sometimes as a screen shot). If the staff attorney relied upon an address provided in the juror-summons list to identify a venire member had moved since the time of the trial, the staff attorney would also save records of the venire member's change of addresses over the years. This information was often available in the Lexis-Nexis Locate a Person Database, which allowed the staff attorney to trace the venire member's address from the juror-summons list to his or her current address reflected in the North Carolina Board of Elections website. For each step in the process linking current information about each venire member to information recorded at the time of the trial, staff attorneys saved a copy of the electronic record.

81. The staff attorneys did not have access to the questionnaires or voir dire transcripts when they conducted the public-records research.

82. We instructed staff attorneys to code a venire member's race as unknown unless they could rule out the possibility that the record on which they were relying referred to someone besides the venire member. In cases where we had juror summons lists with addresses, a staff attorney usually had no trouble identifying the venire member from two people with the same name. Lacking specific identifying information, however, staff attorneys were sometimes unable to meet the strict criteria for extracting race. We expected that this method of extracting data on race would lead to a moderate amount of missing data.

In the full study, we expended additional efforts to find the missing data. In most instances, our staff attorneys reviewed transcripts more closely to gather identifying information that allowed them to link the venire members to the appropriate public records. For example, venire members often stated in voir dire where they lived and worked. This additional information often allowed staff attorneys to narrow down public records for people with the same name even when we lacked a juror-summons list.

Staff attorneys and law students did not expend this level of effort in tracking down race through public-record databases solely for the reliability check.

The methods described in this section allowed us to document race for all but 7 of the 7,421 eligible venire members in our study. In other words, our database includes race information for 99.9% of the eligible venire members, as well as the source of that information for each venire member.

E. CODING RACE-NEUTRAL CONTROL VARIABLES (DESCRIPTIVE INFORMATION)

Strike and race information allows for the calculation of strike rates by race. To account for other factors that might bear on the decision to strike, more detailed information about individual venire members must be considered. Thus, in addition to basic demographic information about each eligible venire member, we coded more detailed information on approximately sixty-five variables for a random sample of venire members. We sought to identify the variables that consistently and reliably predicted whether the state would strike or pass a potential juror. Appendix A provides a partial list of our race-neutral control variables. These variables document information such as views on the death penalty; education, marital, and employment status; religious affiliation; and experience with crime.

Because this process is labor intensive,[83] we drew a random sample of venire members from the database[84] and coded detailed descriptive information for almost a quarter of the venire members in the database (1,753/7,421).[85]

The following sections of this Article present the research in increasing levels of analytical complexity. We start with the unadjusted racial disparities in prosecutorial strikes, and then present disparities controlling, one at a time, for potentially relevant race-neutral variables. Finally, we present the disparities that emerge via fully controlled logistic regression analysis of a randomly selected sample of a quarter of the study population for whom we coded detailed individual-level information.

---

83. We instituted procedures for double coding of descriptive information to ensure accuracy and intercoder reliability.

84. We used the SPSS random-select function to draw the sample. The demographic profile of the random sample strongly resembled that of the complete study population. Of these 1,753 jurors, 1,749 were eligible to be struck by the state. We determined the race of all but two jurors (83.6% non-black (1,465), 16.3% black (286), and 0.1% missing (2)). These percentages mirror those in the full sample (83.6% non-black (6,203), 16.3% black (1,211), and 0.1% missing (7)). The random sample also reflects the relative proportions of men and women: The smaller sample included 51.9% women (910) and 48.1% men (843); the full data set included 53.3% women (3,952) and 46.7% men (3,469).

85. A few of the venire members who were randomly selected to be included in the sample could not be coded due to the poor quality or unavailability of the case materials. The transcript for the case of Wayne Laws was too faded to be made searchable, and no venire members were coded for descriptive information. No transcript was available in the more recent case of Michael Ryan.

F. STATEWIDE UNADJUSTED PROSECUTORIAL STRIKE PATTERNS

The statewide database includes information about 7,421 venire members. Of those, 7,400 (99.7%) were eligible to be struck by the state. We analyzed prosecutorial-strike patterns using only those venire members who were eligible to be struck by the state. Among strike-eligible venire members, the overwhelming majority were either white (6,039, 81.6%) or black (1,208, 16.3%); just 2.0% (153) were other races. As noted above, we are missing race information for 7 (0.1%) venire members.

Prosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members. As seen in Table 1, across all strike-eligible venire members in the study, prosecutors struck 52.6% (636/1,208) of eligible black venire members, compared to only 25.7% (1,592/6,185) of all other eligible venire members.[86]

In addition, Table 2 shows that the average rate per case at which prosecutors struck eligible black venire members is significantly higher than the rate at which they struck other eligible venire members.[87] Of the 166 cases that included at least one eligible black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members.[88]

---

86. *See infra* Table 1. This difference is statistically significant, $p < .001$; put differently, there is less than a one in one thousand chance that we would observe a disparity of this magnitude if the jury selection process were actually race neutral. Several different chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the *p*-values, and the results were consistent regardless of the test used.

87. The analyses presented in Tables 1 and 2 are very similar, but differ in their unit of analysis. Table 1 shows strikes against all venire members in the study pooled across cases (7,400 strike eligible venire members across 173 cases). Table 2 compares the strike rates calculated per case. Thus, only those cases with at least one eligible black venire member (166) were included, and each case represents one data point. We present both ways of calculating these disparities to demonstrate that the effect is robust and does not depend on which method is used.

88. *See infra* Table 2. This difference is statistically significant, $p < .001$. When we exclude those venire members whose race we coded from public records, the pattern is substantially the same: Of 139 cases, prosecutors struck an average of 55.7% of eligible black venire members compared to only 22.1% of all other eligible venire members. This difference is statistically significant, $p < .001$. This suggests that the patterns we observed are not skewed in some way by the source of information about potential jurors' race.

The disparities between mean prosecutorial strike rates against eligible black venire members versus those of other races are consistent across time: 57.4% versus 25.9%, $p < .001$ (1990–1994, forty-two cases); 54.7% versus 24.0%, $p < .001$ (1995–1999, eighty cases); 57.2% versus 25.0%, $p < .001$ (2000–04, twenty-nine cases); and 56.4% versus 25.4%, $p < .01$ (2005–2010, fifteen cases).

TABLE 1

Statewide Prosecutorial Peremptory Strike Patterns

(Strikes against venire members aggregated across cases)

		A	B	C	D
		Black Venire Members	**All Other Venire Members**	**Unknown**	**Total**
1.	**Passed**	572 (47.4%)	4,593 (74.3%)	3 (42.9%)	5,168 (69.9%)
2.	**Struck**	636 (52.6%)	1,592 (25.7%)	4 (57.1%)	2,232 (30.1%)
3.	**Total**	1,208 (100.0%)	6,185 (100.0%)	7 (100.0%)	7,400 (100.0%)

*Chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) indicate that these differences in strike rates are significant at $p < .001$.

TABLE 2

Statewide Average Rates of State Strikes

(Strike rates calculated in individual cases and averaged across cases)

	A	B
	Average Strike Rate	**Number of Cases Averaged**
1. **Strike Rates Against Black Qualified Venire Members**	56.0% (*SD* = 24.6%)	166
2. **Strike Rates Against All Other Qualified Venire Members**	24.8% (*SD* = 7.0%)	166

*A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

As seen in Table 3, disparities were even greater in cases involving black defendants. In cases with non-black defendants, the average strike rate was 51.4% against black venire members and 26.8% against all other venire members.[89] In cases with black defendants, the average strike rate was 60.0% against black venire members and 23.1% against other venire members.[90]

89. *See infra* Table 3. Out of 166 cases with black eligible venire members, ninety involved black defendants and seventy-six involved defendants of other races.

90. *See infra* Table 3.

The difference in the magnitude of the disparity between black and other defendants is statistically significant.[91] In other words, although state strike rates are always higher against black venire members than against other venire members, the disparity is significantly greater in cases with black defendants.

TABLE 3
Disparities in Strike Patterns by Race of Defendant
(Strike rates calculated in individual cases and averaged across cases)

		A	B	C
	Race of Defendant	**Strikes Against**	**Average Strike Rate**	**Number of Cases Averaged**
1.	**Black**	**Black Qualified Venire Members**	60.0% (*SD* = 30.0%)	90
2.		**All Other Qualified Venire Members**	23.1% (*SD* = 6.9%)	
3.	**Non-Black**	**Black Qualified Venire Members**	51.4% (*SD* = 25.8%)	76
4.		**All Other Qualified Venire Members**	26.8% (*SD* = 6.6%)	

*Analysis of variance (*F*-test) indicates that this difference between the disparities in strike rates by race of defendant is significant at $p < .03$.

IV. THE EFFECT OF RACE AFTER CONTROLLING FOR VENIRE MEMBERS' PERSONAL CHARACTERISTICS ON THE EXERCISE OF PEREMPTORY STRIKES

The disparate strike rates in the first stage of the analysis are compelling evidence of racial discrimination in jury selection, but testing alternative explanations for the observed disparities provides a more complete picture. For instance, Baldus and colleagues found that jurors who expressed concern about imposing the death penalty faced markedly higher odds of being struck by the prosecution.[92] Public opinion research indicates that attitudes about the death penalty differ across racial groups.[93] By collecting

91. Note, however, that we were unable to find a statistically significant effect of defendant's race on the likelihood that a black potential juror would be struck in a fully controlled model.

92. Baldus et al., *supra* note 51.

93. For example, a 2003 Gallup poll of 1,017 randomly sampled adults found that 67% of white respondents supported the death penalty compared to only 39% of African American respondents. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL

and controlling for information about a wide variety of juror characteristics, we can examine the possibility that variables that happen to correlate with race (rather than race itself) account for the observed disparities.[94]

We first controlled for race-neutral variables by analyzing strike disparities within subsets of the study population. For example, we excluded all of the venire members who expressed any ambivalence about the death penalty and then analyzed the strike patterns for the remaining venire members. Because none of the remaining venire members expressed ambivalence about the death penalty, any racial disparity in strike patterns we observed could not be attributable to the possibility that relevant attitudes vary along racial lines. We looked at five different subsets in this manner, removing (1) venire members who expressed any reservations about the death penalty, (2) unemployed venire members, (3) venire members who had been accused of a crime or had a close relative accused of a crime, (4) venire members who knew any trial participant, and finally, (5) all venire members with any one of the first four characteristics. The disparities identified through the unadjusted analysis persisted in each and every subset, as seen in Table 4.

JUSTICE STATISTICS 2003, at 146, tbl.2.52, *available at* http://www.albany.edu/sourcebook/pdf/section2.pdf.

94. Our analysis did not include any potential jurors removed for cause. As a result, any characteristic that would make someone ineligible to serve on a death penalty jury (such as categorical opposition to the death penalty) has already been "controlled for" in that people with these characteristics are not included in the analysis.

TABLE 4
Strike Patterns when State-Strike Eligible Venire Members with Potentially Explanatory Variables Are Removed from Equation

		A	B	C	D
	Variable	**Number of Venire Members Removed from Analyses**	**Strike Rates**	**Strike Rate Ratio**	***p*-value***
1.	**Venire Member with Death Penalty Reservations**	185	44.5% (Black VMs) vs. 20.8% (All others)	2.1	<.001
2.	**Unemployed Venire Member**	25	49.0% (Black VMs) vs. 24.7% (All others)	2.0	<.001
3.	**Venire Member or Close Other Accused of Crime**	398	50.3% (Black VMs) vs. 23.7% (All others)	2.1	<.001
4.	**Venire Member Knew a Trial Participant**	47	53.2% (Black VMs) vs. 25.4% (All others)	2.1	<.001
5.	**Venire Member with Any One of Above Characteristics**	580	39.7% (Black VMs) vs. 19.0% (All others)	2.1	<.001

*Chi-squared tests (Pearson Chi-Squared, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the *p*-values.

The disparities in prosecutorial strike rates against eligible black venire members persist even when other characteristics one might expect to bear on the decision to strike are removed from the equation. Table 4 provides a simple way of comparing apples to apples. However, the decision to strike or pass a potential juror can turn on a number of factors in isolation or combination. In the following section, we provide the results of a fully controlled logistic regression model, taking into account a number of

potentially relevant factors to examine whether the racial disparities can be explained by some combination of race-neutral factors.

As noted above, we collected individual-level descriptive information for a significant randomly selected portion (1,753/7,421) of the venire members in the study. Even after controlling for other factors potentially relevant to jury selection, a black venire member had 2.48 times the odds of being struck by the state as did a venire member of another race.[95] In other words, while many factors one might expect to bear on the likelihood of being struck did matter, none—alone or in combination—accounts for the disproportionately high strike rates against qualified black venire members.[96]

The coding process described above produced close to sixty-five variables potentially relevant to whether a venire member was struck or passed. We sought to identify the variables that consistently and reliably predicted whether the state would strike or pass a potential juror. The resulting model combines those factors to distinguish venire members based on how objectionable (or desirable) they were to prosecutors as potential jurors.

Using the Logistic Regression command in SPSS, we started the analysis with a simple model using only venire members' race[97] and tested each candidate control variable both individually and in small groups. This process allowed us to identify the most important control variables for the decision to strike or pass an eligible venire member. This process produced about twenty-five variables that bore a significant relation (either in isolation

95. We used a logistic regression model with the dependent variable that the strike-eligible venire member was struck or passed on by the state. A few words are in order about the choice of this model in lieu of a multilevel model. One assumption of logistic regression is that the data are independent. That assumption comes into question in this context, as a party's decision to use one of its strikes is likely to be affected by who else is in the pool. This can present a problem in that it might increase the risk of Type I error; that is, it could increase the chances that the researcher will improperly find a result statistically significant. One way to gauge whether a particular dataset presents such a risk is to look at interclass correlations. If subjects (i.e., venire members) nested within settings (i.e., trials) are in fact more similar to each other than are subjects between settings, the researcher should use a multilevel model. We examined the interclass correlations for the 173 cases in this study and found a negative interclass correlation. That means that venire members within a case were no more alike as to the outcome of interest (struck or passed) than were venire members between cases. In fact, that the interclass correlation was negative suggests that the results of the logistic regression analysis are likely conservative. For this reason, using a multilevel model was unnecessary and a traditional logistic regression model was appropriate. *See* David A. Kenny, Deborah A. Kashy & Niall Bolger, *Data Analysis in Social Psychology*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 237 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).

96. *See infra* Table 5.

97. Including the race variable in this model helps to identify which variables are potentially significant in the complete model independent of race. To get the clearest picture possible, we also tested potential control variables without including race in the model, but this did not produce a different list of potential control variables.

or in combination) to the odds of being struck. We then tested these variables in various combinations, both by forcing them into the model and by allowing the computer program to assess which of the candidate variables provided the best fitting model. Through this process, we were able to build a model estimating the effects of various venire member characteristics on strike decisions.

Table 5 presents the final logistic regression model for prosecutorial strike decisions. A venire member is coded "1" if struck by the state and "0" if strike-eligible but not struck. The "Black" variable in Row 2 shows the regression coefficient, the standard error of that estimated coefficient, the odds ratio, the confidence interval for that odds ratio, and the *p*-value for the effect that being black has on the odds of being struck by the state. This model estimates that after controlling for several other race-neutral factors, black venire members face odds of being struck by the state that were 2.48 times those faced by all other venire members.[98]

The results of the logistic regression model are consistent with the unadjusted disparities we observed looking simply at the relative strike rates against black and other venire members. None of the factors we controlled for in the regression analysis eliminated the effect of race in jury selection. While we found many non-racial factors that were highly relevant to the decision to strike, none was so closely associated with race or so frequent that it could serve as an alternative explanation of the racial disparities. Note that throughout the process of building this model, we found no factor or combination of factors that rendered the effect of race non-significant. In other words, the statistically significant influence of race on the odds of being struck was robust; its predictive power did not depend on the inclusion or exclusion of any particular variable or variables in the model.[99] A black venire member was still more than twice as likely (2.48 to 1) to be struck by the state even when other relevant characteristics were held constant.

---

98. $p < .001$. *See infra* Table 5.

99. If we were missing data for an individual juror regarding *any* of the variables under analysis, this model excluded that juror from the analysis completely (even though we have data about that juror for some of the other variables). To determine whether exclusion of these cases with missing data skewed the model, we used a method known as multiple imputation. *See* DONALD B. RUBIN, MULTIPLE IMPUTATION FOR NONRESPONSE IN SURVEYS 2 (1987); J.L. SCHAFER, ANALYSIS OF INCOMPLETE MULTIVARIATE DATA 104–05 (1997). This method allows us to use the information we do have about a juror to impute a value for the missing variable using what we know about other jurors for whom we have complete information on the variable in question. We then conducted another logistic regression analysis using these data (original data supplemented by imputed values for the missing). This model produced estimates that were very close to the estimates presented in Table 5, in which we used only jurors for whom we have complete information. This suggests that the information we were missing about venire members was missing randomly, and thus did not skew the analysis.

This finding is notable because it speaks to the concern that we have failed to account for other race-neutral factors that might explain the disparity. For instance, while we have accounted for many race-neutral factors that bear on jury selection, we cannot account for a venire member's physical appearance or body language—factors litigators often cite as relevant to their decision to strike.[100] But factors like these should generally be unrelated to the race of the venire member. Moreover, even if these factors were associated more with some racial groups than others, that association would have to be very strong and the factor quite frequent to explain the observed racial disparities.

100. *See, e.g.*, Ben Rubinowitz & Evan Torgan, *Jury Selection: Time Constraints and Weaknesses in Cases*, N.Y. L.J., Aug. 29, 2007, at 8 (emphasizing the importance of a "juror's demeanor [and] ability to maintain eye contact" in assessing potential bias); Jeff Strange, *Jury Selection in 30 Minutes or Less*, PROSECUTOR (Tex. Dist. & Cnty. Atty's Ass'n, Austin, Tex.). Sept.–Oct. 2009, *available at* http://www.tdcaa.com/node/5267 (emphasizing the importance of noting how a potential juror dresses and interacts with other members of the panel to assess whether they are "conformists who accept societal norms and expect others to do the same").

TABLE 5
Statewide Fully Controlled Logistic Regression Model

	A	B	C	D	E	F	G
	Variable Name	**Variable Description**	**Coefficient**	**S.E.**	**Odds Ratio**	**C.I.**	***p*-value**
1.	**Intercept**		-1.714	0.137	0.16		<.001
2.	**Black**	**Venire member is black**	**0.906**	**0.19**	**2.48**	**1.71, 3.58**	**<.001**
3.	**DP_Reservations**	Venire member expressed reservations about the death penalty	2.437	0.23	11.44	7.23, 18.09	<.001
4.	**SingleDivorced**	Venire member is not married	0.543	0.17	1.72	1.23, 2.41	<.01
5.	**JAccused**	Venire member accused of a crime	0.730	0.23	2.07	1.33, 3.24	<.01
6.	**Hardship**	Venire member worried serving would impose a hardship	1.094	0.31	2.99	1.61, 5.54	<.01
7.	**Homemaker**	Venire member is a homemaker	0.799	0.32	2.22	1.18, 4.17	<.02
8.	**JLawEnf_all**	Venire member or close other works in law enforcement	-0.466	0.19	0.63	0.44, 0.90	<.02
9.	**JKnewD**	Venire member or venire member's immediate family knew the defendant	2.156	0.66	8.63	2.37, 31.41	<.01
10.	**JKnewW**	Venire member knew a witness	-0.615	0.25	0.54	0.33, 0.88	<.02
11.	**JKnewAtt**	Venire member knew one of the attorneys in the case	0.744	0.25	2.11	1.29, 3.44	<.01
12.	**LeansState**	Venire member expresses view that suggests view favorable to state (e.g., problems with presumption of innocence, right not to testify)	-1.966	0.54	0.14	0.05, 0.40	<.001
13.	**PostCollege**	Venire member went to graduate school	0.996	0.27	2.71	1.59, 4.63	<.001
14.	**VeryYoung**	Venire member is 22 or younger	0.920	0.40	2.51	1.14, 5.55	<.03

R^2 = .32

V. CONCLUSION

How North Carolina courts interpret and apply the RJA to claims of racial bias in jury selection is an open question pending the outcome of cases currently in litigation.[101] In the past, North Carolina trial courts have not been especially willing to sustain *Batson* objections, and reviewing courts have shown almost complete deference to those rulings.[102] The RJA's express authorization to look at patterns that emerge in strike decisions across cases shifts the focus from a question of a particular prosecutor's credibility in a particular case to what the data tell us about what drives strike decisions generally. Justifications for strike decisions that seem plausible in the limited context of a single case—even with the aid of side-by-side comparisons of struck and unstruck jurors authorized by *Miller-El v. Dretke*—might not hold up when the universe of potential comparators expands to include jury selection in other cases.[103]

101. The study presented in this Article was the focus of a two-and-a-half week hearing in Cumberland County, North Carolina in early 2012. Death row inmate Marcus Robinson's RJA claim as to racial disparities in prosecutors' use of peremptory strikes in capital jury selection was the first such claim to go to a hearing. On April 20, 2012, the trial court issued its ruling that race had been a significant factor in the state's decision to exercise peremptory strikes, finding the analyses presented here "to be a valid, highly reliable, statistical study of jury selection practices in North Carolina capital cases between 1990 and 2010." Order Granting Motion for Appropriate Relief at 45, State v. Robinson, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012), *available at* http://www.aclu.org/files/assets/marcus_robinson_order.pdf. The defendant's death sentence was vacated, and he was resentenced to life in prison without the possibility of parole.

102. *See* Amanda S. Hitchcock, *Recent Development, "Deference Does Not by Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina Supreme Court's highly deferential approach to reviewing *Batson* claims in capital cases).

103. *See* Sommers & Norton, *supra* note 31, at 269 (finding evidence of racial bias in mock jury selection experiment but noting that "[w]e observed bias against Black venire members only when examining decisions made by several participants; indeed, for any given participant, we are unable to determine whether the peremptory was influenced by race or whether the justification provided was valid").

APPENDIX A

PARTIAL LIST OF VARIABLES FROM DATA COLLECTION INSTRUMENT

Part A. General Codes

Variable Name	Label
DName	Defendant's name
VM_Name	Juror's name
VM_Race	Juror's race
SourceRace	Source of race information (e.g., juror questionnaire, public record)
StrikeState	StrikeState = 1 if state used a peremptory strike against the juror (all else = 0)
StrikeDef	StrikeDef = 1 if defense used a peremptory strike against the juror (all else = 0)
Status	Juror's ultimate status (e.g., struck, seated as an alternate juror)
Gender	0 = Female; 1 = Male
Age	Juror's age in years
Marital	Juror's marital status (e.g., married, widowed, single)
Children	0 = No children; 1 = Children
ReligiousOrg	1 = Belongs to a religious organization; 0 = all else
Education	Juror's education level (e.g., high school graduate, attended graduate school)
Military	1 = Served in military; 0 = all else
Employment	See below for a portion of the coding appendix used to code jurors' employment
SpouseEmployment	Employment of married jurors' spouses (same codes used for jurors' employment)
Descriptives	Up to 10 codes used to capture experiences and attitudes expressed in jury selection. See below for a partial list of codes.

Part B. Employment Codes
(excluding subparts capturing different types of jobs within those listed as examples)

Code	Category	Examples
10	*Management & Professional*	Management and business; computers; legal; medical; engineering
20	*Sales and Office Occupations*	Sales; office and administrative support
30	*Farming, Fishing, and Forestry*	
40	*Service*	Healthcare support; fire fighting; law enforcement; food preparation
50	*Military*	Enlisted or officer
60	*Construction, Extraction, Maintenance, & Repair*	
70	*Production & Transportation*	
80	*Outside of Labor Force*	Student; retired; homemaker; unemployed

Part C. Codes for Juror Characteristics
(excluding subparts capturing more detailed juror characteristics)

Code	Category	Examples
100	*Hardship*	Emotional difficulty; caretaking obligation
300	*Juror/Friend/Family Was Victim of Crime*	
400	*Juror/Friend/Family Was Accused of Criminal Activity*	
700	*Admitted Bias or Other Reason S/he Could Not Be Fair*	Premature opinion; admitted bias
800	*Expressed View Contrary to Applicable Law, Not Including Death Qualification*	Difficulty presuming innocence; draws adverse inferences from failure to testify
900	*Prior Familiarity with Parties*	Knows parties or attorneys
1200	*Moral or Religious Reservations about Imposing the Death Penalty*	Ambivalence about death penalty (short of refusal to impose under any circumstances)

THE JURY SUNSHINE PROJECT: JURY SELECTION DATA AS A POLITICAL ISSUE

*Ronald F. Wright**
*Kami Chavis***
*Gregory S. Parks****

In this Article, the authors look at jury selection from the viewpoint of citizens and voters, standing outside the limited boundaries of constitutional challenges. They argue that the composition of juries in criminal cases deserves political debate outside the courtroom. Voters should use the jury selection habits of judges and prosecutors to assess the overall health of local criminal justice: local conditions are unhealthy when the full-time courtroom professionals build juries that exclude parts of the local community, particularly when they exclude members of traditionally marginalized groups such as racial minorities. Every sector of society should participate in the administration of criminal justice.

This political problem starts as a public records problem. Poor access to records is the single largest reason why jury selection cannot break out of the litigator's framework to become a normal topic for political debate. As described in Part III, the authors worked with dozens of students, librarians, and court personnel to collect jury selection documents from individual case files and assembled them into a single database, which we call "The Jury Sunshine Project." The database encompasses more than 1,300 felony trials and almost 30,000 prospective jurors.

Part IV presents some initial findings from the Jury Sunshine Project to illustrate how public data might generate political debate beyond the courtroom. Part V explores the possible explanations for the racial patterns observed in jury selection. Some accounts of this data point to be-

* Needham Y. Gulley Professor of Criminal Law, Wake Forest University.

** Professor of Law and Associate Provost for Academic Initiatives, Wake Forest University.

*** Professor of Law, Wake Forest University.

We want to thank Elizabeth Johnson, scores of students at the school of law and the college, and hundreds of devoted public servants working in the superior court clerk's offices in the state of North Carolina. We are also grateful to Thomas Clancy, Andrew Crespo, Mary Fan, Russell Gold, Aya Gruber, Nancy King, Harold Lloyd, Sara Mayeux, Richard McAdams, Richard Myers, Wes Oliver, and Chris Slobogin for comments on earlier drafts of this Article.

nign nonracial factors as the real explanation for the patterns observed. Other interpretations of the data treat these patterns as a new type of proof of discriminatory intent: evidence that cuts across many cases might shed new light on the likely intent of prosecutors, defense attorneys, or judges in a single case. A third perspective emphasizes the community effects of exclusion from jury service. Finally, Part VI generalizes from the data about the race of jurors to ask more generally how accessible public records could transform criminal justice. Sunshine will open up serious community debates about what is possible and desirable in local criminal justice systems.

TABLE OF CONTENTS

I. INTRODUCTION

Lawyers treat jury selection—no surprise here—as an issue to litigate. They file motions, objecting to mistakes by the clerk of the court when she calls a group of potential jurors to the courthouse for jury duty. After those potential jurors arrive in the courtroom, lawyers file further motions, testing the

reasons that judges give for removing a prospective juror. The lawyers also watch for signs that their opponents might rely on improper reasons, such as race or gender, to remove potential jurors from the case. Again, there is a motion for that. The law of jury selection has plenty of enforcers who stand ready to litigate.

In this Article, we stand outside the litigator's role and look at jury selection from the viewpoint of citizens and voters. As citizens, we believe that the composition of juries deserves political debate outside the courtroom. Voters should consider the jury selection habits of judges and prosecutors when deciding whether to re-elect the incumbents to those offices. More generally, jury selection offers a stress test for the overall health of local criminal justice. Conditions are unhealthy when full-time courtroom professionals build juries that exclude parts of the local community, particularly when they exclude traditionally marginalized groups such as racial minorities. Every sector of society should play a part in the administration of criminal justice.

This political problem starts as a public records problem. As we discuss in Part II of this Article, the legal doctrines related to jury selection focus too much on single cases, and limited public access to court data makes that myopia worse. Poor access to courtroom records is the single largest reason why jury selection cannot break out of the litigator's framework to become a normal topic for political debate.[1]

The paperwork in the typical case file, found in the office of the clerk of the court, does record a few details about which residents the clerk called to the courthouse, which panel members the judge and the attorneys excluded from service, and which people ultimately served on the jury. But many details about jury selection go unrecorded. And even more important, it is practically impossible to see any patterns across the case files in many different cases. The clerk normally does not hold the data in aggregate form or in electronically searchable form. Thus, there is no place to go if a citizen (or a news reporter or candidate for public office) wants to learn about the actual jury selection practices of the local judges or prosecutors. There is no vantage point from which to see the whole of jury selection, rather than the selection of a single jury.[2]

Until now. As we describe in Part III, we worked with dozens of students, librarians, and court personnel to collect jury selection documents from individual case files. Then we assembled them into a single database, which we call "The Jury Sunshine Project." The paper records, housed in 100 different courthouses, depict the work of lawyers and judges in more than 1,300 felony trials, as they decided whether to remove almost 30,000 prospective jurors. The assembled data offer a panorama of jury selection practices in a state court system during an entire year.

1. *See infra* Section II.D.

2. For a review of periodic efforts to assemble jury selection data related to specialized categories of cases (particularly in capital cases), see *infra* Section II.D.

In Part IV, we present some initial findings from the Jury Sunshine Project to illustrate how public data might generate political debate beyond the courtroom. Our analysis shows that prosecutors in North Carolina—a state with demographics and legal institutions similar to those in many other states—excluded nonwhite jurors about twice as often as they excluded white jurors. Defense attorneys leaned in the opposite direction: they excluded white jurors a little more than twice as often as nonwhite jurors. Trial judges, meanwhile, removed nonwhite jurors for "cause" about 30% more often than they removed white jurors. The net effect was for nonwhite jurors (especially black males) to remain on juries less often than their white counterparts.

The data from the Jury Sunshine Project also show differences among regions and major cities in the state. Prosecutors in three major cities—Greensboro, Raleigh, and Fayetteville—accepted a higher percentage of nonwhite jurors than prosecutors in three other cities—Charlotte, Winston-Salem, and Durham. While there may be reasons why prosecutors choose different jurors than judges or defense attorneys do, why would prosecutors in some cities produce such different results from their prosecutor colleagues in other cities?

Part V explores possible explanations for the racial patterns that we observed in jury selection. Some accounts of these data point to benign nonracial factors as the real explanation for the patterns we observed. Other interpretations of the data treat these patterns as a new type of proof of discriminatory intent: evidence that cuts across many cases might shed new light on the likely intent of prosecutors, defense attorneys, or judges in a single case.

A third perspective emphasizes the *effects* of exclusion from jury service. This system-wide perspective does not concentrate on what a single attorney or judge was thinking at the moment of removing a juror. Instead, what matters is how the work of all the attorneys, judges, clerks, and ordinary citizens in the courthouse forms a pattern over time. When courtroom actors exclude a portion of the community from jury duty in a persistent and predictable way, that outcome—regardless of the intent of the actors—undercuts the legitimacy of local criminal justice.

Finally, in Part VI, we generalize from our data about the race of jurors to ask more generally how accessible public records could transform criminal justice. We believe that sunshine will open up serious community debates about what is possible and desirable in the local criminal justice system. By widening the frame of vision from a litigant's arguments about a single case, the quality of justice becomes a comparative question. For instance, voters and residents who learn about jury selection patterns will naturally ask, "How do the jury selection practices of my local court compare to practices elsewhere?" Researchers and reporters can answer those questions with standardized public data, comparing prosecutors and judges with their counterparts in different districts.

Data-based comparisons such as these make it possible to hold prosecutors and judges directly accountable to the public, in a world where voters generally have too little information about how these public servants perform their

work. When challengers raise the issue during the re-election campaign of the chief prosecutor or the judge, and reporters write stories about the latest jury selection report, it could shape the selection of jurors across many cases.

With the help of public records—assembled to make it easy to compare places, offices, times, and crimes—the selection of juries could become something more than an insider's litigation game of dueling motions. The patterns, visible in those public records, could prompt a public debate about what the voters expect from their judges and prosecutors. It takes a democratic movement, not just a constitutional doctrine, to bring the full community into the jury box.

II. CASE-LEVEL DATA AND DOCTRINES

Every defendant has a legally enforceable right to an impartial and representative jury, so lawyers and judges raise constitutional and statutory claims during criminal and collateral proceedings to protect that right. The litigators' concerns about jury selection, however, keep the focus narrow. In this Part, we briefly review some of the legal doctrines that litigators use to enforce the ideals of jury selection, noting the doctrinal emphasis on single cases.

We then show how current public records laws and the practices of jury clerks reinforce the single-case orientation of the constitutional doctrine. As a result, it is nigh impossible to view jury selection at the overall system level. The existing archival empirical studies of jury selection reflect this difficulty: they deal with specialized crimes or targeted locations, making it difficult to draw general lessons about juries and the overall health of criminal justice systems.

A. Judge Removes Jurors for Cause

Before the start of a jury trial, lawyers for the prosecution and the defense may challenge jurors for cause. The judge, responding to these objections from the attorneys, must confirm that each potential juror meets the general requirements for service, such as residency and literacy requirements.[3] At that point, the judge also evaluates possible sources of juror bias against the defendant or against the government.

The "cause" for removal might be a prospective juror's relationship with one of the parties or lawyers.[4] The judge also inquires into the prior experiences of the jurors; for instance, the judge might ask if any of the jurors was ever a

3. *See* 42 PA. CONS. STAT. § 4502 (2016) (declaring that citizens are not qualified to be jurors if they are "unable to read, write, speak and understand . . . English . . . ;" are not able to "render efficient jury service" due to mental infirmity; or have been "convicted of a crime punishable by imprisonment for more than one year . . . ."); TEX. CODE CRIM. PROC. ANN. art. 35.16 (West 2016) (allowing a challenge for cause for jurors with felony or misdemeanor convictions).

4. Judges encounter special problems during for-cause removals in death penalty cases. A juror who declares that he or she would always vote to impose the death penalty, or not to impose the death penalty, will be excluded for cause. *See* Witherspoon v. Illinois, 391 U.S. 510, 520–23 (1968).

victim of a crime. A juror who brings prior knowledge about the events surrounding the alleged crime receives special scrutiny. There is no limit to the number of jurors a judge might exclude on these grounds.[5]

The statutes and judicial opinions dealing with for-cause removals share two important features. First, the standards defer to trial judges. Appellate courts apply an "abuse of discretion" standard to these questions and rarely overturn the trial judge's decision to grant or deny a party's request to remove a juror for cause.[6] Second, the law of for-cause removal of jurors looks to one trial at a time. Any challenge to the judge's decision begins with a review of the court transcript for evidence of the individual juror's alleged bias. A comparison to some other juror in the same case might be relevant, but the judge's habits across many cases—or the actions of the local judiciary more generally during questions of removal—do not matter for litigators. Indeed, there are no aggregate data sources that could show how often trial judges remove jurors for cause. Litigators see this issue case by case, and appellate courts normally conclude that the trial judge acted within her discretion, whatever she chose.

B. Attorneys Remove Jurors with Peremptory Challenges

After the parties argue to the judge about removals for cause, lawyers for the prosecution and defense use peremptory challenges to strike a designated number of jurors.[7] True to the name, peremptory strikes require no explanation. Perhaps one side wants to exclude jurors with certain political attitudes because the attorneys believe those jurors may not sympathize with their client's side of the case. There are only a few ways that lawyers can take their peremptory strikes too far: they may not use peremptory challenges to exclude jurors based on race, gender, or other "suspect" categories for equal protection purposes. To do so would violate the Constitution.[8]

The method for litigants to prove racial discrimination in the use of peremptory challenges has changed over the years. Under the approach laid out in *Swain v. Alabama*,[9] a party claiming discrimination had to present evidence reaching beyond the opponent's behavior in the case at hand. The defendant would need to show that "in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself."[10]

5. *See* MO. REV. STAT. § 494.470 (2016) ("A prospective juror may be challenged for cause for any reason mentioned in this section and also for any causes authorized by the law."); N.C. GEN. STAT. § 15A-1214(d)–(e) (2016).

6. *See* Oswalt v. State, 19 N.E.3d 241, 245 (Ind. 2014); State v. Lindell, 629 N.W.2d 223, 239–40.

7. *See* OHIO R. CRIM. P. 24(D) (2009) ("[E]ach party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases . . . ."); TENN. CODE ANN. § 40-18-118 (2016) (providing eight strikes for each side in cases punishable by imprisonment for more than one year but not death, and three for each side if crime is punishable by less than one year).

8. *See* Miller-El v. Dretke, 545 U.S. 231, 237–39 (2005); Batson v. Kentucky, 476 U.S. 79, 89 (1986).

9. 380 U.S. 202, 222–23 (1965); Norris v. Alabama, 294 U.S. 587, 589 (1935).

10. *Swain*, 380 U.S. at 223.

Two decades later, the Court in *Batson v. Kentucky*[11] expanded the options for a party trying to prove intentional racial discrimination during jury selection. A litigant now may rely solely on the facts concerning jury selection in the individual case. Under this analysis, the attorneys try to reconstruct the state of mind of a single prosecutor (or a single defense attorney) who removed a prospective juror in a single trial. The relevant factual question is a familiar one in criminal court: what was the state of mind of a single actor at one moment in the past?

The *Batson* Court developed an oddly detailed constitutional test: a three-step analysis (plus one prerequisite) for examining invidious racial discrimination in the use of peremptory strikes during jury selection. As a prerequisite, the litigant must identify jurors belonging to a constitutionally relevant group, such as a group based on race, ethnicity, or gender.[12] At that point, the moving party takes the first step by showing facts (such as disproportionate use of peremptory challenges against jurors of one race, or the nature of the questions posed on *voir dire*) to create a prima facie inference that the other attorney excluded jurors based on race.[13]

Second, the burden shifts to the nonmoving party to give neutral explanations for its challenges. The explaining party cannot simply deny a discriminatory intent or assert good faith. The attorney must point to some reason other than the assumption that jurors of a particular race would be less sympathetic to the party's claims at trial.[14] Finally, in the third step, the moving party offers reasons to believe that the other party's supposedly neutral reasons for the removal of jurors were actually pretextual. On the basis of these arguments, the court decides if the nonmoving party's explanation was authentic or pretextual.

Critics immediately spotted the potential weakness of the *Batson* framework and argued that it is too easy for attorneys to fabricate race-neutral reasons, after the fact, to exclude minority jurors.[15] Appellate courts affirm convic-

11. 476 U.S. at 96–97.

12. *See* United States v. Mensah, 737 F.3d 789, 803 (1st Cir. 2013) (Asian Americans); United States v. Heron, 721 F.3d 896, 902 (7th Cir. 2013) (recognizing circuit split and state court split on religion-based challenges); United States v. Roan Eagle, 867 F.2d 436, 440–41 (8th Cir. 1989) (Native Americans); Commonwealth v. Carleton, 641 N.E.2d 1057, 1058–59 (Mass. 1994) (Irish Americans).

13. *See* People v. Bridgeforth, 769 N.E.2d 611, 616–17 (N.Y. 2016) (holding that removal of dark-skinned juror can satisfy step one); Hassan v. State, 369 S.W.2d 872 (Tex. Crim. App. 2012) (applying step one); City of Seattle v. Erickson, 398 P.3d 1124, 1131 (Wash. 2017) (holding that removal of only minority juror in pool can establish prima facie case).

14. *See* People v. Gutierrez, 395 P.3d 186, 198 (Cal. 2017) (rejecting adequacy of proffered race-neutral reasons); State v. Bender, 152 So. 3d 126, 130–31 (ruling that prosecutor not required to present arrest records in order to support race-neutral explanation for peremptory strike); People v. Knight, 701 N.W.2d 715, 730 (Mich. 2005) (finding prosecutor presented adequate race-neutral reasons for excusing prospective jurors).

15. *See* Wilkerson v. Texas, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting) ("To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd. . . . If such 'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination."); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J.L. REFORM 229, 236 (1993) ("[I]n almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race.").

tions even when prosecutors invoke "nonracial" reasons that correlate with race-specific behaviors or stereotypes,[16] and they sometimes affirm when prosecutors rely on the race-neutral reason only for nonwhite jurors.[17] Some courts also uphold the use of peremptories where the attorney had mixed motives for the removal and at least one of the motives was nonracial.[18] Several studies of published opinions confirm that appellate courts rarely reverse convictions based on *Batson* claims.[19]

Judges stress the fact-specific nature of their rulings on *Batson* claims.[20] The Court's latest case involving race and juror selection, *Foster v. Chatman*,[21] reinforced this aspect of the doctrine: to use a bit of an understatement, the case did not involve subtle discrimination. Documents related to the jury selection in that case showed that the prosecutors made notations about the race of several

16. *See* United States v. Herrera-Rivera, 832 F.3d 1166, 1173 (9th Cir. 2016) (finding that government's proffered reasons for striking potential juror were not pretextual and that strike was based on juror's having criminal history and family members who used drugs); United States v. White, 552 F.3d 240, 251 (2d Cir. 2009) (accepting the explanation that a juror had "an angry look that she wasn't happy to be here"); Lingo v. State, 437 S.E.2d 463, 471 (Ga. 1993) (prosecutor excluded black male juror who appeared "angry"); Clayton v. State, 797 S.E.2d 639, 643–45 (Ga. Ct. App. 2017) (State's reliance on fact that prospective black juror had gold teeth was not race-neutral); State v. Clifton, 892 N.W.2d 112, 126–27 (Neb. 2017) (holding that trial court did not err in finding race-neutral the prosecutor's rationale that juror had years of alcohol and crack addiction).

17. *See* Lewis v. Bennett, 435 F. Supp. 2d 184, 191–92 (W.D.N.Y. 2006) (striking unmarried juror); State v. Collins, No. M2015-01030-CCA-R3-CD, 2017 WL 2126704, at *14 (Tenn. Crim. App. May 16, 2017) (jurors had family members affected by drug abuse, prosecutor removed the only black juror).

18. *See* Cook v. LaMarque, 593 F.3d 810, 817 (9th Cir. 2010) (using comparative analysis of stricken versus nonstricken jurors rather than a mixed-motive test); Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1116–17 (2018).

19. *See* Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092 (2011) (examining 269 *Batson* challenges in federal court from 2000–2009); James E. Coleman Jr. & David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, N.C. ST. B. J., Fall 2017, at 13–14 (comparing reversals in North Carolina to other southern states); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1961 (2016).

20. *See* Gray v. Brady, 592 F.3d 296, 301 (1st Cir. 2010) ("[W]hether to draw an inference of discriminatory use of peremptories is an intensely case and fact-specific question . . . .") (quoting Gray v. Brady, 588 F. Supp. 2d 140, 146 (D. Mass. 2008)). Despite the doctrinal emphasis on fact-specific judicial review of jury selection, the parties often present formulaic, prepackaged arguments to explain their removal of jurors. Litigation in this area has unearthed training materials from local prosecutor's offices, listing ready-made "neutral" justifications that prosecutors might use to overcome a *Batson* challenge. *See, e.g.*, Commonwealth v. Cook, 952 A.2d 594, 601 (Pa. 2008) (describing a training video for new prosecutors calling for prosecutors to strike black people and women from juries and explaining how to conceal discriminatory strikes). Lawyers litigating claims of racial bias in the North Carolina criminal justice system collected materials demonstrating such prosecutor training practices. *See generally* Catherine M. Grosso et al., *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1535 (2012). In some instances, trainers specifically instructed prosecutors to exclude members of racial minority groups from juries. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 265–66 (2005) (Dallas County); Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 104 (2012); Brian Rodgers, *Local DA Encourages Blocking Blacks from Juries, Wharton County Prosecutor Says*, HOUS. CHRON. (Mar. 22, 2016, 9:51 PM), http://www.houstonchronicle.com/news/houston-texas/houston/article/Local-DA-encourages-blocking-blacks-from-juries-6975314.php.

21. 136 S. Ct. 1737, 1743–45 (2016).

potential jurors, writing the letter "b" alongside their names, highlighting their names in green, and placing these jurors in a category labeled, "definite NO's." It is hard to imagine many *Batson* claims with evidence this strong, certainly not for cases litigated after attorneys became more sophisticated in preparing for possible *Batson* claims.[22]

Since the Court decided *Batson*, critics have proposed improvements to the test.[23] Chief among them, scholars persistently call for the abolition of peremptory strikes.[24] At the end of the day, however, the *Batson* test has endured, more or less in its original form. *Batson* marks the boundaries of constitutional enforcement and these boundaries do not seem likely to move any time soon.[25]

C. Venire *Selection*

Litigants also sometimes object to the composition of the jury *venire*—the local residents whom the clerk of the court summons to the courthouse on any given day for potential jury service. Constitutional doctrine plays only a limited backstop role here, as it does with peremptory challenges.

The Supreme Court does read the Equal Protection Clause to prevent states from excluding racial groups from the jury *venire* by statute.[26] The Court

22. *See, e.g.*, *Ex parte* Floyd, 227 So. 3d 1, 13 (Ala. 2016) (affirming conviction after remand to reconsider in light of *Foster*, despite prosecutor use of list designating jurors by race).

23. *See* Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. REV. 357, 372 (2017); Scott Howe, *Deselecting Biased Juries*, 2015 UTAH L. REV. 289, 337 (2015); Nancy S. Marder, Foster v. Chatman*: A Missed Opportunity for* Batson *and the Peremptory Challenge*, 49 CONN. L. REV. 1137, 1176 (2017) (proposing allowing defendants to obtain more information, such as prosecutor notes, or inferring discriminatory intent from discriminatory effect or practice); Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 22 (2014); Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1541 (2015); *cf.* Andrew G. Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 969 (2016).

24. *See* Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) ("I continue to believe that we should reconsider *Batson*'s test and the peremptory challenge system as a whole."); Bellin & Semitsu, *supra* note 19, at 1107; Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1149 (1994); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 179 (2005); Amy Wilson, *The End of Peremptory Challenges: A Call for Change Through Comparative Analysis*, 32 HASTINGS INT'L & COMP. L. REV. 363, 371 (2009); David Zonana, *The Effect of Assumptions About Racial Bias on the Analysis of* Batson*'s Three Harms and the Peremptory Challenge*, 1994 ANN. SURV. AM. L. 203, 241.

25. *See* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 528 (decrying the doctrine's "useless symbolism"); Camille A. Nelson, Batson, *O.J., and* Snyder*: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1689 (2008) ("*Batson*'s promise of protection against racially discriminatory jury selection has not been realized."); Bryan Stevenson, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, HUM. RTS. MAG. (Fall 2010), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/illegal_racial_discrimination_in_jury_selection.html. Change might occur instead at the subconstitutional level. In April 2018, the Washington Supreme Court approved a new procedural rule that removed a showing of discriminatory intent as a basis for disallowing an improper peremptory challenge. *See* WASH. STATE CT. GEN. R. 37.

26. In the first case to deal with the question, *Strauder v. West Virginia*, the Court sustained an equal protection challenge to a statute excluding black people from the jury *venire*. 100 U.S. 303, 309 (1880). In later cases, the Court did not require the defendant to show complete exclusion of a racial group from jury service: a substantial disparity between the racial mix of the county's population and the racial mix of the *venire*, together

has also established that defendants may challenge the process of creating the *venire*, a right that stems from the Sixth Amendment's promise of an impartial jury.[27] A defendant who challenges the *venire* must show that a distinctive group (such as a racial group) is underrepresented in the pool, meaning that its jury *venire* numbers are "not reasonable in relation to" the number of such persons in the community.[28] After showing a gap between the general population and the composition of the *venire*, the defendant must identify some aspect of the jury selection process that causes a "systematic" exclusion of the group.[29]

Statistics matter in proving the defendant's claim. State courts and lower federal courts use several different techniques to measure the gap between the presence of a distinctive group in the population and on the jury *venire*.[30] In that sense, the litigation related to jury *venires* places more weight on the pattern of outcomes and less on the intent of particular actors in a single trial.[31] Nevertheless, litigators in this arena still look to a small set of trials—a single *venire*, typically a single day's worth of trials—for the relevant evidence.[32] Moreover, a judicial finding for defendants who challenge the composition of the *venire* is rare.[33] Like the legal doctrines related to judicial removals for cause and litigant removals through peremptory challenges, the litigation surrounding the jury *venire* leaves most jury selection choices undisturbed—including some troubling outcomes.[34]

D. Public Records and Past Jury Selection Studies

As we have seen, when entire segments of the community remain underrepresented in jury service, constitutional doctrines provide a remedy only in

with an explanation of how the jury selection process had created this outcome, would be enough to establish a prima facie case of discrimination. The government would then have to rebut the presumption of discrimination. *See* Castaneda v. Partida, 430 U.S. 482, 499 (1977) (underrepresentation of Mexican Americans); Turner v. Fouche, 396 U.S. 346, 359 (1970) (underrepresentation of black people).

27. In *Taylor v. Louisiana*, the Court held that a Louisiana law placing on the *venire* only those women who affirmatively requested jury duty violated the Sixth Amendment's requirement that the jury represent a "fair cross section" of the community. 419 U.S. 522, 530 (1975).

28. Missouri v. Stewart, 714 S.W.2d 724, 727 (Mo. Ct. App. 1986).

29. *See* Duren v. Missouri, 439 U.S. 357 (1979). At that point, the burden of proof shifts to the government to show a "significant state interest" that justifies use of the method that systematically excludes a group.

30. The Court, in *Berghuis v. Smith*, described three different measures of the participation gap: the absolute disparity test, the comparative disparity test, and the standard deviation test. 559 U.S. 314, 316 (2010); *see also* State v. Plain, 898 N.W.2d 801, 826–27 (Iowa 2017) (challenges to jury pools can be based on multiple analytical models).

31. *See* Jessica Heyman, *Introducing the Jury Exception: How Equal Protection Treats Juries Differently*, 69 N.Y.U. ANN. SURV. AM. L. 185, 203 (2013).

32. *Id.*

33. *See* United States v. Fadiga, 858 F.3d 1061, 1063–64 (7th Cir. 2017) (holding that evidence that 20% of the population in the two counties that provided jurors for the district court were black and that no juror on defendant's forty-eight person *venire* was black was insufficient to establish prima facie case of discrimination); United States v. Best, 214 F. Supp. 2d 897, 902–03 (N.D. Ind. 2002) (holding that jury *venire* did not violate Sixth Amendment fair cross-section requirement, even if percentage of black people in counties from which *venire* was drawn was 19.6% and percentage of black people on this *venire* was only 4.8%).

34. *See* David M. Coriell, Note, *An (Un)Fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 465 (2015).

the most extreme individual cases. They do so without checking the broader context of courtroom practices. Unfortunately, record-keeping about jury selection compounds the doctrinal problem of single-case myopia.

State courts maintain records (typically in a nonelectronic format) about the construction of individual juries: which prospective jurors sat in the box, which jurors the judge removed for cause, and which jurors the two attorneys removed through peremptories.[35] But aggregate data is another thing entirely: clerks do not traditionally compile data on the rate at which parties or judges exclude minority jurors over long periods of time.[36] Even if state courts were to compile and publish their records to show jury selection practices across many cases, the case files are not fully comparable from place to place. The lack of data not only makes it difficult for litigants to ferret out racial discrimination in particular cases, but it also makes it difficult to identify patterns of behavior that supervisors might address through better training and accountability.[37]

Because of the fragmented nature of public records dealing with jury selection, researchers have not created many databases on this topic, and the limited data they have managed to collect focus on specialized crimes or on trials in a handful of locations. Comparisons across many locations, time periods, or types of crimes have not been possible.

For instance, most of the efforts of scholars and litigants to collect records about jury selection at the trial court level have related to capital murder trials.

35. Clerks in some states also maintain a record of the order of removal. Jurisdictions vary in how much information they collect and retain about individual jurors. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 8-314(a) (West 2016) ("A jury commissioner shall document each . . . decision with regard to disqualification, exemption, or excusal from, or rescheduling of, jury service."); MINN. GEN. R. PRACTICE R. 814 (2017) ("[N]ames of the qualified prospective jurors drawn and the contents of juror qualification questionnaires . . . must be made available to the public . . . ."); 42 PA. CONS. STAT. § 4523(a) (2016) ("The jury selection commission shall create and maintain a list of names of all prospective jurors who have been disqualified and the reasons for their disqualification. The list shall be open for public inspection.").

36. For an exception, see N.Y. JUD. LAW § 528 (McKinney 2016).

> The commissioner of jurors shall collect demographic data for jurors who present for jury service, including each juror's race and/or ethnicity, age and sex, and the chief administrator of the courts shall submit the data in an annual report to the governor, the speaker of the assembly, the temporary president of the senate and the chief judge of the court of appeals.

Id. We are unaware of any state that requires the clerk of the court to collect information about the removal of jurors from the *venire* at the case level, in all jury trials, and to report that data routinely, both at the case level and in aggregate form. *See* S.B. 576, 2017 Leg. (Cal. 2017) (requiring jury commissioner to develop a form to collect specified demographic information about prospective jurors, prohibiting disclosure of the form, but also requiring jury commissioner to release biannual reports with aggregate data).

37. The best overview of these shortcomings in the public records appears in Catherine M. Grosso & Barbara O'Brien, *A Call to Criminal Courts: Record Rules for* Batson, 105 KY. L.J. 651, 654 (2017); *see also* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 322 (2007) ("[T]here is extremely little evidence available even in a full-blown *Batson* hearing to shed much light on the question of whether an explanation is credible."); Peter A. Joy & Kevin C. McMunigal, *Racial Discrimination and Jury Selection*, 31 CRIM. JUST., Summer 2016, at 43, 45 ("[E]very jurisdiction needs to do a better job of collecting data both on the composition of the jury venires and on the use of peremptory challenges."); Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 954–56 (noting poor quality of juror data that courts maintain and report).

Researchers have tallied jury statistics in capital cases in Pennsylvania,[38] North Carolina,[39] South Carolina,[40] and elsewhere.[41]

Other studies have ventured beyond capital murder trials but remained limited to a small number of county courthouses.[42] The most comprehensive of these efforts includes a study of criminal trial juries based on records from two counties in Florida.[43] Several studies focused on the creation of the jury *venire*, prior to any removals by judges and attorneys.[44] Litigators—perhaps frustrated

38. *See* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1662 (1998); David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425, 1449 (2012).

39. *See* Grosso et al., *supra* note 20, at 1533; Barbara O'Brien & Catherine M. Grosso, *Beyond* Batson*'s Scrutiny: A Preliminary Look at Racial Disparities in Prosecutorial Preemptory Strikes Following the Passage of the North Carolina Racial Justice Act*, 46 U.C. DAVIS L. REV. 1623, 1627 (2013).

40. *See* Ann M. Eisenberg et al., *If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2014*, 68 S.C. L. REV. 373, 373 (2017); Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. U. L. REV. 299, 302 (2017).

41. *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 22–28 (2001); Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 116 (2016) (qualitative study of *Witherspoon* strikes in eleven Louisiana trials resulting in death verdicts from 2009 to 2013); Brandon L. Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L. J.F. 417, 419 (2017) (survey of persons reporting for jury duty in Orange County, California, asking questions about eligibility to serve on hypothetical death penalty case); Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 520 (2014) (analyzing nonarchival study of 445 jury-eligible citizens in six death penalty states).

42. Two noncapital studies analyzed single parishes in Louisiana. *See* LA. CRISIS ASSISTANCE CTR., BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 2 (2003), http://www.blackstrikes.com; Billy M. Turner et al., *Race and Peremptory Challenges During* Voir Dire*: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 63 (1986) (examining data from 121 criminal trials in one Louisiana parish). Another working paper analyzed 351 jury trials from Los Angeles County, Maricopa County (Arizona), Bronx County, and Washington, D.C. *See* Jee-Yeon K. Lehmann & Jeremy Blair Smith, *A Multidimensional Examination of Jury Composition, Trial Outcomes, and Attorney Preferences* 9 (2013), http://www.uh.edu/~jlehman2/papers/lehmann_smith_jurycomposition.pdf.

43. *See* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1026 (2012). Some of the single-jurisdiction studies collected data about juries for a remarkably small number of cases. *See* Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 697 (1999) (compiling data from thirteen noncapital felony criminal jury trials in North Carolina; black people were much more likely to be excluded by the prosecution and white people by the defense).

44. *See* MAUREEN M. BERNER ET AL., A PROCESS EVALUATION AND DEMOGRAPHIC ANALYSIS OF JURY POOL FORMATION IN NORTH CAROLINA'S JUDICIAL DISTRICT 15B, at 2 (2016), https://www.sog.unc.edu/publications/reports/process-evaluation-and-demographic-analysis-jury-pool-formation-north-carolina's-judicial-district; BOB COHEN & JANET ROSALES, RACIAL AND ETHNIC DISPARITY IN MANHATTAN JURY POOLS: RESULTS OF A SURVEY AND SUGGESTIONS FOR REFORM 1 (2007), http://www.law.cuny.edu/academics/social-justice/clore/reports/Citizen-Action-Jury-Pool-Study.pdf; James Michael Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 3 (2014); Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado* Veniremen, 42 U. COLO. L. REV. 1, 4 (1970); Ted M. Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. REV. 1813, 1814 (2001).

by silence from the academy—have also assembled some statistics regarding prosecutor exclusions from juries in single counties.[45] Journalists have also assembled a few localized studies.[46]

Finally, a few studies have analyzed jury selection in the trial court through the lens of published opinions. Some studies used these opinions as a way to understand typical practices in trial courts, despite the selection bias problems involved.[47] Other studies based on published appellate opinions restricted their analyses to the role of appellate judges in this litigation.[48]

What is missing from the archival research on jury selection is the power to look across all criminal trials, comparing different jurisdictions and different types of trials. Without that systemic view, judges and lawyers in one county can only speculate about whether the findings of specialized studies are generalizable to their home jurisdiction.

III. THE JURY SUNSHINE PROJECT

Public data, collected routinely in the criminal courts, could expand the frame of reference. If jury selection records were published in comparable form across jurisdictions, available without physical travel between courthouses, it would become feasible to compare one prosecutor's or public defender's office to another, and to compare one jurisdiction to another. Such comparisons might be valuable to supervising prosecutors, judges with administrative duties, researchers, voters, or even litigants.

To demonstrate how this data collection might operate, we set a goal to learn about jury selection for all felony trials in a single year, for an entire state. We chose felony trials in 2011 in North Carolina.[49] Our main contribution to

45. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf (summarizing statistics indicating racial disparities among prosecutors during jury selection for eight southern states: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee); Grosso & O'Brien, *supra* note 37, at 657 (summarizing collection of jury selection data in capital litigation context).

46. *See* Steve McGonigle et al., *Striking Differences*, DALL. MORNING NEWS, Aug. 21–23, 2005 (finding that in felony trials in Dallas County, Texas, prosecutors tended to reject black jurors, while defense attorneys tended to retain them).

47. *See* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 463 (1996) (inferring that criminal defendants make approximately 90% of *Batson* claims; only 17% of challenges with black people as the targeted group were successful, 13% for Hispanic people, and 53% for white people).

48. *See* Shaun L. Gabbidon et al., *Race-Based Peremptory Challenges: An Empirical Analysis of Litigation from the U.S. Court of Appeals, 2002–2006*, 33 AM. J. CRIM. JUST. 59, 62 (2008) (analyzing 184 race-based peremptory challenge cases, concluding that appellants rarely win such challenges); Pollitt & Warren, *supra* note 19, at 1962. In light of the challenges of assembling archival data, some researchers opt instead for experimental studies. *See* Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527, 533–34 (2008).

49. We began this effort in the fall of 2012, so we chose the most recent complete year of records. The state constitution at the time guaranteed that all felony trials in the state would be tried to a jury. N.C. CONST. art. I, § 24. Only a few misdemeanor charges were decided by juries: those "appealed" from the district court to

the existing public records was to connect the dots, pulling into one location the insights about public servants and public actions that are currently dispersed among paper files, voter records, and office websites. Although each data point comes from a public record, linking them is no easy job. In our case, it became a run through an elaborate obstacle course.

A. Traveling to the Courthouses

The first obstacle on the course was to identify trial files, separating them from the much more common cases that did not produce a trial. The North Carolina Administrative Office of the Courts ("NCAOC") reports the number of charges tried each year, but they do not specify which cases are resolved through trial and which end with guilty pleas, dismissals, or other outcomes.[50] NCAOC declined our request to generate a list of file numbers for all cases that were resolved through jury trials in 2011, citing resource limitations.[51] We needed, therefore, a path around this obstacle.

Putting aside a few customized situations,[52] our most useful strategy relied on public data from NCAOC to specify the trial cases. NCAOC posts raw data of court dispositions in a format not easily accessible by the public. After persistent and creative efforts by the information technology staff at our law school, we were able to download this data and format it for our purposes.[53] On the basis of this NCAOC data, we generated a list of cases that led to a jury trial in each county.

In all likelihood, our lists from these various sources were incomplete. Some felony jury trials probably occurred in 2011 that never came to our attention. But based on comparisons between the number of trials we located and the number of trials that NCAOC listed in their annual reports,[54] we are confident that we obtained a strong majority of the trials for that year. There is no reason

the superior court for a trial *de novo*. *See* N.C. GEN. STAT. § 7A-271(b) (2016) (providing for appeals from district court to superior court).

50. Annual case activity reports for felonies, misdemeanors, and infractions appear at *Case Activity Reports—Fiscal Year 2016–2017*, N.C. CT. SYS., http://www.nccourts.org/Citizens/SRPlanning/Statistics/CAReports_fy16-17.asp (last visited May 18, 2018).

51. Our contact in NCAOC had cooperated with past data requests, with minimal burden on the office, but asserted that NCAOC leadership appointed by the governor who was elected in 2012 had instructed employees not to cooperate with this type of request. Recent litigation established that court records are housed in the clerks' offices, not in a centralized file housed with the NCAOC. *See* LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts, 775 S.E.2d 651, 656 (N.C. 2015).

52. A few counties (such as Guilford and Mecklenburg) maintained their own records about the cases that proceeded to trial. In those cases, we relied on the county clerk's records to identify cases that proceeded to trial. In one case (New Hanover County), our researcher focused on "thick files" in the collection as a rough proxy for the cases that went to trial. In other cases, we asked the county clerk to request from the NCAOC a list of trials for that county. NCAOC treated requests from the county clerk of the superior court as a legal obligation, unlike statewide requests from scholars.

53. We are grateful to Trevor Hughes and Matt Nelkin for their work on this project.

54. NCAOC data track the number of criminal charges resolved through trials, while our database records the number of criminal trials, treating multi-charge or multi-defendant cases as a single trial. We collected jury selection data on 1,307 trials, while NCAOC listed 2,112 charges resolved by jury trial for fiscal year 2011–2012.

to believe that our collected trials differ from the remaining trials for any relevant characteristic.[55]

The typical file for a felony trial, stored in the county clerk's office, contains a jury selection form. The one-page form includes space for twelve separate jury boxes. In each box, an assistant clerk records the names of the jurors seated in that box.[56] Other documents in the file indicate the judge, defense attorney, and prosecutor assigned to the case; the charges filed; the jury's verdict for each charge in the case; and the sentence that the judge imposed.

In the fall of 2012, we conducted a pilot project in one county to test the viability of our collection plans, gathering the available file information for a few dozen trials. From that point forward, we relied on law students, law librarians, and undergraduate students to travel to most of the clerks' offices for the 100 counties in North Carolina, between early 2013 and the summer of 2015.[57] Remarkably, the clerks in 10 of the 100 counties reported that *no jury trials at all* occurred in their counties between 2011 and 2013.[58]

B. Completing the Picture for Jurors, Judges, and Attorneys

The clerk in each county summons prospective jurors who reside in that county,[59] so we knew the name and county of residence of each prospective juror. Based on the research of Grosso and O'Brien in the capital trial context,[60] we also knew that North Carolina maintains open public records about jurors who are also registered voters, so we assigned a cohort of student researchers to pursue the biographical background for each juror.[61] Some prospective jurors were not present in the voter database because they were summoned for jury

55. We also plan to keep this research project open for some years and will add further trials to the 2011 data as they come to our attention.

56. We were disappointed to find that some clerks recorded only the fact that a prospective juror was removed from the box without indicating which courtroom actor was responsible for the removal. We coded these jurors as "Removed." The jury form also usually indicated the order of removals for any particular actor (that is, the form showed that a prospective juror was the third peremptory challenge by the defense or the fourth removal for cause by the judge) but not the overall order of removal of jurors in the *voir dire* process. One county (Guilford) adopted a notation that did capture this information about the overall order of removals.

57. Based on what we learned from the pilot study, we refined a data collection protocol for students, as recorded in a codebook and standard spreadsheet. The field researchers focused on trials in 2011, but in smaller counties with very few trials per year, they also collected information for trials in 2010 and 2012. We are grateful to Elizabeth Johnson, a reference librarian at the school of law, for coordinating this complex field operation. *See* Liz McCurry Johnson, *Accessing Jury Selection Data in a Pre-Digital Environment*, 41 AM. J. TRIAL ADVOC., Summer 2017, at 45, 49.

58. The counties with no jury trials were Bertie, Camden, Chowan, Clay, Franklin, Madison, Mitchell, Montgomery, Pamlico, and Warren.

59. *See* N.C. GEN. STAT. § 9-4 (2016).

60. *See* Grosso et al., *supra* note 20, at 1533.

61. The board of elections provides online data including the name, home address, gender, race, age, and party affiliation of each voter. *See Voter Search*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT, https://vt.ncsbe.gov/RegLkup/ (last visited May 18, 2018). A few counties (including Mecklenburg) adopted notation techniques that included a record of each juror's race and gender within the clerk's file. Students worked on matching juror profiles with voter records between spring 2013 and summer 2016.

duty based on their driver's license,[62] but we did obtain the background information for a strong majority of the prospective jurors based on the voter database.[63]

The file for each trial indicated the judge, prosecutor(s), and defense attorney(s) assigned to the case. For most of these full-time courtroom actors, research assistants were able to identify race, gender, date of admission to the state bar (a proxy for the actor's level of experience), and the judge's date of appointment to the bench.[64]

In addition to the case-specific information about each trial and its participants, we also obtained information about each county, judicial district, and prosecutorial district.[65] These data points included census information about the population and racial breakdown of each county and case-processing statistics about each prosecutorial district.

After all of the data road trips and Internet searches were done, we held records for 1,306 trials.[66] This phase of the Jury Sunshine Project contains information about 29,624 removed or sitting jurors, 1,327 defendants, 694 defense attorneys, 466 prosecutors, and 129 superior court judges. We connected all of those bits of information into a single relational database.[67]

62. *See* N.C. GEN. STAT. § 9-2(b) ("In preparing the master list [of prospective jurors], the jury commission shall use the list of registered voters and persons with driver's license records supplied to the county by the Commissioner of Motor Vehicles . . . .").

63. We gave researchers a protocol to follow when deciding whether a prospective juror from the clerk's records matched a voter from the online board of elections records. The clerks in some offices provided us with the jury *venire* lists, which they maintained separately from the files for each trial; the *venire* lists provided home addresses for the jurors, increasing our confidence that the jurors listed in the clerk's records matched the voters listed in the voter records for the county. After clerks learned that we were asking for access to file information about jurors, some superior court judges issued orders prohibiting the clerks from releasing the juror *venire* lists to anyone other than the parties to the case. The North Carolina General Assembly also amended the statute to restrict access to the addresses and birthdates recorded on the jury *venire* lists. *See* N.C. GEN. STAT. § 9-4(b); 2013 N.C. Sess. Laws 166; 2012 N.C. Sess. Laws 180.

64. In some cases, this information was available from the public data stored on the site of the North Carolina State Bar regarding licensed attorneys. *See Search for a North Carolina Lawyer*, N.C. ST. B., https://www.ncbar.gov/for-lawyers/directories/lawyers/ (last visited May 18, 2018). We also learned which office defense attorneys worked in (private firm or public defender's office). In North Carolina, the public defender service covers sixteen of the judicial districts in the state. The remaining districts operate with appointed counsel. *See* N.C. GEN. STAT. § 7A-498.7. Students followed a written protocol to search in standard locations and a prescribed order for the professional biographies of the courtroom actors.

65. North Carolina divides the state into forty-four different prosecutorial districts and thirty different superior court districts. *See* N.C. GEN. STAT. § 7A-41. The judicial districts break into eight different divisions; judges spend six months each year in their home district and six months traveling to other districts within the division.

66. The NCAOC data list a total of 2,112 charges that were resolved through trial for fiscal year 2011–2012. The breakdown of charges for individual counties suggests that we obtained the records for almost every felony trial that occurred in the state during calendar year 2011. The total number of defendants who faced trial in North Carolina in 2011 remains speculative because each prosecutor retains the discretion to file separate counts either as separate file numbers in the office of the clerk or as separate counts covered under a single file number.

67. We checked the quality of the field data during the process of loading county-specific spreadsheets into the central database. Another statewide version of the data exists in spreadsheet form, as assembled by Dr. Francis Flanagan of the Wake Forest University Department of Economics. *See generally* Francis X. Flanagan, *Peremptory Challenges and Jury Selection*, 58 J.L. & ECON. 385 (2015); Francis X. Flanagan, Race, Gender,

IV. ILLUSTRATIVE COMPARISONS OF JURY SELECTION PRACTICES

These data open up a new universe of questions about jury selection and performance. They shed light on simple descriptive issues about the relative contributions of judges, prosecutors, and defense attorneys in building a jury. They also allow us to compare jury practices in more serious felonies to those in the trials of lesser crimes. Because the data include the jury's verdict on each charge,[68] we can compare outcomes for a defendant with a single charge to outcomes in trials with multiple defendants and charges. It is possible to track case outcomes from juries of different compositions, based on juror age, gender, or race. Any of these questions might prove interesting to taxpayers and voters who want to understand their criminal courts.

But you have to start somewhere. In this Part, we present evidence related to racial disparities in jury service. We treat this as a demonstration project, to imagine in concrete terms the sort of public debate that might spring up when jury data become available in accessible form, allowing comparisons among jurisdictions.

Our first observations relate to the flow of prospective jurors through the courtroom. Table 1 indicates the contributions of each of the three courtroom actors.

TABLE 1: TOTAL JURORS REMOVED AND RETAINED

DISPOSITION	JURORS	%
Juror Retained for Service	16,744	57
Judge Removed	3,277	11
Prosecutor Removed	3,002	10
Defense Attorney Removed	4,187	14
Removed, Source Unknown	2,414	8
TOTAL	29,624	100

As Table 1 indicates, 57% of the jurors who sat in the jury box ultimately served on that jury. Defense attorneys were the most active courtroom figures, removing 14% of the total with peremptory challenges; judges removed 11% of the jurors for cause; and prosecutors exercised their peremptory challenges against 10% of the prospective jurors called into the box. Records did not indicate the source of the removal for 8% of the jurors.[69]

We know something about the order of removal because state statute creates a uniform framework for some aspects of the selection process.[70] At the

and Juries: Evidence from North Carolina (2017) (unpublished article) (on file with the author) [hereinafter Flanagan, North Carolina Jury Evidence].

68. Our field researchers entered separate codes for guilty as charged, guilty of lesser charge, mistrial, and acquittal.

69. These unexplained removals were based on incomplete records in a few counties. If we assume that the courtroom actors accounted for the "unknown" removals at the same rate that they did for the recorded cases, then defense attorneys removed a total of 15% of the pool, judges excluded 12% for cause, and prosecutors removed 11%.

70. *See* N.C. GEN. STAT. § 15A-1214.

outset, the clerk of the court randomly selects prospective jurors from the *venire* to seat in the jury box. The judge instructs the jury about the general nature of the upcoming trial[71] and then may ask jurors about their "general fitness and competency."[72] The parties "may personally question prospective jurors individually."[73]

The judge removes jurors for cause before the parties make their peremptory challenges, basing this decision in part on motions from the attorneys. The judge rules first on the prosecutor's motions, and the clerk replaces any jurors removed. After that, the prosecutor exercises challenges to the twelve jurors in the box. Again, the clerk refills any empty seats before the judge and prosecutor repeat the process. The defense attorney takes the next shift, asking the judge to remove jurors for cause and striking any jurors from the group of twelve that the prosecutor and judge left in the box.[74] The judge and prosecutor again take the first turn on any replacement jurors who arrive in the box after the defense attorney is done with the first set of challenges.[75]

71. *See id.* § 15A-1213.

72. *See id.* § 15A-1214(b).

73. The judge sometimes removes jurors for cause before the parties ask their questions, but the judge always remains free to remove additional jurors in light of their answers to attorney questions. Defense attorneys examine jurors only after prosecutors tender a complete set of twelve jurors. *See id.* § 15A-1214(c).

74. When jurors are replaced at any step along the way, the initiative passes again to the judge and the prosecutor, who may remove any new juror before the prosecutor "tenders" the newest set of retained jurors to the defense attorney. *See id.* § 15A-1214(d), (f). In capital cases, the process may advance one juror at a time. *See id.* § 15A-1214(j).

75. Local variations in this removal process and gaps in the file records leave us uncertain about the precise order of removals of jurors from any given trial. For instance, it is possible for the judge and the prosecutor to retain all twelve jurors initially placed in the box, for the defense attorney to exercise all six of the available peremptories, and then for the judge and prosecutor to remove some of the replacement jurors for those six boxes. In most counties, the clerk records the order of jurors removed by each particular actor (for instance, "D3" would indicate the third juror removed by defense counsel), but not the order of removals as between parties. Only one county (Guilford) tracked the order of removal overall.

A. Demographic Differences Among Removed Jurors

Table 2 indicates the racial breakdown of jurors who were retained and removed. We identified 60% of our jurors as white, 16% as black, and 2% as some other race (including Hispanic ethnicity).[76] The race was not indicated in our data for 22% of the jurors.[77]

The data indicate that black jurors and other nonwhite jurors serve on juries at a slightly lower rate than white jurors. The retention rate for white jurors was 58%, while the rate for black jurors was 56% and for jurors of other races was 50%.

TABLE 2: JUROR DISPOSITION, BY RACE OF JUROR

DISPOSITION	WHITE	%	BLACK	%	OTHER	%	UNKNOWN	%
Juror Retained	10,402	58	2,628	56	324	50	3,389	53
Judge Removed	1,729	10	574	12	133	21	841	13
Prosecutor Removed	1,437	8	755	16	94	15	716	11
Defense Removed	2,960	17	288	6	63	10	876	14
Removed, Source Unknown	1,351	8	427	9	36	6	600	9
TOTAL	17,879		4,672		650		6,422	

76. The voter registration and juror records use the racial categories white, black, Asian, Hispanic, Native American, and other. Voters self-identify and do not have the option of choosing more than one race. Because of the small numbers recorded in four of those categories, we combine them into a single "other" category. Based on current census figures, we believe that these figures underestimate the number of Hispanic or Latino citizens called for jury service in felony trials today. White residents (excluding Hispanic or Latino ethnicity) comprised 65.3% of the 2010 population, while "Black or African American alone" residents made up 21.5%, and "Hispanic or Latino" residents made up 8.4% of the state population at that time. *See Quick Facts: North Carolina*, U.S. CENSUS BUREAU (July 1, 2017), https://www.census.gov/quickfacts/NC.

77. These jurors did not appear in the voter database or appeared in the voter database with race not indicated. Jurors not appearing in the voter database were placed into the juror pool in the county based on their appearance on the list of licensed drivers. The race of licensed drivers is not publicly available data in North Carolina. If the jurors whose race was unknown were assigned a racial identity in proportion to the rest of the pool, black jurors would constitute 20% of the pool. Under this scenario, white jurors would constitute 77% of the total pool, and other races would make up 3%.

When it comes to the race of the jurors, a remarkable pattern appears in Table 2. The data show that judges removed nonwhite jurors at a higher rate than they did for white jurors.[78] Then prosecutors removed nonwhite jurors at about twice the rate that they did white jurors. But in the end, defense attorneys *nearly* rebalanced the levels of jury service among races by removing more jurors than the judges or the prosecutors did and by using their peremptory challenges more often against white jurors than they did against black and other nonwhite jurors.

To bring these racial effects into focus, we express the differences in the form of a "race removal ratio." In Table 3, we express the ratio of removal rates for black jurors to removal rates for white jurors: a ratio of exactly 1.0 would mean that the judges or attorneys removed black jurors and white jurors in exactly the same percentages.[79] A ratio above 1.0 means that the actors removed black jurors at a higher rate than they removed white jurors. Conversely, a ratio below 1.0 means that actors removed white jurors more often. We adjusted the calculations for each courtroom actor to reflect the pool of jurors available at the time of that actor's removal decision.[80]

TABLE 3: REMOVAL RATIOS, BY RACE, FOR COURTROOM ACTORS

ACTOR	BLACK-TO-WHITE RATIO	OTHER-TO-WHITE RATIO
Judge	1.3	2.1
Prosecutor	2.1	2.0
Defense Attorney	0.4	0.7

Table 3 indicates that prosecutors excluded black jurors at more than twice the rate that they excluded white jurors (for a 2.1 ratio, or 20.6% to 9.7%); similarly, they used peremptory challenges against other nonwhite jurors at twice their rate of exclusion for white jurors (producing a 2.0 ratio, or 19.5% to 9.7%). Defense attorneys, by contrast, excluded black jurors less than half as often as they excluded white jurors (with a 0.4 ratio, or 9.9% to 22.2%). Interestingly, the judges excluded black jurors for cause a bit more often (a 1.3 ratio, or 13.5% to 10.5%) but they excluded other nonwhite prospective jurors at a much higher rate (with a 2.1 ratio, or 21.7% to 10.5%).

78. The different removal rates for jurors of different races by each of the three courtroom actors are all statistically significant, using the chi-square test for significance.

79. We calculated this ratio after excluding the removals by unknown parties and the removal of jurors of unknown race. In every case, the rate of removal of jurors of unknown race sat in between the rate of removal for white jurors and for nonwhite jurors.

80. Judges have access to the entire pool. Prosecutors choose from the jurors remaining after the judge has chosen, while defense attorneys make their decisions regarding the jurors left after the prosecutors and judges have acted. There is some imprecision in this method because after one of the parties has exercised its full complement of peremptories, the clerk might place additional jurors into the box. While the attorneys may still challenge these additional jurors for cause, the removal depends on establishing the relevant legal basis for removal. The number of jurors that a party "retains" therefore includes some jurors that the party did not actively choose.

The gender of prospective jurors complicates the selection patterns. On the whole, women and men served on juries at much the same rate. Judges, prosecutors, and defense attorneys did not differ much in their choices based on gender, at least when we look at all felony trials together.[81] When race and gender intersected, however, the courtroom actors each pursued a different strategy.

TABLE 4: TOTAL REMOVALS, BY RACE AND GENDER

DISPOSITION	BLACK MALE	%	BLACK FEMALE	%	WHITE MALE	%	WHITE FEMALE	%
Juror Retained	1,011	53	1,609	58	5,028	57	5,346	59
Judge Removed	255	13	318	12	813	9	910	10
Prosecutor Removed	345	18	407	15	805	9	625	7
Defense Removed	105	6	183	7	1,438	16	1,518	17
Removed, Source Unknown	186	10	238	9	677	8	671	7
TOTAL	1,902		2,755		8,761		9,070	

Black male jurors were scarce from the outset. They made up only 6.4% of the total pool of summoned jurors (compared to 9.3% for black females). Once the selection process began, judges and prosecutors removed black males at a higher rate than other jurors. Table 5 summarizes the removal rates for each of the courtroom actors.[82]

TABLE 5: RATES OF REMOVAL OF AVAILABLE JURORS

	BLACK MALE	BLACK FEMALE	WHITE MALE	WHITE FEMALE
Judge	14.9%	12.6%	10.1%	10.8%
Prosecutor	23.6%	18.5%	11.1%	8.3%
Defense	9.4%	10.2%	22.2%	22.1%

81. The retention rate for female jurors overall was 55%; for male jurors it was 55.4%. Judges removed 13% of females and 11.7% of males; prosecutors removed 12.1% of female and 13.8% of male jurors available to them; defense attorneys removed 21.5% of female and 20.6% of male jurors available to them. It is possible, on the basis of Jury Sunshine Project data, to compare the treatment of male and female prospective jurors in particular categories of cases, such as sexual assault or domestic violence charges. We reserve those questions for another time, concentrating here on the insights one can gain from exploring all felony trials as a group.

82. The percentages in Table 5 are based on the pool of jurors after excluding those with an unknown removal source. The percentages for prosecutors and defense attorneys also reflect the reduced pool of jurors available to those actors at the relevant point in the process. The differences in treatment between white and nonwhite jurors are statistically significant, using the chi-square test. For each group of actors, the p-value is < 0.00001.

Defense attorneys did not remove male and female jurors of the same race at meaningfully different rates. Prosecutors, however, used their challenges proportionally more often against black male jurors (striking 23.6% of those available in the pool at that point in the process) than they did against black female jurors (18.5% of those available). A similar, but less pronounced, gap appeared in judicial removals for cause: judges removed 14.9% of the black male jurors and 12.6% of the black female jurors. All told, black males started the process underrepresented in the pool and ended up comprising only 6% of the jurors who served.[83]

B. Geographical Differences in Juror Removal Practices

Judges, prosecutors, and defense attorneys have different objectives at a trial and value different characteristics in jurors. It does not surprise us, therefore, to find that these courtroom actors produce different demographic patterns when they choose jurors.

Comparisons *within* these groups, however, are another matter. What might explain two different prosecutor's offices that behave quite differently in their selection of juries? We explored this question through a comparison of the six largest cities in the state, all with populations larger than 200,000. Table 6 lists the removal ratios for the courtroom actors in the counties where those cities are located.

TABLE 6: REMOVAL RATIOS IN URBAN COUNTIES

CITY (COUNTY)	Judges Black-to-White	Judges Other-to-White	Prosecutors Black-to-White	Prosecutors Other-to-White	Defense Black-to-White	Defense Other-to-White
Winston-Salem (Forsyth)	1.6	2.7	3.0	4.0	0.6	0.8
Durham (Durham)	1.1	1.0	2.6	1.5	0.5	0.3
Charlotte (Mecklenburg)	1.0	1.9	2.5	2.3	0.3	0.5
Raleigh (Wake)	1.2	1.4	1.7	1.9	0.4	1.0
Greensboro (Guilford)	0.9	0.4	1.7	1.6	0.4	1.0
Fayetteville (Cumberland)	0.9	1.2	1.7	1.2	0.5	0.4

The prosecutor's offices appear to fall into two groups. Greensboro, Raleigh, and Fayetteville all produced a removal ratio of 1.7 for black jurors; Greensboro and Durham also showed relatively low removal ratios for other nonwhite jurors. On the other hand, the prosecutor's offices in Durham, Char-

83. Black males make up approximately 11% of the state population overall. We note for future research the potential relevance of the race and gender of the judges, prosecutors, and defense attorneys who select the jurors.

lotte, and Winston-Salem excluded black jurors at a higher rate than elsewhere in the state. In the most extreme case, the prosecutors in Forsyth County removed black jurors from the box three times more often than they removed white jurors: that is, among the 151 black jurors reporting for duty in felony trials, the prosecutors exercised their peremptory challenges to remove 27.5% of the jurors available to them after the judges removed some jurors for cause. Out of 541 total white jurors, the prosecutors in Forsyth County removed 9.3% of the available candidates.

One more geographical comparison deserves our attention: the differences between urban and rural counties.[84] Despite the differences in jury selection among the six largest cities in the state, urban counties as a group shared some features that distinguished them from rural counties. Table 7 summarizes the results.

TABLE 7: REMOVAL RATIOS, URBAN AND RURAL COUNTIES

	Judges, Black-to-White	Prosecutors, Black-to-White	Defense, Black-to-White
Urban	1.2	2.3	0.5
Rural	1.1	1.7	0.3

For the judges and the prosecutors, it appears that the racial disparities in removal rates are most pronounced in urban counties. Defense attorneys, on the other hand, produced more racially imbalanced results in rural areas; their ratio of black-to-white removal rates became even smaller in rural counties.[85]

V. PREVIEW OF A POLITICAL DEBATE

The data from the Jury Sunshine Project speak only to outcomes in the jury selection process. The numbers show what judges and attorneys did when they picked jurors, but they do not show why. The competing—and complementary—explanations for these racial disparities in the jury selection process are a fitting topic for political debate.

In this Part, we preview the sorts of arguments that prosecutors, judges, defense attorneys, and interested community members are likely to advance during this debate. Some of these explanations for racial disparity emphasize

84. We designate the most rural counties as the thirty-three counties with the lowest population densities in the state. *See North Carolina Population Density County Rank*, USA.COM, http://www.usa.com/rank/north-carolina-state--population-density--county-rank.htm (last visited May 18, 2018). Among those thirty-three counties, eight conducted no jury trials at all and eleven recorded generic removals without attributing them to the judge or a party. Those counties made choices regarding 2,706 jurors (or 2,199 when excluding the jurors with an unknown removal source). For purposes of Table 7, we designated the most urban counties as the eleven counties with the highest population densities, covering all cities with populations more than 80,000. Those counties made choices about 13,037 jurors. The racial differences in rates of juror removal for each of the actors, as well as the urban-rural differences reflected in the removal ratios in Table 7, are statistically significant.

85. All three courtroom actors—judges, prosecutors, and defense attorneys—removed fewer available jurors in rural counties than they did in urban counties. Judges removed 15.7% of available jurors in urban counties, and only 8.1% in rural counties. The comparable figures for prosecutors were 14.3% and 8.4%; for defense attorneys, they were 22.3% and 12.3%.

the intent of the judges and attorneys when they exclude jurors. Others put intent to the side and ask instead about the effects of systematic exclusion on defendants and the community.

A. Intent-Based Interpretations

What might explain the patterns in jury selection that we observed in Part IV? Starting with the defense attorneys, who used their removal powers at the highest rate, perhaps the simplest explanation is best: they used all the available *voir dire* clues (including the race of the prospective jurors) to seat jurors who were more sympathetic to human frailty, or those who were more skeptical of local police. Perhaps the use of the jurors' race was the explicit basis for the defense attorney's choice, or maybe the race correlated with other clues, such as expressions of general respect for authority. Put simply, defense attorneys may have used race as one factor to pick a jury to win a trial.

As a matter of trial strategy, such choices are rational. Flanagan used our jury data to calculate the performance differences among juries of different racial compositions. He found that juries composed of more black men were more likely to acquit any defendant.[86] Conversely, juries with more white men were more likely to convict, particularly when the defendant was a black man.[87] Thus, it is easy to see why defense attorneys might want to save more of their peremptory challenges for white male jurors.[88]

As for the judges, it is more difficult to reconstruct the reasons why they removed a higher percentage of black jurors from the *venire*. The 30% increase in the rate of removal among black jurors, when compared to white jurors, might reflect greater economic stresses among black jurors, such as transportation difficulties or pronounced hardship from missing days away from a job.[89] The higher rate of judicial removals for cause for nonwhite jurors might also reveal how judges align themselves with prosecutors, and respond more favorably to their requested removals for cause.

And then there are the prosecutors. One potential explanation for the race removal ratios higher than 1.0 would be intentional strategic decisions that incorporate race.[90] Perhaps line prosecutors relied on race as a clue about the general receptiveness of jurors to a law enforcement perspective. Like the defense attorneys, the prosecutors may have relied in part on race to pick a winning jury.

86. *See* Flanagan, North Carolina Jury Evidence, *supra* note 67, at 14.

87. *Id.* at 13–15. Flanagan used instrumental variable regressions, using the demographic composition of the randomly selected jury pool as an instrument for the composition of the jury.

88. There is also another possible explanation for the exclusion pattern on the defense side: perhaps defense attorneys were aware that nonwhite jurors were underrepresented on the *venire* that the clerk called to the courthouse. Their removal of white jurors, then, might have revealed an effort to restore the jury to a racial balance that better reflected the community. *See* BERNER ET AL., *supra* note 44, at 7.

89. The judges' different treatment of white jurors and nonwhite jurors other than black jurors is equally puzzling. It might reflect a greater incidence of language barriers within this group, but that is speculation.

90. *Cf.* Michael Selmi, *Statistical Inequality and Intentional (Not Implicit) Discrimination*, 79 LAW & CONTEMP. PROBS. 199, 206 (2016).

It is also possible that prosecutors removed jurors based on a factor correlated with race—most prominently, jurors with a felony conviction, a prior arrest, or close family members who had negative experiences in the criminal justice system.[91] Prosecutors might have been fully aware of the disparate racial impact of these choices and regretted that unintentional side effect of their removal strategy.

Again, our data suggest that such choices by prosecutors are strategically rational. Flanagan found that for every peremptory challenge that the prosecutor used, the conviction rate for black male defendants increased by 2–4%.[92]

None of these intent-based accounts, for any of the courtroom actors, can explain jury selection choices in individual cases. Racial disparities in aggregate jury selection outcomes speak only about averages. They reveal incentives that shape the larger patterns of removal. These arguments, therefore, might not win the day in the courtroom under current constitutional doctrine. But the reasons why prosecutors and judges exclude black jurors (especially males) at a high rate could be relevant to voters and community groups outside the courtroom as they discuss local criminal justice conditions.

B. The Effects of Juror Exclusion

A political debate about the exclusion of jurors might extend beyond the possible intent of courtroom actors. The discussion, based on data-driven comparisons of different places and actors, might also include the *effects* of juror exclusion.

Having a diverse jury can have life-changing implications for criminal defendants. White jurors are more likely to convict and are more likely to inflict harsh punishments on black defendants accused of killing white victims.[93]

The exclusion of minority jurors from service also affects the jurors themselves and the community where the trial occurs. Jury service creates a forum for popular participation in criminal justice.[94] When major segments of the community remain outside the courtroom, with other more "favored" people issuing the verdicts, the legitimacy of the system suffers. Statewide statistics reveal in more systematic and detailed ways how different parts of the community find it easier or harder to serve on juries.

91. *See* Binnall, *supra* note 44, at 3; Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 389 (2016); Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 593 n.12 (2013).

92. *See* Flanagan, North Carolina Jury Evidence, *supra* note 67, at 14. Among the 1,327 defendants in our database, 666 (50%) are black males and 385 (29%) are white males. The race is unknown for 71 male defendants (5%). There are 74 (6%) black female defendants and 63 (5%) white female defendants.

93. *See* Bellin & Semitsu, *supra* note 19, at 1082–83.

94. *See* AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 15, 205 (2005); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 70 (2012).

1. Impact on Excluded Jurors

In addition to the harm to criminal defendants, courts have long recognized that individuals who are excluded because of racial discrimination also experience a cognizable harm. For example, in *Carter v. Jury Commission of Greene County*, the Court noted, "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion."[95]

Even when courts have declined to hold that serving on a jury is an enforceable right, they have still agreed that jury service is a "'badge of citizenship' worn proudly by all those who have the opportunity to do so and that it would, indeed, be desirable for all citizens to have that opportunity."[96] Many courts have noted that exclusion of qualified groups not only violates the Constitution but also undermines "our basic concepts of a democratic society and representative government."[97] When state actors participate in this exclusion, it deepens the harm. As one court noted long ago, "When Negroes are excluded from jury service because of their color, the action of the state 'is practically a brand upon them, affixed by the law, an assertion of their inferiority.'"[98]

2. Impact of Juror Exclusion on the Community

The exclusion of minority jurors also has a detrimental impact on the community. It is a basic notion of democracy that a jury should reflect the community. A jury that is "made up of representatives of all segments and groups of the community" is "more likely to fit contemporary notions of neutrality" and a combined "commonsense judgment of a group of laymen."[99]

95. 396 U.S. 320, 329 (1970).

96. *See* United States v. Conant, 116 F. Supp. 2d 1015, 1020–22 (E.D. Wis. 2000) ("While no court has yet recognized a constitutional right to serve on a jury, the possibility that such a right might exist is to be given the most careful scrutiny.").

97. *See* Ciudadanos Unidos de San Juan v. Hidalgo Cty. Grand Jury Comm'rs, 622 F.2d 807, 825 (5th Cir. 1980) (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

Id.; *see also* Cassell v. Texas, 339 U.S. 282, 303–04 (1950) (Jackson, J., dissenting).

> Qualified Negroes excluded by discrimination have available, in addition, remedies in courts of equity. I suppose there is no doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or a class action for an injunction or mandamus against the state officers responsible.

Cassell, 339 U.S. at 303–04.

98. White v. Crook, 251 F. Supp. 401, 406 (M.D. Ala. 1966) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)); *see also* Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561, 1564 (2012) (proposing suits by prospective jurors to overcome informational obstacles to *Batson* challenges).

99. *See* Hiroshi Fukurai, *Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection*, 24 J. CRIM. JUST., no. 1, 1996, at 71, 72 (quoting Apodaca v. Oregon, 406 U.S. 404, 410 (1972)).

The Supreme Court has long recognized the importance of the role of jury participation in our society and has explicitly examined the impact that such exclusion has on the broader community. For example, in *Taylor v. Louisiana*, the Supreme Court recognized the importance in selecting a fair representation of jury members because of the potential impact on a community.[100] The Court explained that the fair representation requirement was essential in (1) guarding against "the exercise of arbitrary power" and invoking the "commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor," (2) upholding "public confidence in the fairness of the criminal justice system," and (3) sharing the administration of justice as "a phase of civic responsibility."[101]

Systemic exclusion harms the community because jury service creates a forum for popular participation in criminal justice.[102] When major segments of the community remain outside the courtroom, with other people issuing the verdicts, the legitimacy of the system suffers. In *Georgia v. McCollum*, the Court explained that improper exclusion of jurors on the basis of race not only affects the juror, but that the harm also extends beyond the rejected juror "to touch the entire community"[103] because discriminatory proceedings "undermine public confidence in the fairness of our system of justice."[104]

The problems related to the systemic exclusion of racial minorities on juries are particularly acute when the subject matter of the case involves racial violence. The Court has long recognized the danger that such cases might create distrust within minority communities. For example, in *McCollum*, Justice Blackmun discussed cases involving racial violence in which peremptory challenges had resulted in the striking of all black jurors:

> In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal jus-

100. *See* Taylor v. Louisiana, 419 U.S. 522, 526–27 (1975).

101. *Id.* at 530–31 (internal quotation marks omitted) (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). Similarly, after the Court's decision in *Batson*, the Court decided in *Powers v. Ohio*, 499 U.S. 400 (1991), to expand the right to complain against discriminatory use of peremptory challenges to defendants who were not members of the same race as the excluded jurors. The harm done to the community's interest in jury service served as a key justification: "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." *Powers*, 499 U.S. at 402.

102. *See* AMAR, *supra* note 94, at 15, 205; Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 981–94 (1998) (exploring historical basis for treating jury selection as a political right affecting the community).

103. 505 U.S. 42, 49 (1992) (quoting Batson v. Kentucky, 476 U.S. 79, 87 (1986)). The *McCollum* Court noted that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* (internal quotation marks omitted) (quoting *Batson*, 476 U.S. at 87).

104. *Batson*, 476 U.S. at 87. This is a key insight from the "procedural justice" literature. *See* Richard R. Johnson, *Citizen Expectations of Police Traffic Stop Behavior*, 27 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 487, 488 (2004) (noting that studies have shown that people are more likely to "defer to the law and refrain from illegal behavior" when police treat them fairly); Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008).

> tice system is essential for preserving community peace in trials involving race-related crimes. Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.[105]

A homogenous jury, on the surface, does not look like a fair jury. The appearance of prejudice in the jury selection process leads to continuing pessimism and distrust concerning the operation of the criminal justice system among the omitted groups.[106] The excluded community perceives that it is "shut out." The court's participation in discrimination and racism undermines its moral authority as the enforcer of antidiscrimination policies.[107]

The public at large also shares an interest in "demonstrably fair trials that produce accurate verdicts."[108] Diversity itself enhances the deliberations of juries. In *Peters v. Kiff*,[109] Justice Marshall identified this contribution of a representative jury:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience . . . . [E]xclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[110]

In sum, excluding minorities from jury selection has negative implications beyond the harms that a criminal defendant might raise in the courtroom. Like other systemic issues in the criminal justice system, visible and systematic barriers to jury service can erode community trust and decrease legitimacy.[111]

The accountability of judges and prosecutors to the community is also compromised when particular races, neighborhoods, ages, or other social

105. *See* Tyler & Fagan, *supra* note 104, at 235–36. The 1980 Miami urban rebellion resulted in the death of eighteen people and $200 million in property damage and other losses. This rebellion followed an all-white jury acquitting four white police officers for the beating death of a black insurance executive after a change of venue from Miami to Tampa and after the defendants had used their peremptory challenges to exclude all black people on the jury *venire*. *See* Ihosvani Rodriguez, *McDuffie Riots Shook Miami*, SUN SENTINEL (May 16, 2005), http://articles.sun-sentinel.com/2005-05-16/news/0505150370_1_liberty-city-blacks-and-police-black-man. The Florida governor's report of the disturbance specifically identified the practice of excluding black people from juries in racially sensitive cases as a cause of the riots and a reason for black people in Dade County to distrust the criminal justice system. GOVERNOR BOB GRAHAM'S DADE CTY. COMM., REPORT OF GOVERNOR'S DADE COUNTY CITIZENS COMMITTEE 60–61 (Oct. 30, 1980), https://www.floridamemory.com/items/show/329091?id=1.

106. Adam Benforado, *Flawed Humans, Flawed Justice*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/opinion/flawed-humans-flawed-justice.html.

107. *See* M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855, 1928 (1993).

108. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 749 (1992).

109. 407 U.S. 493 (1972).

110. *Id.* at 503–04.

111. There is an ironic aspect to the Jury Sunshine Project: publication of data about uneven community access to jury service might exacerbate the problem by making it more visible. If the public debate never results in greater equality of jury service, that outcome is a sobering possibility.

groups cannot contribute their fair share to the jury system. In particular, prosecutors who can exclude parts of the community from jury service effectively shield themselves from full accountability to the public.[112] They can choose for themselves which segments of the population will set their priorities in the charging and resolution of cases.

Whether such disparities are the result of purposeful discrimination is difficult to prove, but even the perception that discrimination is occurring has important implications for the criminal justice system.[113] These practices deserve scrutiny outside the courtroom, beyond the confines of constitutional doctrine.

VI. ACCESS TO DATA AND CRIMINAL JUSTICE REFORM

In Part IV we highlighted data, for illustrative purposes, to address the question of exclusion from juries on the basis of race. But racial equity is only one possible objective for those who might use open jury data. In this Part, we explain how file data, made available in a searchable form that is comparable across district boundaries, could create an informed and engaged role for the public in positive criminal justice reform.

A. The Analogy to Traffic Stop Data

Constitutional doctrines such as *Batson* have not opened the door to jury service for minority groups.[114] But is there any better (or quicker) alternative than advocating for changes in the constitutional doctrine? The American experience with traffic stops and pedestrian stops by police over the last two decades suggest that there is, in fact, a better way. In that setting, a frustrating and limited constitutional doctrine does not tell the whole story. The increased availability of data about the patterns of police stops created a political debate that continues to shape police conduct. Through the political process, members of these communities are able to insist on changes in police department policies with the aim of reducing racial profiling.

Just as in the jury selection context under *Batson*, the Supreme Court's approach to racial profiling under the Fourth Amendment allows law enforcement officials to cloak constitutionally impermissible conduct in race-neutral terms. Equal Protection jurisprudence insulates these practices from systemic reform.

112. This compounds the other weaknesses of the electoral check on the prosecutor's performance in office. *See* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 88–89 (2011); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582–83 (2009).

113. *See* Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 2 (2009); Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J.C.R. & SOC. JUST. 25, 30 (2011).

114. *See supra* Section II.B.

The centerpiece of this evasion is *Whren v. United States*.[115] The case involved two vice squad officers' decision to stop a car. One possible ground for the stop was illegal driving (making a right turn without a signal); another plausible reason for the stop was the officers' unsupported hunch that the driver and passenger were involved in drug distribution. Which was the true reason? The Court said that it didn't matter. As long as the circumstances give officers reasonable suspicion to believe a driver violated a *traffic* law, courts treat the stop as reasonable under the Fourth Amendment.[116] An officer can use race as a basis for suspicions about criminal behavior, stop suspects of only one race, and shroud those discriminatory stops in race-neutral language.[117] David Harris summed up the impact of constitutional law on pretextual stops this way: a judicial finding of racial profiling is "the legal equivalent of lightning bolts hurled by Zeus."[118]

As a result, constitutional litigation standing alone has not changed field practices very much. Numerous studies conducted over several decades have demonstrated that law enforcement officers disproportionately select racial minorities for traffic stops, disproportionately search them during these stops, and disproportionately subject minority drivers to "stop and frisk" practices.[119]

The greater impact of constitutional litigation was delayed and indirect. Some of the earliest statistical clues about racial profiling practices came to light during litigation over constitutional claims, which routinely ended in losses for plaintiffs who wanted to change these police practices.[120] Eventually, advocates changed the venue for their arguments. They broadened their strategy

115. 517 U.S. 806 (1996); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Carlos Torres et al., *Indiscriminate Power: Racial Profiling and Surveillance Since 9/11*, 18 U. PA. J.L. & SOC. CHANGE 283, 285 (2015).

116. *Whren*, 517 U.S. at 819.

117. *See* MICHAEL L. BIRZER, RACIAL PROFILING 72 (2013). A few examples confirm the limited power of equal protection doctrine to respond to racial profiling. In *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997), the court turned aside the defendant's equal protection claim and rejected statistics showing that police disproportionately targeted black people because the officers had a plausible, nonracial reason for detaining the defendant. Similarly, in *Bingham v. City of Manhattan Beach*, 329 F.3d 723, 736 (9th Cir. 2003), the Ninth Circuit affirmed summary judgment because the appellant failed to provide evidence to refute the officer's race-neutral explanation for the traffic stop. *See also* Johnson v. Crooks, 326 F.3d 995, 999–1000 (8th Cir. 2003) (denying relief because plaintiff failed to provide evidence of discrimination to counter the officer's race-neutral justification of the traffic stop).

118. David A. Harris, *Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 75 (2003).

119. *See, e.g.*, David Barstow & David Kocieniewski, *Records Show New Jersey Police Withheld Data on Race Profiling*, N.Y. TIMES (Oct. 12, 2000), http://www.nytimes.com/2000/10/12/nyregion/records-show-new-jersey-police-withheld-data-on-race-profiling.html; DAVID A. HARRIS, AM. CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS ACLU (June 1999), https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways (describing statistics from Maryland and Illinois). More recent data related to New York City's "stop and frisk" policy tell a consistent story. Nearly nine out of every ten people that the New York Police Department stopped and frisked were completely innocent. Although black people and Hispanic people account for a little over half of the city's population, 83% of the people stopped were black or Hispanic. *See Racial Discrimination in Stop-and-Frisk*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/opinion/racial-discrimination-in-stop-and-frisk.html.

120. *See* Harris, *supra* note 118, at 78.

and took their claims to legislatures. As a result, many states enacted legislation to address racial profiling, including some laws that require law enforcement to collect and report data about their stop practices.

As part of a strategy to prevent racial profiling, about eighteen states now require, by law, mandatory data collection for all stops and searches.[121] Public agencies now make these data available to the public, sometimes through a centralized entity and at other times through individual law enforcement agencies.[122]

Private individuals and groups have stepped forward as intermediaries to monitor and interpret these data, making the information accessible and useful for the public and for policy entrepreneurs. Researchers employed in universities produced some studies,[123] while policy advocacy organizations performed some of their own analyses.[124]

Journalists also found stories within these numbers. Some news outlets reported the results of academic and advocacy studies.[125] In addition, teams of reporters created their own analyses, sorting and summarizing the overwhelming databases for their readers. For instance, the *New York Times* examined police traffic stop records between 2010 and 2015. In consent searches in Greensboro, North Carolina, "officers searched blacks more than twice as often but

121. See NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA app.1 (Sept. 2014), http://www.naacp.org/criminal-justice-issues/racialprofiling/; Patrick McGreevy, *Brown Signs Legislation to Protect Minorities from Racial Profiling and Excessive Force*, L.A. TIMES (Oct. 4, 2015, 3:00 AM), http://www.latimes.com/local/politics/la-me-pol-sac-brown-racial-profiling-20151004-story.html. In 1999, North Carolina became the first state to mandate data collection regarding race for police who stop drivers. N.C. GEN. STAT. § 143B-902 (2016); R.I. GEN. LAWS § 31-21.2-5(e) (2016).

122. Since 2002, all state highway patrol and police departments in North Carolina have collected the data and sent them to the North Carolina Department of Justice, which publishes the data through its website. *See North Carolina Traffic Stop Statistics*, N.C. DEP'T PUB. SAFETY, http://trafficstops.ncsbi.gov (last visited May 18, 2018).

123. One such academic study, by Frank Baumgartner, reported that black drivers were on average 73% more likely to be searched than white drivers in North Carolina. *See* Frank R. Baumgartner, *NC Traffic Stops*, U.N.C. CHAPEL HILL, https://www.unc.edu/~fbaum/traffic.htm (last updated Dec. 13, 2017) (concluding that Hispanic drivers were 96% more likely to be searched than white drivers and black male drivers were 97% more likely to be searched, yet black men were 10% less likely to have illegal substances than white men in probable cause searches; during consent searches, black men were 18% less likely to have illegal substances than their white counterparts).

In a separate study based on 4.5 million traffic stop records, Sharad Goel and other researchers at Stanford University found that 5.4% of black drivers were searched, compared to 3.1% of white drivers. *See* Camelia Simoiu et al., *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 ANNALS APPLIED STAT. 1193, 1206 (2017), https://5harad.com/papers/threshold-test.pdf (revealing that, in nearly every department, black and Hispanic drivers were subject to a lower threshold of suspicion than their white and Asian counterparts; statewide, the thresholds for searching white people were 15%, for Asian people 13%, for black people 7%, and for Hispanic people 6%).

124. *See* Richard A. Oppel, Jr., *Activists Wield Search Data to Challenge and Change Police Policy*, N.Y. TIMES (Nov. 20, 2014), https://www.nytimes.com/2014/11/21/us/activists-wield-search-data-to-challenge-and-change-police-policy.html. In 2015, the Southern Coalition for Social Justice published an interactive map on their website that allows a viewer to search the North Carolina stop data by police department. *See Open Data Policing*, S. COALITION SOC. JUST., https://opendatapolicingnc.com (last visited May 18, 2018).

125. *See* Tonya Maxwell, *In Traffic Stops, Disparity in Black and White*, ASHEVILLE CITIZEN-TIMES (Aug. 27, 2016, 2:34 PM), http://www.citizen-times.com/story/news/local/2016/08/27/traffic-stops-disparity-black-and-white/89096656/ (describing Simoiu et al., *supra* note 123).

found contraband only 21 percent of the time, compared with 27 percent of the time with whites."[126]

The collection, publication, and interpretation of traffic stop data fundamentally changed the conversation. Advocates claim that collecting data about race is the best way to gather tangible evidence of widespread unconscious bias toward minorities during police traffic stops.[127] Compared to case studies or anecdotal evidence of an individual who was harmed due to police brutality or over-policing, statistical evidence might persuade a wider range of people.[128]

The public discussion of data also changes internal management for police departments. When the police know that data analysts and reporters are watching them work, they work more carefully.[129] Where this transparency exists, reform advocates can target more precisely the local police practices that they suspect are most troubling. In some cases, the data will reveal no problems; in others, they might confirm for police leadership the factual basis for a complaint that once seemed amorphous or speculative.[130]

When the government collects and publishes data in a format that allows for comparisons between places, reports give the public and local police leaders a benchmark for police performance. One department that stands out from other law enforcement agencies across the state—either in a positive or negative way—can reflect on the reasons for those local differences. Similarly, data collected over time may identify trends, allowing police leaders to see in a concrete way whether a new policy is working.

In sum, the move from constitutional argument in the courtroom to political argument in the public arena loosened a stalemate on the question of police

126. *See* Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 25, 2015), http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html (city's driving population is 39% black; 54% of those pulled over were black); *see also* Matthew Kauffman, *Data: Minority Motorists Still Pulled Over, Ticketed at Higher Rates than Whites*, HARTFORD COURANT (Sept. 22, 2015, 7:02 PM), http://www.courant.com/news/connecticut/hc-racial-profiling-0923-20150922-story.html.

127. LORIE FRIDELL ET AL., RACIALLY BIASED POLICING: A PRINCIPLED RESPONSE 116–17 (2001), http://fairandimpartialpolicing.com/docs/rbp-principled.pdf; *cf.* Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 129–31 (2016).

128. FRIDELL ET AL., *supra* note 127, at 128. For a discussion of methodology issues in these studies, see JOYCE MCMAHON ET AL., U.S. DEP'T JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVICES, HOW TO CORRECTLY COLLECT AND ANALYZE RACIAL PROFILING DATA: YOUR REPUTATION DEPENDS ON IT! 35 (2002), https://ric-zai-inc.com/Publications/cops-p044-pub.pdf (last visited May 18, 2018). Critics argue that unless the record of the stop includes very specific data points, down to the cross streets where the stop occurred (which in many cases is not a required data point), there is no record of which areas of the jurisdiction are facing the most police presence. The specific location of the stop, according to this argument, is necessary to put the stop into context.

129. Martin Kaste, *Police Are Learning to Accept Civilian Oversight, but Distrust Lingers*, NPR (Feb. 21, 2015, 10:18 AM), https://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers.

130. Sometimes, of course, police leaders offer benign interpretations of the data and deny any need for policy changes. *See* Joey Garrison, *Nashville Police Chief Slams Racial Profiling Report as 'Morally Disingenuous,'* TENNESSEAN (Mar. 7, 2017, 12:58 PM), https://www.tennessean.com/story/news/2017/03/07/nashville-police-chief-slams-racial-profiling-report-morally-disingenuous/98856754/.

traffic stops.[131] We believe that something similar can happen if government agencies collect and report jury selection data and if academics, advocates, and journalists step forward to interpret and publicize those data.[132]

B. The Effects of Sunshine Across Different Criminal Justice Areas

The transformative power of data, in our view, is not limited to traffic stops or jury selection. We place our proposal in the larger context of using transparency to change criminal justice practices for the better.

1. Use of Data to Regulate a Range of Actors

As Andrew Crespo has pointed out, the criminal courts already collect useful facts that remain hidden because they are scattered in single files or inaccessible formats.[133] An effort to assemble these facts in aggregate form could improve the courts' efforts to regulate the work of other criminal justice players, such as police and prosecutors.

Careful record-keeping and transparency regarding the collected data already contributes to accountability in diverse parts of the criminal justice system. In the context of correctional institutions, transparency of data has been instrumental in ensuring fair treatment of prisoners, as Alabama and other states' courts have held that their state open-record acts apply to prisoners.[134] While correctional institutions have been hesitant to comply, this requirement has shed light on prison deaths, suicides, beatings, and other prison conduct, hopefully holding these correctional institutions accountable and giving the legislature a chance to address misconduct.[135]

Similarly, experts have pushed for increased transparency in the context of officer-involved shootings, arguing that a lack of transparency surrounding

131. As a result of the *New York Times* investigation in 2015, the Greensboro police chief ordered officers to refrain from stopping drivers for minor infractions involving vehicle flaws, which are stops that are subject to individual officer discretion and stops for which black people and Hispanic people were more likely to be pulled over. *See* Sharon LaFraniere, *Greensboro Puts Focus on Reducing Racial Bias*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/12/us/greensboro-puts-focus-on-reducing-racial-bias.html; Oppel, *supra* note 124.

> After having initially rejected protesters' demands, the city [of Durham, North Carolina] . . . agreed to require the police . . . to obtain written consent to search vehicles in cases where they do not have probable cause. . . . "Without the data, nothing would have happened," said Steve Schewel, a Durham City Council member . . . .

Oppel, *supra* note 124.

132. For an example of news coverage drawing on relevant, but limited, demographic information related to jury selection, see Pam Kelley & Gavin Off, *Wes Kerrick Jury Won't Mirror Mecklenburg's Diversity*, CHARLOTTE OBSERVER (July 27, 2015, 8:51 PM), http://www.charlotteobserver.com/news/local/crime/article29073877.html (comparing jury pool in the criminal trial of a police officer who shot a suspect with overall county population demographics).

133. *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2109–10 (2016).

134. *See* Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 460 (2011).

135. *Id.* at 458–63.

these incidents has impeded reform.[136] In a test of the reform power of data, President Obama signed the Death in Custody Reporting Act.[137] This law requires states and local law enforcement agencies that receive federal money to make quarterly reports about the deaths of any persons who are detained, arrested, or incarcerated.[138] The theory is that national data will help policymakers "identify not only dangerous trends and determine whether police use force disproportionately against minorities, but best practices, and thus ultimately develop policies that prevent more deaths."[139] The next few years might reveal whether this government-mandated reporting regime can produce more comprehensive results than the more decentralized efforts of newspapers and others in the private sector to build databases of police-involved shootings.[140]

2. Internal Management Uses of Data

The practical impact of jury selection data depends, in part, on how prosecutors, judges, court clerks, and others use the data once the information becomes available. These criminal justice professionals have the capacity to collect for themselves the jury selection statistics and to generate reports on the topic.[141] Managers in the prosecutor's office, the chief judge's chambers, or the clerk's office might be more open to the use of jury selection data if they were to collect the data themselves.

On the other hand, data collection mandated by statute, statewide regulation, or rule of procedure could produce more uniform results in different localities and allow for the sort of place-to-place comparisons that make it easier to diagnose local problems. For example, the Florida legislature recently passed a pathbreaking law that requires key criminal justice actors to collect and post criminal justice data in a format that will allow comparisons across localities.[142]

136. Mark Berman & Mark Guarino, *Chicago Releases 'Unprecedented' Evidence from Nearly 100 Investigations into Police Shootings, Use of Force*, WASH. POST (June 3, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/06/03/chicago-set-to-release-massive-trove-of-evidence-from-100-investigations-into-police-shootings-alleged-misconduct/?utm_term=.dc838ad9f343.

137. Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (2014).

138. *Id.* § 2(a).

139. *See* Kami Chavis Simmons, *No Way to Tell Without a National Database*, N.Y. TIMES: ROOM FOR DEBATE (July 13, 2016, 10:53 AM), https://www.nytimes.com/roomfordebate/2015/04/09/are-police-too-quick-to-use-force/no-way-to-tell-without-a-national-database.

140. *See* Geoffrey P. Alpert, *Toward a National Database of Officer-Involved Shootings: A Long and Winding Road*, 15 CRIMINOLOGY & PUB. POL'Y 237, 238–39 (2015); *2015 Washington Post Database of Police Shootings*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings/ (last visited May 18, 2018) (displaying police shooting data drawn from "news reports, public records, Internet databases and original reporting").

141. *See* Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1485, 1485 n.97 (2012) (collecting proposals that would require prosecutors to maintain jury selection statistics); Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. (forthcoming 2019) (proposing the use of standardized letters to disclose prosecutor discovery violations to affected parties).

142. *See* FLA. STAT. ANN. § 900.05(3), (4) (2018); John Kennedy, *Governor Signs Sweeping Court Data Collection*, SARASOTA HERALD-TRIBUNE (Mar. 30, 2018), www.heraldtribune.com/news/20180330/governor-signs-sweeping-court-data-collection.

A sense of professionalism among judges or prosecutors might motivate them to take data seriously when it shows a departure from the standard practices of their colleagues elsewhere in the state.[143] After learning about patterns in jury selection across many cases, they might change practices on their own initiative. For instance, accessible data might convince supervisors to train prosecutors to avoid racial bias during jury selection.

3. External Public Uses of Data

Internal management use of routine criminal justice data is only half the story. In the end, we look to public accountability—through the ballot box or other forms of democratic input into criminal justice practices[144]—to convert jury selection data and other comparable datasets into drivers of change.

The information visible to the public about how prosecutors and judges perform, compared to their peers, is historically thin.[145] That is starting to change. Private nonprofit organizations, such as Measures for Justice, are funding, collecting, and disseminating data that allow citizens to compare their local courts to others in the same state and elsewhere.[146] Data such as this could make it possible to evaluate practices across time and across places. When news reporters, advocates, academics, and analysts interpret that data for the general public, the data could shift public priorities. It could create more informed accountability in a world where criminal court professionals get very little feedback from the communities they serve.

We do not claim to know how voters will ultimately react when these data about the criminal courts become accessible to them. It is possible that in some places, the most politically engaged members of the community will not care about jury selection; they might even resist the idea of expanding jury participation to include every population group. But local variety is built into the

143. *See* Sidney Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 587–90 (2011) (analyzing the restraining power of professional norms in bureaucracies such as prosecutor's offices).

144. *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1621 (2017); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014).

145. *See* Russell M. Gold, *"Clientless" Prosecutors*, 51 GA. L. REV. 693, 701 (2017); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 776–77 (2017); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 594 (2014). For a remarkable recent example of a prosecutor committing to regular release to the public of its own statistics about charging decisions, see Tanveer Ali, *Cook County Felony Weapon Cases Up 43 Percent in 2017, Data Shows*, CHI. SUN-TIMES (Feb. 21, 2018, 3:24 PM), https://chicago.suntimes.com/
news/felony-weapon-cases-up-43-percent-in-2017-county-data-shows (reporting change in office practices based on data set that Cook County prosecutor released voluntarily).

146. *See Overview*, MEASURES FOR JUSTICE, https://measuresforjustice.org/about/overview/ (last visited May 18, 2018); Amy Ellis, *MacArthur Foundation Awards FIU $1.7 Million to Study Prosecutor Behavior*, FIU NEWS (Mar. 9, 2018, 10:26 AM), https://news.fiu.edu/2018/03/macarthur-foundation-awards-fiu-1-7-million-to-study-prosecutor-behavior/120350.

criminal justice systems in the United States.[147] Voters and engaged community groups in most places, we hope, will value inclusive practices in their criminal courts and will expect their agents, operating in the sunshine, to deliver the results.

VII. CONCLUSION

The fulcrum that could move jury practices sits in the office of the clerk of the court. Public employees in those offices already collect some basic background facts about prospective jurors and record the decisions by judges, prosecutors, and defense attorneys to remove jurors or to keep them. And if the clerk's office is the fulcrum, the lever to shift the entire jury selection process in the direction of greater inclusion will be public records laws, embodied in state statutes, local court rules, and office policies.

It is startling that public courts, in an age when electronic information surrounds us on all sides, make it so difficult to track jury selection practices across different cases. It should not require hundreds of miles of driving between courthouses; access to the data should not depend on special requests for judicial approval.[148] Information about the performance of public servants in the criminal courts, in aggregate form, would be easy to collect and to publish. Jury selection goes to the heart of public participation in criminal justice: this is precisely where the sun needs to shine first.

147. *See* Ronald F. Wright, *The Wickersham Commission and Local Control of Criminal Prosecution*, 96 MARQ. L. REV. 1199, 1200 (2013). *But cf.* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973 (2008) (describing decline of local influence in last half of twentieth century).

148. Careful disclosure policies can protect the legitimate privacy interests of jurors without requiring case-by-case judicial approval of jury selection information. *See* Grosso & O'Brien, *supra* note 37, at 667–68; Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 152 (1996).

Law and Human Behavior, Vol. 23. *No.6, 1999*

The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County

Mary R. Rosel

Some view the peremptory challenge as crucial to a fair jury selection process, whereas for others, it is a tool for invidious race or gender discrimination. Nevertheless, debates utilize little empirical data regarding uses of this challenge. Data are reported from observation of a small number of criminal trials in one, largely biracial southeast. ern county. In the aggregate, there was no association between race and selection for a jury, and only a modest relationship for gender and selection. However, the null finding for race masks a pattern of strikes by each party: When dismissed, Whites were likely to be excused by the defense, and African Americans by/he state. A trial-by-trial analysis showed that when disparities between venire and jury composition existed. the direction usually pointed to ouerrepresentation of African Americans and women on juries. Despite limited generaIizability, the data suggest the need for a more informed debate about the peremptory challenge's use in modern criminal trials.

In the last decade, members of the judiciary *(Alen v. State,* 1992; Broderick, 1992; Hoffman, 1997; *People v. Bolling,* 1992) as well as legal commentators (e.g., Bray, 1992; Marder, 1995) have all expressed concerns about the merits of eliminating citizens from petit juries through the peremptory challenge. Supreme Court rulings have established the Equal Protection rights of prospective jurors in jury selection (e.g., *Powers v. Ohio,* 1991; *Edmonson v. Leesville Concrete Co.,* 1991; *Georgia v. McCollum,* 1992; *J.E.B. v. Alabama, ex retT.B.,* 1994). Thus, some have suggested that constitutional violations to eliminated jurors are of greater import than potential harms to litigants resulting from abandoning or drastically limiting the peremptory (which is not grounded in the Constitution; see Bader, 1996; Leipold, 1998; Un~ derwood, 1992). Recently, a sizable faction of a panel convened to suggest jury reforms in the District of Columbia favored eliminating the peremptory, although this reform was not ultimately adopted (Council for Court Excellence, 1998).

Supporters of the peremptory challenge, such as former Chief Justice Burger *(Batson v. Kentucky,* 1986) have argued that it is essential to a fair jury selection

IAmerican Bar Foundation. 750 North Lake Shore Drive. Chicago, Illinois 60611; e-mail: mrose@abfn.org

OI47-7307J99/I200-069S$16.00I1lt> 1999 American Psychology-LaW SocietyJDivj.ion 41 01 the American Psychology Association

process. An early article by Babcock (1972) outlined four functions the peremptory serves, including the appearance of fairness engendered by litigants' having control over choosing a jury, the ability to leave unstated any concerns about jurors'[2] biases, the ability to overrule jurors' natural reluctance to admit partiality, and, finally, as a "shield for the exercise of the challenge for cause" (1972, p. 554)—that is, a mechanism to excuse a juror one may have alienated during intensive voir dire questioning. As these rationales suggest, the peremptory can serve as a check on judicial control of the jury selection process.

These alleged advantages notwithstanding, critics posit several harms engendered by the peremptory (for a recent overview, see Hoffman, 1997). The primary dissatisfaction revolves around the doctrinal goal of having juries that are representative of the community. In this regard, the peremptory has been called "the last best tool of Jim Crow" (Hoffman, 1997, p. 827). Indeed, it was not until the Supreme Court's ruling in *Batson v. Kentucky* (1986) that any reasonable legal mechanism prohibited the state from using the peremptory to systematically exclude African Americans from serving on juries (cf. *Swain v. Alabama,* 1965). The Supreme Court has likewise prohibited race-based peremptories by the defense (*Georgia v. McCollum,* 1992) and in civil trials (*Edmonson v. Leesville Concrete Co.,* 1991). Race-based peremptories are illegal irrespective of the race of the defendant (*Powers v. Ohio,* 1991), and gender-based peremptories are forbidden (*J.E.B. v Alabama, ex rel T.B.,* 1994).

Despite these rulings, there is concern that, aided by pretext, discrimination against jurors continues (Charlow, 1997; Sutphen, 1995). Melilli (1996) reviewed reasons proffered by attorneys who must account for challenges and deemed many "silly, if not offensive" (Melilli, 1996, p. 499). For example, when accused of *Batson* violations, lawyers have asserted that the jurors were challenged because they were "from New York," "from Texas," were the "same build as the opposing party," or had "too much education" (Melilli, 1996, p. 498). A Maryland appellate court upheld a trial court's ruling against the peremptory dismissal of a set of White jurors; according to the defense, one juror reminded the attorney of her Catholic school teacher and another dressed well and "seemed rather studious" (*Gilchrist v. State,* 1993, pp. 47–49; see Raphael and Ungvarsky, 1993, for a review of appellate rulings on allegedly "neutral" explanations). Additionally, the procedures in place to oversee peremptory challenges (which are no longer "peremptory") have been termed a burden on the courts (e.g., *Alen v. State,* 1992, p. 1088; *Gilchrist v. State,* 1993, p. 55). Thus, it is argued, given its potential for abuse and problems with enforcement, the peremptory challenge should be eliminated (see *Batson v. Kentucky,* 1986, p. 103, Marshall, J., concurring).

Banning the peremptory would constitute a revolution in jury selection procedures. Nevertheless, debates over the challenge have generally proceeded in the absence of empirical data bearing on the current use of the peremptory. Instead, as evidence, critics sometimes rely upon assertions by other commentators (e.g., Bray, 1992, p. 564, quoting Altman, 1986, who summarizes others, n. 8) or upon

[2]For ease of description, I use the term "juror" to refer to persons both selected for and excused from a jury panel.

the fact that a number of *Batson*-type cases have reached the appellate levels and the Supreme Court (e.g., Marder, 1995, n. 189).

Available social science data on voir dire and the peremptory do not directly address issues of jury representativeness. Instead, such research has focused on the extent to which lawyers successfully identify biased jurors (Broeder, 1965; Johnson & Haney, 1994; Seltzer, Venuti, & Lopes, 1991) or even potentially favorable jurors (Finkelstein & Levin, 1997; Zeisel & Diamond, 1978); juror disclosure to judges versus attorneys (Jones, 1987); and voir dire as a remedy for pretrial publicity exposure (Kerr, Kramer, Carroll, & Alfini, 1991). In the pre-*Batson* era, lawyers reported using race in decision making about potential jurors (Diamond, Ellis, & Schmidt, 1997), and a post-*Batson* study also found that prosecutors disproportionately eliminated African-American mock jurors (Kerr *et al,* 1991). Nevertheless, data on jury selection outcomes in recent trials are largely unavailable.

Thus, modern, systematic records of how the peremptory challenge is used—on whom and by whom—are lacking. What effect does the peremptory have upon the racial or gender composition of petit juries in criminal trials? This paper presents data gathered through trial observation in a North Carolina courthouse. I investigate how prosecutors and defense attorneys use the peremptory challenge and how characteristics of seated jury panels compare to those of the venire.

METHOD

The data come from a larger study investigating jurors' perceptions of voir dire questioning, especially their concerns about privacy. A portion of the research entailed court observation and record keeping about who was excused and who was selected for trials. Thirteen noncapital, felony criminal jury trials in a single North Carolina county were observed. Cases were selected after consulting with court officials about which cases, if any, were likely to proceed to trial in a given week. From these, the most serious felony charge slated for trial was selected for observation. Due to the small size of the courthouse, usually only one trial would be held in a given week. Hence, although not randomly selected, the cases represent a sizable proportion of all felony jury trials held during the study period.

The 13 criminal trials involved 4 cases of homicide (3 second-degree murder and 1 involuntary manslaughter); 1 case of felonious assault (which included first-degree sex offenses); 2 cases of robbery with a dangerous weapon (1 of which was a car-jacking, the other an armed robbery); 2 felony drug offenses; 2 accusations of breaking and entering/possession of stolen goods; and 2 cases of obtaining property by false pretenses. There were 18 defendants: one trial had 4 defendants, one had 3, and the rest had a single defendant. All but 1 of the accused were African American (the other was White); only 2 defendants were female.

In this jurisdiction, lawyers conducted the majority of voir dire questioning. Customarily, the judge introduced the nature of the case and the parties, obtained basic information on the jurors (e.g., employment, marital status), and sometimes assessed whether there were clear hardships or obvious conflicts among the panel. The judge then oversaw voir dire questioning but was largely passive. For example,

although one judge informed attorneys that he disapproved of open-ended questions (e.g., "How do you feel about . . ."), he did not forbid inquiries framed in this manner unless one of the parties objected.

Three hundred and forty-eight people called for jury service in the 13 trials were questioned during voir dire. The county used a "sequential method" of questioning (Bermant & Shapard, 1981), in which the prosecutor asked all of his or her questions and exercised challenges; new jurors replaced those excused. Once the prosecution had passed a panel of 12, the defense questioned the remaining set of jurors and exercised challenges. Decisions at each round were final: When jurors were passed by each side, they could not be excused later through the peremptory. The process was repeated until 12 jurors and at least 1 alternate were seated. In noncapital cases, each side was allowed six peremptory challenges (per defendant), with one additional peremptory per alternate. There were no *Batson* claims asserted by any party during these cases.

This county has a high proportion of African Americans, who were 32% of those questioned (and, according to 1990 census data, are 37% of the population). In addition, the county is essentially biracial, as 97% of residents are either White or African American; 2% are Asian or Pacific Islander. The sample largely reflects this composition: Only two jurors were Asian, and the remainder were African American or White. Fifty-three percent of the venire were female. Racial and gender categorizations of this sample were based upon researcher observation of jury selection.

RESULTS

Aggregate Analysis

The peremptory challenge was the most common means of excusing a juror: Only 19% of the 181 people excused were eliminated through a challenge for cause (38% of these people were African American and 74% were male). In 6 trials, lawyers made unsuccessful challenges for cause (n = 11 motions). All but one of these jurors were later excused through a peremptory challenge. In all, lawyers exercised 147 peremptory challenges (range: 5–33 per trial).[3] In the majority of trials (n = 10), neither side used all available peremptories (the defense did so in 2). The majority of peremptories came from the defense, which exercised 66% of all such challenges (range: 45%–100%).

Overall, compared to Whites, African Americans were no more likely to be excused from the jury via the peremptory challenge: 42% of African Americans were peremptorially excused compared 49% of Whites, χ^2 = 1.04, ns. However, when excused, African Americans were much more likely to be dismissed by the State: 71% of African Americans dismissed from service were excused by the prosecution. The reverse was true for Whites: 81% of White persons excused were

[3]The high figure of 33 peremptory challenges comes from the trial with four defendants. In this case, the prosecutor used 6 challenges, as did one of the defense attorneys. The remaining three defense attorneys each used their full complement of 7 strikes (6, plus 1 for the alternate).

dismissed by the defendant. This association between prosecution/defense and the race of the juror who was excused was highly significant, $\chi^2 = 36.20$, $p < .001$. Across cases, 60% of the state's peremptories were exercised on African Americans (range within trials: 0%–100%). In contrast, 87% of the defendants' challenges were used on Whites (range: 40%–100%).

In an analysis of gender, men were somewhat more likely to be excused through the peremptory than were women (54% of men vs. 41% of women), $\chi^2 = 5.67$, $p < .05$. However, this relationship was nonsignificant when one outlier case—in which women made up 85% of the final panel—was eliminated from analysis ($\chi^2 = 1.71$, ns). In addition, there was no association between gender of the juror and their likelihood of being excused by one side or the other through the peremptory, $\chi^2 = 0.003$, ns.

Trial-Level Analysis

The ruling in *Batson v. Kentucky* (1986) held that the appropriateness of any particular jury selection process is necessarily examined at the trial level. The following is a descriptive picture of the resulting juries in the 13 trials.

Although race was not associated with the likelihood of being selected when data are collapsed across trials, representation of African Americans on juries, given their representation in the venire, varied greatly across trials. In 5 trials, the percentage of African-Americans on the final panel differed from their representation in the venire by no more than 5 percentage points, usually in the direction of overrepresentation (e.g., 33% of the venire, 38% of the final jury panel). In another 6 cases, the difference ranged between 6 and 11 percentage points; 4 of these resulted in overrepresentation and 2 in underrepresentation. In the remaining 2 trials discrepancies between African-American representation on the venire and on the final jury were more stark. In one case, African Americans were 40% of the venire, but only 14% of the final jury. In another, they were 35% of the venire but were fully 71% of the final jury panel. Across cases, African Americans were underrepresented on jury panels to any extent in only 4 of the 13 trials observed and overrepresented in 5 of 13.

An analysis for gender reveals comparable results. In 7 trials, women's representation on juries paralleled their representation in the venire, differing by no more than 5 percentage points. In 3 trials, the number of women on the final panel exceeded their representation on the venire by between 7 and 14 percentage points. Finally, in the remaining 3 cases, there were marked differences, always resulting in overrepresentation of women on the final panels. Specifically, in one case women were 45% of the venire, but 79% of the final panel; in another, it was 46% of the venire and 69% of the jury; and in the third, it was 67% of the venire versus 85% of the jury panel.

DISCUSSION

According to this research, news about the peremptory is best seen as both good and bad. Aggregating across trials, in a county in which the minority group

is one-third of the jury-eligible population, African Americans were no more or no less likely to be excused from jury service than Whites. In this sense, the peremptory had no "disparate impact" upon the minority participation in juries in this county. On the other hand, a closer look reveals that this result comes about in large part because of the adversary system and "disparate treatment" by prosecutors and defense attorneys of both racial groups. If an African American was excused from the jury, it was more often than not the result of a prosecutor's peremptory challenge; if a White person was excused, it was likely attributable to the defense's strike.

These results are similar to New Mexico data reported by Van Dyke (1977, p. 159). However, in that study, White jurors appeared to be the primary focus of the adversaries: Prosecutors eliminated 6% of Whites, whereas the defense eliminated 27%. Members of the predominant minority group in that state (Hispanics) were eliminated by both sides at equivalent rates (just above 10%). With respect to gender, although the present data suggest women were slightly more likely to be selected, this was due largely to discrepancies in one particular trial. Of note, another study reported women as more likely than men to be selected for juries (Cipriani, 1994). However, in that study, as in this one, there was not strong evidence that the two parties showed contradictory preferences for female versus male jurors, rendering the result somewhat difficult to explain. Reviews of research suggest that gender usually provides little predictive utility for verdicts, despite much "folklore" (Fulero & Penrod, 1990); however, it may be that parties' ideas about which gender is better for its side tend to be case-specific and thus variable.

A trial-by-trial analysis of the present data indicates that minority-group and gender representation on juries mirrored the population profile in most cases. However, in approximately one third of the trials observed, the final panel showed marked discrepancies from the venire in terms of race, gender, or both. Interestingly, more often than not, the minority group members tended to be *overrepresented* on the petit jury compared to their numbers in the venire. When discrepancies were evident by gender, it was always in the direction of overrepresentation of women. Certainly such a result is likely to be of little solace to those who oppose peremptory challenges, as juries did not uniformly reflect the venire panels from which they were drawn. Nonetheless, it seems evident that the peremptory challenge's harm to jury composition is not a settled issue in this county.

There are several limitations to these data. First, they are derived from a single county, one with a fairly high proportion of jury-eligible African Americans (32%). Harm to jury representativeness and jury diversity certainly could be more acute in jurisdictions with lower base rates of minorities. In addition, defendants in the sample were primarily African American. Thus, with these data it was not possible to determine whether the defendant's race influences how peremptories are exercised. For instance, it could be that the adversary striking of African Americans and Whites is an indicator of attorneys' assumptions about defendant–juror similarity rather than of generalized views about the two groups' leniency or conviction proneness. Finally, the cases represent a nonrandom (albeit sizable) proportion of the total cases within a defined period, and the sample size is small.

The thrust of these limitations warrants explicitness: Standing alone, the data cannot and should not eliminate concerns about the peremptory challenge's effect

on jury composition. Instead, they provide an example of the type of empirical evidence lacking in the debates surrounding the peremptory. Jury selection in some criminal trials may result in panels that do not mirror the community, but how often does this occur? In what types of cases? Which groups tend to be overrepresented or underrepresented? Why? A large-scale survey of cases across jurisdictions would help shed light upon the legitimacy of charges that the peremptory harms jury representativeness.

Were the peremptory challenge eliminated, litigants would lose direct control over decision making regarding juror fitness—a situation that many attorneys fear, even as they advocate for greater jury representativeness (Brown, 1994). Without diminishing the importance of the principle established in *Batson*—namely, that an injustice in any individual case needs to be addressed—it seems unwise to make drastic policy changes without having substantially more information regarding the use of the peremptory challenge in the modern trial.

ACKNOWLEDGMENTS

The author gratefully acknowledges Neil Vidmar and the anonymous reviewers who commented upon previous drafts of this paper.

REFERENCES

Alen v. State. 596 So.2d 1083 (Fla.App. 3 Dist. 1992).

Altman, T. (1986). Affirmative selection: A new response to peremptory challenge abuse. *Stanford Law Review, 38,* 781–812.

Babcock, B. A. (1972). Voir dire: Preserving 'its wonderful power.' *Stanford Law Review, 27,* 545–565.

Bader, C. G. (1996). *Batson* meets the First Amendment: Prohibiting peremptory challenges that violate a prospective juror's speech and association rights. *Hofstra Law Review, 24,* 567–621.

Batson v Kentucky, 476 U.S. 79 (1986).

Bermant, G., & Shapard, J. (1981). The voir dire examination, juror challenges, and adversary advocacy. In B. D. Sales (Ed.), *Perspectives in law and psychology, Vol 2: The trial process. New York: Plenum.*

Bray, K. M. (1992). Reaching the final chapter in the story of peremptory challenges. *UCLA Law Review, 40,* 517–569.

Broderick, R. J. (1992) Why the peremptory challenge should be abolished. *Temple Law Review, 65,* 369–423.

Broeder, D. W. (1965). Voir dire examinations: An empirical study. *Southern California Law Review, 38,* 503–528.

Brown, R. M. (1994). Peremptory challenges as a shield for the pariah. *American Criminal Law Review, 31,* 1203–1212.

Charlow, R. (1997). Tolerating deception and discrimination after *Batson. Stanford Law Review, 50,* 9–64.

Cipriani, K. L. (1994). The numbers don't add up: Challenging the premise of *J.E.B v. Alabama ex rel T.B. American Criminal Law Review, 31,* 1253–1277.

Council for Court Excellence (1998). *Juries for the year 2000 and beyond: Proposals to improve the jury systems in Washington, D.C.* Washington, DC: District of Columbia Jury Project.

Diamond, S. S., Ellis, L., & Schmidt, E. (1997). Realistic responses to the limitation of *Batson. Cornell Journal of Law and Public Policy, 7,* 77–106.

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

Finkelstein, M. O., & Levin, B. (1997). Clear choices and guesswork in peremptory challenges in federal criminal trials. *Journal of the Royal Statistical Society,* 160(part 2), 275–288.

Fulero, S. M., & Penrod, S. D. (1990). Attorney jury selection folklore: What do they think and how can psychologists help? *Forensic Reports, 3,* 233–259.

Georgia v. McCollum, 505 U.S. 42 (1992).
Gilchrist v. State, 627 A.2d 44 (Md. App. 1993).
Hoffman, M. B. (1997). Peremptory challenges should be abolished: A trial judge's perspective. *University of Chicago Law Review, 64,* 809–871.
J.E.B. v. Alabama, ex rel. T.B., 511 U.S. 127 (1994).
Johnson, C., & Haney, C. (1994). Felony voir dire: An exploratory study of its content and effect. *Law and Human Behavior, 18,* 487–506.
Jones, S. E. (1987). Judge- versus attorney-conducted voir dire: An empirical investigation of juror candor. *Law and Human Behavior, 11,* 131–146.
Kerr, N. L., Kramer, G. P., Carroll, J. S., & Alfini, J. J. (1991). On the effectiveness of voir dire in criminal cases with prejudicial pretrial publicity: An empirical study. *American University Law Review, 40,* 665–701.
Leipold, A. (1998). Constitutionalizing jury selection in criminal cases: A critical evaluation. *Georgetown Law Journal, 86,* 945–1010.
Marder, N. S. (1995). Beyond gender: Peremptory challenges and the roles of the jury. *Texas Law Review, 73,* 1041–1138.
Melilli, K. J. (1996). *Batson* in practice: What we have learned about *Batson* and peremptory challenges. *Notre Dame Law Review, 71,* 447–503.
People v. Bolling, 582 N.Y.S.2d 950 (Ct. App. 1992).
Powers v. Ohio, 499 U.S. 400 (1991).
Raphael, M. J., & Ungvarsky, E. J. (1993). Excuses, excuses: Neutral explanations under *Batson v. Kentucky. University of Michigan Journal of Law Reform, 27,* 229–275.
Seltzer, R., Venuti, M. A., & Lopes, G. M. (1991). Juror honesty during the voir dire. *Journal of Criminal Justice, 19,* 451–462.
Sutphen, D. A. (1995). True lies: The role of pretext evidence under *Batson v. Kentucky* in the wake of *St. Mary's Honor Center v. Hicks. Michigan Law Review, 94,* 488–511.
Swain v. Alabama, 380 U.S. 202 (1965).
Underwood, B. D. (1992). Ending race discrimination in jury selection: Whose right is it, anyway? *Columbia Law Review, 92,* 725–774.
Van Dyke, J. M. (1977). *Jury selection procedures: Our uncertain commitment to representative panels.* Cambridge, MA: Ballinger.
Zeisel, H., & Diamond, S. S. (1978). The effect of peremptory challenges on jury and verdict: An experiment in federal district court. *Stanford Law Review, 30,* 491–531.

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____
STATE OF NORTH CAROLINA v. DEFENDANT	) **DEFENDANT'S MOTION FOR**) **DISCOVERY OF INFORMATION**) **PERTAINING TO BATSON**) **LITIGATION**

NOW COMES the Defendant, _____, and respectfully moves the Court for an order directing the State to provide to the defense information concerning any policy or training, past or present, written or informal, regarding the use of peremptory strikes in jury selection, and notice of any prior findings that this prosecutor struck a juror based on race, ethnicity or gender. This information is required under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994); *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); *State v. Hobbs*, ____ N.C. ____ (2020); and *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) ("The people of North Carolina have declared that they will not tolerate the corruption of their juries by racism . . . and similar forms of irrational prejudice."). In support of this motion, Defendant states the following:

Grounds for Motion

Evidence that training materials providing instruction on how to evade the strictures of *Batson* are available to the prosecution is unquestionably relevant to the

question of whether a strike is motivated by race. In *Miller-El II*, the Court considered the following training evidence in reaching its conclusion that the Texas prosecutor had violated *Batson*:

> A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller–El's trial.

545 U.S. at 264 (bracket in original, citation omitted).

It is notable the petitioner in *Miller-El II* did not present evidence that the attorneys who personally prosecuted his case actually studied the training manual at issue. Rather, the Supreme Court focused on the fact that the training materials were "available." Additionally, in *Miller-El II*, the discriminatory training materials predated the defendant's trial by approximately a decade. Nonetheless, the *Miller-El II* Court concluded,

> If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection.

Id. at 266.

It is significant also that we know that North Carolina prosecutors have been trained in how to justify strikes of African Americans. At a 1994 seminar called *Top Gun*, prosecutors were given a list of race-neutral reasons to cite when *Batson* challenges were raised. This list, or "cheat sheet," titled "*Batson* Justifications," included "attitude," "body language," and a "lack of eye contact with Prosecutor" — the types of justifications that prosecutors routinely give for striking black jurors in North Carolina.

A group of prominent former prosecutors filed a friend-of-the-court brief in *Foster v. Chatman* and described the *Top Gun* cheat sheet as an effort to "train their prosecutors to deceive judges as to their true motivations." Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8. Unfortunately, as the existence of the *Top Gun* handout demonstrates, "the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before." *Miller-El II*, 545 U.S. at 270 (Breyer, J., concurring).

Furthermore, a prosecutor's personal history of striking jurors based on their race, ethnicity, or gender is an appropriate consideration under the *Batson* analysis. *See Hobbs* ___ N.C. at ____; *see also Flowers*, 139 S.Ct. at 2245 (considering "the history of the prosecutor's peremptory strikes in Flowers' first four trials"); *Miller-El II*, 545 U.S. at 263-64 (considering policy of district attorney's office of systematically excluding black from juries, which was in place "for decades leading up to the time this case was tried").

Wherefore, Defendant asks the Court to enter an order directing the prosecutor to turn over to the defense all information pertaining to any policy or training, past or present, written or informal, regarding the use of peremptory strikes in jury selection, and any prior findings by any court that the prosecutor struck a juror based on his or her race, ethnicity, or gender.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion for Discovery of Information Pertaining to Jury Selection Training has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File No. __ CRS ____

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
DEFENDANT	)

DEFENDANT'S MOTION TO APPLY OBJECTIVE OBSERVER STANDARD WHEN RULING ON OBJECTIONS TO PEREMPTORY STRIKES

NOW COMES the Defendant, _____, and respectfully moves the Court to rule on the parties' objections to peremptory strikes due to alleged race, ethnicity, or gender discrimination, by applying the objective observer standard adopted by the Supreme Court of Washington on April 5, 2018, which provides in part: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. *The court need not find purposeful discrimination to deny the peremptory challenge*." *See also* Exhibit 1, Washington General Rule 37 (emphasis added).

This Court's adoption of the objective observer standard is required pursuant to Article I, §§ 1, 19, and 26 of the North Carolina Constitution, which provide greater protection against discrimination than the federal minimum established in *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court's inherent power to take action in the interests of justice also requires adoption of the objective observer standard.

Legal Basis for Adopting Objective Observer Standard

In the related context of discrimination in the selection of grand jury foreperson, the Supreme Court of North Carolina has held that state constitutional protections against

discriminatory exclusion from jury service go further than the U.S. Constitution. In *Cofield*, our state Supreme Court held that race discrimination in the selection of the grand jury foreperson violated the state constitution even though the United States Supreme Court had not yet clearly decided the question under the federal constitution. 320 N.C. at 305-308. "Article I, section 26 of the North Carolina Constitution does more than protect individuals from unequal treatment." It ensures that the jury system "must also be *perceived* to operate evenhandedly." 320 N.C. at 302 (emphasis in original). The Court in *Cofield* emphasized that it was interpreting Article I, §§ 19 and 26 as providing more protection than their federal counterparts by separately analyzing the issue under the state and federal equal protection clauses. *See* 320 N.C. at 305-08 ("our decision in this case can stand on the North Carolina Constitution alone, and we need not reach the federal question presented."). Chief Justice Exum explained:

> Our state constitutional guarantees against racial discrimination in jury service are intended to protect values other than the reliability of the outcome of the proceedings. Central to these protections, as we have already noted, is the perception of evenhandedness in the administration of justice. Article I, section 26 in particular is intended to protect the integrity of the judicial system, not just the reliability of the conviction obtained in a particular case.

320 N.C. at 304 (1987).

In a subsequent case, three justices affirmed *Cofield*'s interpretation of Article I, § 26. At trial, the prosecutor in a capital case struck a potential juror because he was originally from Africa. *State v. Montgomery*, 331 N.C. 559 (1992). The Court granted a new trial because of an unconstitutional jury instruction. *Id.* at 573. Concurring in the result, Justice Frye, joined by Chief Justice Exum and Justice Whichard, wrote separately to explain they would also grant a new trial because the prosecutor's strike based on

national origin violated the North Carolina Constitution. *Id*. at 574. The justices echoed *Cofield*'s holding that Article I, § 26 goes further than simply policing intentional discrimination, but also ensures that the system be perceived to operate evenhandedly. *Id.* at 576 (citing *Cofield*, 320 N.C. at 304).

In addition to the state constitution, this Court must also adopt the objective observer standard pursuant to its inherent authority to bring about justice. The Supreme Court of North Carolina has held that when "there is no statutory provision either authorizing or prohibiting [certain] orders . . . such authority exists in the inherent power of the court to act when the interests of justice so require." *In re Superior Court Order*, 315 N.C. 378, 380 (1986) (citations omitted); *see also In Re Paul*, 84 N.C. App. 491, 499-500 (1987) (in the context of judicial discipline of attorneys, holding that a trial court has inherent power to protect the court and the public from "impropriety and to serve the administration of justice.") (citations omitted).

The protections provided by both the state constitution, and the Court's inherent authority, are triggered in this circumstance because the North Carolina courts' implementation of the federal *Batson* standard has been ineffective in preventing discrimination in the exercise of peremptory strikes. *See State v. Carter*, 322 N.C. 709, 722-23 (1988) (in the context of the good faith exception to the exclusionary rule, finding it appropriate to extend additional protections under the state constitution because of the state constitutional interest in "preserv[ing] . . . the integrity of the judicial branch of government . . . . Under the judicial integrity theory . . . . [t]he courts cannot condone or participate in the protection of those who violate the constitutional rights of others."); *In re Superior Court Order*, 315 N.C. at 380 (explaining courts may exercise inherent

powers in the interest of justice where "other options available . . . provide inadequate means of obtaining the desired" result).

The North Carolina courts' prior application of *Batson* has been inadequate – and thus is appropriate for modification under the state constitution or inherent authority – because in over thirty years and over a hundred decisions, the North Carolina appellate courts have never found a single instance of discrimination against a minority juror under the *Batson* approach. *See* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 NC L. Rev. 1957 (2016). North Carolina is the only state in the American South whose appellate courts have never found *Batson* discrimination against a minority juror.[1]

Predictably, the absence of appellate enforcement of *Batson* has led to frequent reliance on race at the trial level. One recent study analyzed more than 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases tried between 1990 and 2010. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012). The study showed that prosecutors across North Carolina struck 53% of eligible African-American jurors and only 26% of all other eligible jurors. *Id.* at 1549. It further found that the probability of this disparity occurring in a race-neutral jury selection was less than one in ten trillion. *Id*. Even after adjusting for non-racial factors that might reasonably affect strike decisions – for example, reluctance to

[1] The courts in our sister Southern states have not had trouble finding *Batson* violations – more than a dozen in South Carolina and a half dozen in Virginia. In Alabama, there have been more than 80 appellate reversals because of racially-discriminatory jury selection, more than 30 in Florida, 10 each in Mississippi and Louisiana, and eight in Georgia. *See Equal Justice Initiative Report, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, p. 19, found at https://eji.org/reports/illegal-racial-discrimination-in-jury-selection.

impose the death penalty – researchers found prosecutors struck black jurors at twice the rate they struck all other jurors. *Id*.

Nor are racial disparities in jury selection confined to capital cases. Another recent study from Wake Forest University School of Law released preliminary findings that in all non-capital felony trials in North Carolina from 2011 to 2012 – which included data on 29,000 potential jurors – prosecutors struck 16% of minority potential jurors, while they struck only 8% of white potential jurors. Ronald F. Wright, Kami Chavis, and Gregory Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill.L.Rev. 1407.[2]

The Wake Forest researchers also found that, in several large North Carolina cities, including Charlotte, Durham, and Winston-Salem, prosecutors exclude minority jurors nearly three times as often as white jurors. *Id*. at 26.

A study of Durham County conducted in 1999 found the same patterns. Approximately 70% of African Americans were dismissed by the State, while less than 20% of whites were struck by the prosecution. Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695, 698-99 (1999).

Application of Objective Observer Standard

The objective observer standard, as set forth in Washington General Rule 37, *see* Exhibit 1, provides a framework for implementing *Cofield*'s mandate that jury selection be perceived to operate evenhandedly. *Cofield*, 320 N.C. at 304. There are several ways in which the objective observer standard differs from the *Batson* approach. In other

[2] Now available on SSRN at https://ssrn.com/abstract=2994288, at pp. 2, 21, 23-24.

respects, the actions of a court implementing an objective observer standard will mirror *Batson*.

As in *Batson*, objections to peremptory strikes under the objective observer standard follow a three-step process. A party or the Court may raise an objection of improper bias. However, whereas under *Batson*, the Court must determine whether the moving party has established a *prima facie* case of intentional discrimination, under the objective observer standard, the party exercising the peremptory challenge shall always, upon objection, be required to articulate the reasons for the strike. The Court will then rule on the objection in light of the totality of circumstances. *See* Rule 37(c), (d), and (e).

As in *Batson*, when ruling on an objection under the objective observer standard, the Court may consider circumstances such as the number and types of questions posed to the juror, disparate questioning of jurors based on race or another impermissible category, disparate treatment of jurors, reliance on a reason disproportionately associated with race or another impermissible category, and a party's prior history of using peremptory strikes on impermissible bases. *See* Rule 37(g).

However, unlike *Batson*, the objective observer standard does not require a showing of purposeful discrimination to sustain the objection. Rather, the Court will sustain the objection if it "determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge . . . ." Rule 37(e). An "objective observer" is defined as one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors . . . ." Rule 37(f).

In this way, the objective observer standard takes into account the likelihood that

parties' strike decisions may be rooted in biases that are unknown even to themselves, recognizing that implicit stereotypes and attitudes can produce unintentional or unconscious biases. Jerry Kang, *Implicit Bias: A Primer for Courts*, National Center for State Courts (August 2009 at 1-2). The Supreme Court has repeatedly recognized the existence of negative stereotypes about African Americans. *See, e.g., Buck v. Davis*, 137 S.Ct. 759, 776 (2017) (noting "powerful racial stereotype" of African-American men as "violence prone."); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (post-Civil War laws limiting jury service to whites were based on belief that African Americans were "abject and ignorant, and in that condition w[ere] unfitted to command the respect of those who had superior intelligence"). The Court has also acknowledged that these stereotypes are often held unconsciously. *See Turner v. Murray*, 476 U.S. 28, 36 (1986) (noting belief that blacks are "morally inferior" and "[m]ore subtle, less consciously held racial attitudes" including "[f]ear of blacks").

If one considers the *impact* of discrimination rather than the *intent* of the decision-maker, it is clear that implicit attitudes can result in discrimination every bit as detrimental as conscious racism. The *Miller-El* Court recognized that racial minorities suffer harm from discrimination in jury selection, because the practice perpetuates "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (1995) (internal quotations omitted). Moreover, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. 79, 87. Racial discrimination in jury selection

> casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial.

> That is, 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, 545 U.S. 231, 238 (internal citations and quotations omitted). Racial discrimination — or even the appearance of it — negatively affects individuals and communities in ways that have nothing to do with whether it was the product of conscious or unconscious decisions. Thus, the objective observer approach, in accounting for the impact of implicit bias, fills a gaping hole in the traditional approach under *Batson*, which is limited to a review for intentional discrimination. *Compare Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008) (under *Batson*, "the trial court must determine whether the defendant has shown purposeful discrimination.").

The incorporation of implicit bias into the objective observer standard is consistent with a growing recognition that racial disparities appear in the justice system for reasons far more complex than blatant, intentional racism. For example, the National Center for State Courts has documented the development and implementation of pilot programs on the topic of implicit racial bias in three states, and has issued a Primer for Courts on the subject of implicit bias.[3] *See also Iowa v. Plain*, 898 N.W.2d 801, 817 (Iowa 2017) ("While there is general agreement that courts should address the problem of implicit bias in the courtroom . . . . We strongly encourage district courts to be proactive about addressing implicit bias").

The objective observer standard's recognition of implicit bias is critical, because it avoids one of the primary factors that has limited *Batson* as an effective tool for preventing the racially-disparate use of peremptory strikes. Namely, reliance on implicit

[3] *See* http://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/Resource-Guide.aspx.

bias dispenses with the necessity under *Batson* that a court rule that the prosecutor has engaged in intentionally racist conduct. *See also People v. Gutierrez*, 2 Cal. 5th 1150, 1182-83 (2017) (Goodwin, J., concurring) (arguing that *Batson* should be understood as a "probabilistic standard [that] is not designed to elicit a definitive finding of deceit or racism" but instead "defines a level of risk that courts cannot tolerate," because "brand[ing] the prosecutor a liar or a bigot . . . obscure[s] the systemic values that the constitutional prohibition on racial discrimination in jury selection is designed to serve.").

In order to address this longstanding problem with *Batson*, the objective observer standard adopted in Washington General Rule 37 not only allows the court to take unconscious bias into account but declares presumptively invalid several justifications for peremptory strikes that "historically . . . have been associated with improper discrimination," for example, prior contact with or distrust of law enforcement officers or living in a "high-crime" neighborhood. Rule 37(h). The rule also implements special procedures when a party seeks to justify a strike based on a juror's conduct or demeanor: the party must give prior notice of intent to rely on those bases so the Court may observe the juror and make an appropriate determination. Rule 37 (i).

This Court should adopt these aspects of Rule 37, because they address the long-recognized difficulty that many common "race-neutral" reasons that are used to justify peremptory strikes are too easily susceptible to unconscious bias:

> Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King, supra,* at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's

> own conscious or unconscious racism may lead him to accept such an explanation as well supported . . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.

See Batson, 476 U.S. at 106 (Marshall, J., concurring).

Conclusion

In light of the foregoing, and pursuant to Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and the Court's inherent authority, this Court must apply the objective observer standard set forth in Washington General Rule 37 when ruling on the parties' objections to peremptory strikes due to alleged race, ethnicity, or gender discrimination. Doing so will eliminate the unfair exclusion of potential jurors on discriminatory bases, which has long been a persistent problem in North Carolina.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. __ CRS ____

STATE OF NORTH CAROLINA	)	
	)	**DEFENDANT'S MOTION**
v.	)	**TO PRESERVE ALL NOTES,**
	)	**QUESTIONNAIRES, AND OTHER**
DEFENDANT	)	**DOCUMENTS FROM JURY SELECTION**

COMES NOW the Defendant, _____, by and through counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the North Carolina Constitution and respectfully moves the Court to enter an order directing that all notes, questionnaires, and other documents collected in preparation for voir dire or used during jury selection in this case be preserved. Defendant makes this motion based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 1, 19, and 26 of the North Carolina Constitution, and *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322 (2003); *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); and *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). In support of this motion, the Defendant shows unto the Court the following.

Grounds for Motion

Defendant has a right to a jury selected without regard to race. *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). If convicted, Defendant is entitled to appeal. *See* N.C. Gen. Stat. § 15A-1444. In order to vindicate Defendant's constitutional rights on appeal, Defendant must establish a full record of the constitutional violation. *See* N.C. App. R. 9. Indeed, it has long been established that is it the duty of the appellant to see that the record is properly preserved.

State v. Atkinson, 275 N.C. 288 (1969). Where a defendant does not include in the record any matter tending to support the grounds for objection, the defendant has failed to carry the burden of showing error. *State v. Duncan*, 270 N.C. 241 (1967). Assignments of error based on matters outside the record are improper and must be disregarded on appeal. *State v. Hilton*, 271 N.C. 456 (1967).

With regard to ensuring a proper record for any alleged violations of *Batson*, the following materials are unquestionably relevant to any inquiry in the appellate division concerning whether race was significant in the strike decision:

- **Jury questionnaires**. The jury questionnaires, completed by each juror questioned during voir dire, are the best record of juror race. *See State v. Payne*, 327 N.C. 194, 199, 394 S.E.2d 158, 160 (1990) (inappropriate to have court reporter note race of potential jurors; an individual's race "is not always easily discernible, and the potential for error by a court reporter acting alone is great"). In addition to including self-identification of race by each prospective juror, the questionnaires also include basic demographic information – age, gender, marital status, employment, and so on – pertinent to determining whether or not race was a factor in jury selection. *See Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 241 (2005) ("side-by-side comparisons" of black venire panelists who were struck and white panelists allowed to serve constitutes "powerful" evidence "tending to prove purposeful discrimination"); *Snyder v. Louisiana*, 552 U.S. 472, 483-84 (2008) (reversing conviction and granting *Batson* relief based on the "significant" and "particularly striking" similarities between a black venire member excused by the prosecution and two passed white venire members).

- **Prosecution notes**. The Supreme Court has made clear that the contents of the prosecution's file, including lists of jurors coded by race, highlighted racial designations, and notes on particular jurors are relevant to the *Batson* inquiry. *See Foster*, 136 S. Ct. at 1747-48 (considering prosecutor notes as evidence of discrimination); *id*. at 1749-50 (using prosecution notes to rebut prosecution's proffered explanation for strike); *id*. at 1753 (prosecutor's handwritten note "fortifies our conclusion that [the proffered reason] was pretextual"); *id*. at 1755 ("The contents of the prosecution's file, however, plainly belie the State's claim that it exercised its strikes in a 'color-blind' manner. The sheer number of references to race in that file is arresting.") (record citation omitted).

- **Training materials**. Evidence that prosecutors were trained in how to evade the strictures of *Batson* is relevant to the determination of whether race was significant in the strike decision. *See Miller-El II*, 545 U.S. at 264 (considering evidence of a jury selection manual outlining reasons for

excluding minorities from jury service); *Foster v. Chatman*, Brief of Amici Curiae of Joseph diGenova, et al., available at http://www.scotusblog.com/case-files/cases/foster-v-humphrey/ at 8 (describing North Carolina prosecution seminar in 1994 that "train[ed] their prosecutors to deceive judges as to their true motivations").

- **Criminal record checks**. To the extent the State bases strike decisions on the criminal records of prospective jurors or their family members, evidence that the prosecutor selectively reviewed the criminal records of certain racial groups is relevant to the *Batson* inquiry. *See Kandies v. Polk*, 385 F.3d 457, 475 (4th Circ. 2004) (denying relief on *Batson* claim and noting petitioner could have met his burden by establishing that the prosecution only discussed prospective African-American jurors with the local police department).[1]

Accordingly, Defendant asks the Court to direct the prosecution to preserve all of its jury questionnaires, notes, training materials, criminal record checks, and any other documents collected in preparation for voir dire or used during jury selection in this case.

Respectfully submitted, this the ____ day of _____.

_____
COUNSEL FOR DEFENDANT

[1] The United States Supreme Court subsequently granted the petitioner's request for a writ of *certiorari*, vacated the judgment and remanded the case for further consideration in light of *Miller-El II*. *Kandies v. Polk*, 545 U.S. 1137 (2005).

CERTIFICATE OF SERVICE

I hereby certify that Defendant's Motion to Preserve has been duly served by first class mail upon _____, Office of District Attorney, _____, by placing a copy in an envelope addressed as stated above and by placing the envelope in a depository maintained by the United States Postal Service.

This the _____ day of _____.

_____
COUNSEL FOR DEFENDANT

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?

STEP ONE: PRIMA FACIE CASE

You have burden to show an inference of discrimination

***Johnson v. California*,** 545 U.S. 162, 170 (2005).

"Not intended to be a high hurdle for defendants to cross." *State v. Hoffman*, 348 N.C. 548, 553 (1998).

"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*, 841 S.E. 2d at 498.

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*, 841 S.E.2d at 497

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

> **"The State has stuck ___% of African Americans and ___% of whites"**
> **or**
> **"The State has used 3 of its 4 peremptory strikes on African Americans"**

- **Give the history of strike disparities and *Batson* violations in this DA's office/prosecutor.** *Miller-El*, 545 U.S. at 254, 264; *Flowers v. Mississippi,* 139 S.Ct. 2245 (2019); *Hobbs*, 841 S.E. 2d at 501 (Contact CDPL for data on your county to reference.)
- **State questioned juror differently or very little.** *Miller-El*, 545 U.S. at 241, 246, 255.
- **Juror is similar to white jurors passed (describe how).** *Foster v. Chatman,* 136 S.Ct. 1737, 1750 (2016); *Snyder,* 552 U.S. at 483-85.
- **State the racial factors in case (race of Defendant, victim, any specific facts of crime).**
- **No apparent reason for strike.**

STEP TWO: RACE-NEUTRAL EXPLANATION

Burden shifts to State to explain strike

- **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.

STEP THREE: PURPOSEFUL DISCRIMINATION

You now have burden to prove race was a <u>significant factor</u>

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 four of eleven reasons given).

- **The reason <u>applies equally to white jurors</u> the State has passed.** *Miller-El,* 545 U.S. at 247, n.6. 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 <u>not supported by the record</u>.** *Foster,* 136 S.Ct. 1737, 1749.
- **The reason is <u>nonsensical or fantastic</u>.** *Foster*, 136 S.Ct. at 1752.
- **The prosecutor <u>failed to ask the juror any questions about the topic</u> that the State now claims disqualified them.** *Miller-El,* 545 U.S. at 241.
- **State's reliance on juror's <u>demeanor</u> is inherently suspect.** *Snyder*, 552 U.S. at 479, 488.
- **A <u>laundry list</u> of reasons is inherently suspect.** *Foster*, 136 S.Ct. at 1748.
- **<u>Shifting reasons</u> are inherently suspect.** *Foster*, 136 S.Ct. at 1754.
- **State's reliance on juror's expression of <u>hardship or reluctance to serve</u> 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).
- **<u>Differential questioning</u> is evidence of racial bias.** *Miller-El,* 545 U.S. at 255.
- **<u>Prosecutor training and prior practices</u> are relevant.** *Miller-El*, 545 U.S. at 263-64.

<u>JUDGE GRANTS YOUR OBJECTION: REMEDY</u>

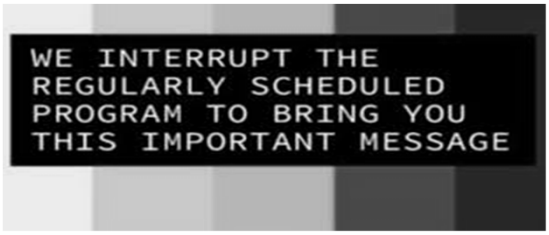
In judge's discretion to:

- **Dismiss the venire and start again** OR
- **Seat the improperly struck juror(s).** *State v. McCollum,* 334 N.C. 208 (1993).

RACIAL JUSTICE LITIGATION UPDATE

Emily Coward & Elizabeth Hambourger
Public Defender Conference
August, 2020

1



2

https://www.newsobserver.com/news/local/crime/article243199551.html

THE WALL STREET JOURNAL.

US

Breaking With Tradition, Some Judges Speak Out on Racial Injustices

State supreme courts pledge to root out bias in judicial system and heal 'raw wounds of racism'

3

THESE ARE NOT NORMAL TIMES - SEIZE THE MOMENT!

Now is the time to be bold in racial justice litigation strategies!

- We have a NCSC leading and willing to be led on racial justice
- We have a Task Force taking a comprehensive look at racial justice reform
- ABA, Conference of Chief Justices, other groups all endorsing reform and/or bias education

4

Racial Justice Act Rulings

2015:

"the trial court abused its discretion by denying [the State's] third motion for a continuance."

5

Racial Justice Act Rulings

2020: History matters!

- "An understanding of the history and evolution of racial discrimination is necessary in order to understand why the RJA was passed."
- "The same racially oppressive beliefs that fueled segregation manifested themselves through public lynchings, the disproportionate application of the death penalty against African-American defendants, and the exclusion of African-Americans from juries."
- RJA = "a statutory mechanism for rooting out the insidious vestiges of racism in the implementation of our state's most extreme punishment."

6

WHAT CAN YOU DO?

#1: Make *Batson* Objections

7

Major *Batson* Developments in the NCSC Refresher: Three Step Framework

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

8

New NC *Batson* decisions

https://www.youtube.com/watch?v=MpChsigQogk&t=8s

- *State v. Hobbs*, remanded May 1, 2020
- *State v. Bennett*, remanded June 5, 2020

9

Takeaways from *Hobbs* and *Bennett*

PRIMA FACIE CASE IS A LOW BAR

STRIKES BY OBJECTING PARTY ARE IRRELEVANT

HISTORY MATTERS

COMPARATIVE JUROR ANALYSIS IMPORTANT

COURTS MUST SHOW THEIR WORK IN REVIEWING EVIDENCE

JURORS MUST SELF-IDENTIFY RACE

PRIMA FACIE CASE MOOT WHEN PROSECUTOR STATES RACE- NEUTRAL REASON

10

Toolkit for Litigating *Batson*

11

Example of *Batson* objection: *State v. Bennett*

Defense Counsel:

"the basis of my motion goes to the fact that in Seat Number[ ] 10, we had two jurors… 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."

12

Example of *Batson* objection: *State v. Hobbs* (Method #1)

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.

13

Example of *Batson* objection: *State v. Hobbs* (Method #2)

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.

14

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

Qualified Black Jurors

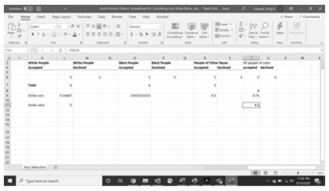
Qualified White Jurors

15

$$\frac{6}{11} \div \frac{2}{20} = 5.5$$

(55%) (10%)

16



USE AN EXCEL SPREADSHEET TO TRACK STRIKE DATA

17

Pending NC *Batson* decisions

- *State v. Clegg*, PDR granted
- *State v. Bell*, cert pending
- *State v. Campbell*, review pending after dissent in COA

State was looking for male jurors and potential foreperson. Was making a concerted effort to send male jurors to the Defense as they were taking off every male juror.

This the 9th day of January 2012.

Gregory C. Butler
Assistant District Attorney
Prosecutorial District 11B

Sworn and Subscribed to me this the 9th day of January 2012.

Billie F. Hood (Pass)
NOTARY PUBLIC

My commission expires 4-26-2015

BILLIE F. HOOD NOTARY PUBLIC LENOIR COUNTY, N.C.

18

"I have sat in that young man's seat and I don't feel this system to be fair."

"Me myself, I have faith in the judicial system. But I am aware of what's going on the in world. I got trust in the system, but I know it's flawed."

"I'm going to be weary of the things officers say. I'm going to have my doubts."

"It would affect my ability to be fair and impartial because I called the police for help, and they locked me up. I feel a certain way about law enforcement."

"I believe the system is racist and disadvantages people of color."

"I am seeing a young black male facing life not being jurored by a jury of his peers."

"I've had experiences that weren't so good or so fair. An officer grabbed me and my friends and snapped us against the car."

19

WHAT CAN YOU DO?

#2: Request Complete Recordation At Every Trial

20

State v. Campbell

"Defendants are entitled to have their *Batson* claims and the trial court's rulings thereon subjected to appellate scrutiny. To do so, it is incumbent on counsel to preserve a record from which the reviewing court can analyze the *Quick* factors. **Thus, we urgently suggest that all criminal defense counsel follow the better practice and request verbatim transcription of jury selection."**

21

WHAT CAN YOU DO?

#3: Expose Race as the Issue Whenever You Can

22

STATE V. COPLEY: RAISING RACE IN CLOSING ARGUMENT

No news is good news:

nothing stopping you from making non-derogatory references to race where necessary to protect your client's rights. See Justice Earls's concurrence.

23

State v. Johnson

- **Equal protection challenge to racial profiling in traffic stop**
- **Improper (in our opinion) importing of Fourth Amendment standard into Equal Protection analysis**
- **Keep an eye out for this one at the NCSC**

24

WHAT CAN YOU DO?

#4: Unearth Racist Origins of Current Practices

25

Discriminatory Prosecution of Voters

1. Litigation in Hoke and Alamance Counties
2. Accused voters prosecuted under Jim Crow law
3. Excellent example of insisting on the relevance of history when representing clients facing apparently race-neutral charges

26

Unearthing the origins of "safekeeping"

Fearing a lynching attempt, the sheriff took Lawrence to the State Prison in Raleigh, rather than jailing him in Hertford County's jail in Winton. Confining an African American suspect in Raleigh's more secure State Prison was a common practice throughout the nineteenth and twentieth century in North Carolina. Suspects were described as being taken to Raleigh for "safekeeping," a phrase—initially used by sheriffs and other law-enforcement officers to describe the practice of jailing enslaved runaways until their enslavers paid out a reward and collected them—used to describe the imprisonment of suspects awaiting trial to this day.[78] A special term of court convened to try Lawrence and, anticipating a lynching attempt, local authorities secured the services of twenty-eight National Guardsmen.[79] The

Seth Kotch, **Lethal State:** ***A History of the Death Penalty in North Carolina***

27

"Motion for Defendant to be Transferred to Another Facility Until He is Needed to be Transferred Back to Vance County for Trial."

[1] Normally the term "safekeeping" or safekeeper is used when requesting a transfer of a pre-trial inmate to another jail or prison. N.C. Gen. Stat. § 162-39 specifically uses both terms. We will not, however, be using either term in the body of our motion because of the origins of those phrases in North Carolina. The term "safekeeping" was originally used to describe the practice in North Carolina of sheriffs and other law enforcement officers holding runaway enslaved persons until their enslavers paid out an award to collect them. *See* Kotch, Seth, LETHAL STATE, The University of North Carolina Press, 2019, page 39.

28

Questions?

Elizabeth Hambourger
elizabeth@cdpl.org

Emily Coward
escoward@email.unc.edu

29

UNC SCHOOL OF GOVERNMENT

ADMINISTRATION OF JUSTICE BULLETIN NO. 2020/02 | JUNE 2020

Securing the Release of People in Custody in North Carolina During the COVID-19 Pandemic

Ian A. Mance

This bulletin analyzes five potential mechanisms for securing the release of people in custody in North Carolina during the COVID-19 pandemic:

- federal habeas,
- state habeas,
- appeal bonds,
- joint motions for appropriate relief (MARs), and
- parole reviews "in the interests of justice."

This bulletin and other reference materials will be posted on the School of Government's Public Defense Education microsite. Motions and orders referenced herein will be made available through the N.C. Office of Indigent Defense Services (IDS) COVID-19 resources online portal.

Federal and State Habeas Claims

The Right to a Meaningful Remedy

COVID-19 represents a significant threat to the health and lives of people incarcerated in North Carolina, and it has left advocates across the state searching for legal mechanisms to protect their clients in custody. In recognition of this threat, the North Carolina Department of Public Safety (DPS) has begun releasing some people from custody who are pregnant or aged 65 and older with underlying health conditions. However, no obvious remedy exists for people who appear to meet DPS criteria but are not chosen for release, or for younger people with medical conditions that make them uniquely vulnerable to the effects of the disease. Attorneys are finding existing legal doctrines inadequate in the face of a highly contagious virus for which population density is a principal aggravator. Capturing the dilemma now facing many courts, one judge recently queried what might be done "if confinement itself is the unconstitutional

Ian A. Mance is an attorney with the Public Defense Education group at the UNC School of Government. He engages in research, training, and consultation for public defenders, assigned counsel, and court officials on issues related to the COVID-19 pandemic.

© 2020. School of Government. The University of North Carolina at Chapel Hill.

'condition of confinement'?" *Essien v. Barr*, No. 20-CV-1034-WJM, 2020 WL 1974761, at *3 (D. Colo. Apr. 24, 2020).

Claims related to the dangers of prison life are generally litigated as civil actions under 42 U.S.C. § 1983. *Farmer v. Brennan*, 511 U.S. 825, 845–46 (1994); *see generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In addition to damages, remedies can include orders to restore constitutionally acceptable conditions. *Farmer*, 511 U.S. at 845. However, a "constitutional wrong" requires a "realistic" and practical remedy, *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 339–40 (2009), and early cases suggest many courts have found traditional remedies a poor match for the virus. As of the first week of June, the four biggest clusters of known COVID-19 outbreaks in the United States were all linked to correctional facilities. *See* *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, June 3, 2020.

As a matter of both state and constitutional law, the exposure of inmates to a serious, communicable disease is a violation of rights that requires an adequate remedy. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding Eighth Amendment prohibits officials from "ignor[ing] a condition of confinement that is . . . likely to cause serious illness . . . the next week or month or year"); N.C. Const. art. I, § 18 (stating "every person for an injury done him in his . . . person . . . shall have remedy by due course of law").[1] The transmissibility of COVID-19, however, has made it difficult for courts to fashion orders capable of ensuring constitutional and

1. While conditions-of-confinement challenges brought under the U.S. Constitution are generally evaluated under the Eighth Amendment, that is not always the case. In claims brought by pretrial detainees, some courts now apply a more plaintiff-friendly "objective standard to evaluate . . . prison conditions." *See Estate of Vallina v. Cty. of Teller Sheriff's Office*, 757 F. App'x 643, 646–47 (10th Cir. 2018) (unpublished) (noting that the Second, Seventh, and Ninth Circuits use this standard, while the Fifth, Eighth, and Eleventh Circuits still use the Eighth Amendment subjective deliberate indifference standard); *People ex rel. Stoughton v. Brann*, No. 451078/2020, 2020 WL 1679209, at *1 (N.Y. Sup. Ct. Apr. 6, 2020) (citing the Due Process protections of the Fifth and Fourteenth Amendments in granting state habeas relief to group of pretrial detainees endangered by COVID-19 on Rikers Island). The reason for this change is rooted in the U.S. Supreme Court's 2015 opinion in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which considered an excessive force claim brought by a pretrial detainee but also discussed conditions-of-confinement challenges. A divide exists as to whether the opinion controls conditions-of-confinement claims by pretrial detainees or is limited to excessive force. *Kingsley* held that excessive force, while properly evaluated for "convicted prisoners" under the Eighth Amendment's Cruel and Unusual Punishment Clause, should be analyzed for "pretrial detainees under the Fourteenth Amendment's Due Process Clause." *Id.* at 2475. The Court noted that the "language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all . . . ." *Id.* The opinion cited extensively to *Bell v. Wolfish*, 441 U.S. 520 (1979), a conditions-of-confinement case, and stated that "a pretrial detainee can . . . prevail by showing that the [challenged] actions [related to conditions of confinement] are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" *Kingsley*, 135 S. Ct. at 2475 (quoting *Bell*, 441 U.S. at 561). The Court cited language in *Bell* that indicated that in "appl[ying] this . . . objective standard to evaluate a variety of prison conditions," the *Bell* Court "did not consider the prison officials' subjective beliefs." *Id.* (quoting *Bell*, 441 U.S. at 541–43). While the Fourth Circuit does not appear to have squarely addressed the proper standard for conditions cases brought by pretrial detainees post-*Kingsley*, it did cite to *Kingsley* approvingly in a case that considered whether "the imposition of disciplinary segregation without a hearing violated [a pretrial detainee's] procedural due process rights." *See Dilworth v. Adams*, 841 F.3d 246, 248, 251–52 (4th Cir. 2016). As a result, pretrial detainees in North Carolina threatened by COVID-19 may face a lower bar to challenging the conditions of their confinement than those who have been convicted.

© 2020. School of Government. The University of North Carolina at Chapel Hill.

habitable conditions in prisons. *See generally Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 1916883 (S.D. Tex. Apr. 20, 2020) (detailing unique challenge of creating remedy for dangers posed by COVID-19 in a prison setting).

This reality has prompted some advocates and courts to look to habeas relief as a means of protecting the lives of people in custody. This section analyzes the viability of state and federal habeas proceedings as a means of relief for North Carolina prisoners affected by the COVID-19 pandemic. The contours of habeas law are evolving fast during the COVID era. Early opinions suggest that the remedy is more likely to be granted in cases involving people with pre-existing health conditions that make them acutely vulnerable to the disease, who are housed in facilities with significant outbreaks that authorities have struggled to contain.[2]

Federal Habeas Corpus

The U.S. Supreme Court has never directly ruled whether federal habeas is an appropriate vehicle to challenge one's confinement in unconstitutional conditions. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862–63 (2017); *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 498–99 (1973). In the absence of clarity, the Federal Circuit Courts of Appeal have split on the issue. *See Camacho Lopez v. Lowe*, No. 3:20-cv-563, ____ F. Supp. 3d ____, ____, 2020 WL 1689874, at *5 (M.D. Pa. Apr. 7, 2020) (collecting cases).

The Fourth Circuit has "never addressed . . . in a published decision" whether "conditions-of-confinement claims are . . . cognizable in habeas proceedings," *Wilborn v. Mansukhani*, 795 F. App'x 157, 163–64 (4th Cir. 2019). Unpublished decisions by federal district courts within the circuit, a number of them quite recent, have reached different conclusions. *Compare Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020) (finding that habeas claim "seeking release because of unconstitutional conditions of treatment is cognizable") *with Toure v. Hott*, No. 1:20-CV-395, 2020 WL 2092639, at *7–8 (E.D. Va. Apr. 29, 2020) (stating "disagree[ment] with the reasoning of *Coreas*" and detailing "reasons to believe the Fourth Circuit would . . . hold § 2241 is an inappropriate means to challenge one's conditions of confinement"). The *Toure* court seems to reflect the weight of the unpublished district court opinions in the Fourth Circuit.

The science of COVID-19 could cause a reevaluation of the equities. Some courts that have historically rejected habeas as a "means for remedying condition of confinement constitutional violations" have indicated that, should a record show that "conditions . . . cannot be modified to reasonably eliminate [COVID-19] risks, [they] may find [the] argument for habeas relief persuasive." *A.S.M. v. Donahue*, No. 7:20-CV-62 (CDL), 2020 WL 1847158, at *1 (M.D. Ga. Apr. 10, 2020). They have observed that "the general principle eschewing habeas relief as a [remedy] . . . rests on the assumption that eliminating the contested confinement conditions is possible without releasing the detainee from detention." *Id.*

---

2. One North Carolina judge, citing failures with testing and actions in contradiction of CDC guidelines, determined that officials had acted with deliberate indifference to the safety of those in custody and granted a preliminary injunction to a coalition of civil rights groups that sued on their behalf. See Bench Memo, *NAACP v. Cooper*, 20-CVS-500110 (Wake Cty. Sup. Ct. June 8, 2020) (memorializing oral order finding deliberate indifference by state officials and granting preliminary injunction against state prison system). The case did not involve habeas relief. Instead, the groups petitioned the court for a writ of mandamus and sought declaratory and injunctive relief and the appointment of a special master. *See* Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus, *NAACP v. Cooper,* 20-CVS-500110 (Apr. 20, 2020).

© 2020. School of Government. The University of North Carolina at Chapel Hill.

The "unprecedented circumstances" and "unique context in which litigation over COVID-19 arises . . . [and] the sudden threat to mortality from the spread of the virus in a congregate setting" has "cast . . . doubt" on the viability of long-established judicial doctrines used to adjudicate conditions-of-confinement claims. *Money v. Pritzker*, No. 20-CV-2093, 2020 WL 1820660, at *9 (N.D. Ill. Apr. 10, 2020). This development may mean that attorneys could find success with federal habeas petitions on behalf of people who are endangered because of age, pre-existing conditions, a COVID-19 outbreak at their facility, or a combination of factors.

One court recently observed that there was "good authority" for the argument that "release from custody is the only effective remedy available under . . . circumstances [where], for all practical purposes, there is no way [someone] can avoid infection in [] close quarters," while also noting that "none of the potentially applicable precedents was decided with [the realities of a pandemic] in mind." *Essien v. Barr*, No. 20-CV-1034-WJM, 2020 WL 1974761, at *3 (D. Colo. Apr. 24, 2020). Courts confronting the threat of COVID-19 in prisons are finding § 1983 inadequate "as a method of vindicating constitutional claims that sound in the 'core of habeas.'" *Camacho Lopez v. Lowe*, No. 3:20-CV-563, 2020 WL 1689874, at *5–6 (M.D. Pa. Apr. 7, 2020), *as amended* (Apr. 9, 2020), *for text, see* No. 3:20-CV-563, 2020 WL 1812445 (M.D. Pa. Apr. 9, 2020). Some have concluded that the "extraordinary conditions" occasioned by COVID-19 "warrant a habeas remedy." *Id*.

Federal Habeas Class Relief

It is possible that the exigencies of the pandemic may warrant broader, class wide relief. Habeas class actions are uncommon, but the U.S. Supreme Court has never foreclosed them, despite having had several opportunities. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 858 n.7 (2018) (Thomas, J., concurring); *Schall v. Martin*, 467 U.S. 253, 261 n.10 (1984); *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979); *Middendorf v. Henry*, 425 U.S. 25, 30 (1976); *Harris v. Nelson*, 394 U.S. 286, 294 n.5 (1969). Perhaps the most famous case involving the mass release of prisoners began as a conditions-of-confinement case, but "[a]fter years of litigation, [when] it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison population," ultimately transformed into "the functional equivalent of 46,000 writs of habeas corpus." *Brown v. Plata*, 563 U.S. 493, 500 (2011); *id.* at 560 (Scalia, J., dissenting).

As more prisons become afflicted with COVID-19, and as courts, officials, and advocates struggle to identify alternative means for them to meet their constitutional obligations, habeas relief, even class relief, could emerge as a solution. A coalition of civil rights organizations, including the ACLU of North Carolina, is presently attempting to make that case with a complaint filed on May 26, 2020, in the Eastern District of North Carolina on behalf of people incarcerated at the Federal Correctional Complex in Butner, NC, where, as of the date of filing, nine people had died of COVID-19. *See* Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241 and Class Action Complaint for Injunctive and Declaratory Relief, *Hallinan v. Scarantino*, 5:20-hc-02088-FL (E.D.N.C. May 26, 2020).

A federal district court in Ohio, acting in response to a similar emergency habeas class petition, recently held that, "[a]gainst a backdrop where approximately one out of every four Elkton inmates . . . tested positive for COVID-19, [the prison] must move inmates out." *See* Order, *Wilson v. Williams*, No. 4:20-cv-00794-JG (N.D. Ohio May 19, 2020). The court directed the State of Ohio to make immediate expanded use of home confinement, compassionate release, and transfer to other facilities to significantly reduce the prison population. *Id*. On May 26, 2020, the U.S. Supreme Court denied a government request to stay the order. *See* Adam

© 2020. School of Government. The University of North Carolina at Chapel Hill.

Liptak, *Supreme Court Refuses to Stop Order to Move Inmates From Virus-Ravaged Prison*, N.Y. Times, May 26, 2020. However, on June 5, the Court reversed itself, granting a second government request for a stay. *See* Dan Sewell, *Supreme Court Delays Federal Prison Inmates' Release in Ohio*, Associated Press, June 5, 2020.

State Habeas Corpus

State habeas claims could emerge as a remedy in North Carolina, as they have in other states, for those seeking review of conditions of confinement.[3] *See, e.g., Bergamaschi v. Cuomo*, No. 20 CIV. 2817 (CM), 2020 WL 1910754, at *4 (S.D.N.Y. Apr. 20, 2020) (stating that "numerous" prisoners have "petition[ed] for a writ of habeas corpus in [New York's trial-level courts], . . . and many [have been] granted"). One virtue of the North Carolina habeas statute, at least for advocates, is that application for the writ can be made to "any one of the superior court judges," irrespective of the county of conviction or incarceration, and proceedings generally move quickly. *See* Chapter 17, Section 6(2) of the North Carolina General Statutes (hereinafter G.S.); *State v. Miller*, 97 N.C. 451, 451 (1887). The procedures for applications for the writ are relatively straightforward and are detailed in G.S. 17-7, requiring a general explanation as to why the person's "imprisonment or restraint is alleged to be illegal." G.S. 17-7(4). Orders from state habeas proceedings under Chapter 17 are not appealable, although they are reviewable by certiorari. *See State v. Niccum*, 293 N.C. 276, 278 (1977) (calling rule "firmly established" and stating that the "remedy, if any, is by petition for certiorari addressed to the sound discretion of the appropriate appellate court").

Some sources, including the *North Carolina Superior Court Judges' Benchbook,* state only the general rule from G.S. 17-4 that the writ is to be denied if it is determined the applicant is incarcerated "by virtue of . . . order, judgment or decree of a competent tribunal," *See, e.g.,* Jessica Smith, *Habeas Corpus* 1 (Mar. 2014), *in* North Carolina Superior Court Judges' Benchbook (stating "habeas is not the proper procedure for challenging a detention pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction"). However, well-recognized exceptions to the general rule exist. *See* 2 Julie Ramseur Lewis & John Rubin, North Carolina Defender Manual § 35.4C, State Habeas Corpus: Scope of Writ (2d ed. 2012). G.S. 17-4 must be read in conjunction with G.S. 17-33, which provides that applicants can avail themselves of the writ if one of the enumerated conditions are present. *State v. Leach*, 227 N.C. App. 399, 411 n.6 (2013); *see also Hoffman v. Edwards*, 48 N.C. App. 559, 561–62 (1980) (citations omitted) (stating that while "[t]raditionally, the writ of habeas corpus was thought to issue only to ascertain whether the court . . . had jurisdiction of the matter or . . . exceeded its power, . . . it is clear now that . . . habeas corpus jurisdiction is much broader"). One situation where a court may exercise habeas jurisdiction is "[w]here, though the original imprisonment was lawful, yet by some . . . event, which has taken place afterwards, the party has become entitled to be discharged." G.S. 17-33(2); *see also In re Harris*, 241 N.C. 179, 181 (1954) (recognizing this provision); *In re Imprisonment of Stevens*, 28 N.C. App. 471, 473–74 (1976) (same).

Medically vulnerable prisoners who are unable to socially distance might argue that an outbreak of COVID-19 in their facility constitutes an "event" that has "entitled [them] to be discharged"—at least from that facility. G.S. 17-33(2). The North Carolina Court of

3. State habeas relief is not available to those detained pursuant to federal authority, including those detained by state officials in accordance with 287(g) immigration agreements. *Chavez v. McFadden*, No. 437PA18, 2020 WL 3025855, at *9 (N.C. June 5, 2020) (citing *In re Tarble*, 80 U.S. 397, 409 (1871)).

© 2020. School of Government. The University of North Carolina at Chapel Hill.

Appeals, citing G.S. 17-33(2), has indicated that people may apply "for the issuance of a writ of habeas corpus when the applicant, although originally incarcerated in a lawful manner," can demonstrate "some clear constitutional violation has occurred." *Leach*, 227 N.C. App. at 411 & n.6. At least two federal courts evaluating the provision in the context of parole have agreed. *See Bey v. Hooks*, No. 5:15-HC-2097-FL, 2018 WL 2465471, at *4 (E.D.N.C. June 1, 2018) (citing *Warren v. Smith*, No. 5:13-HC-2220-D, 2015 WL 631331, at *3–4 (E.D.N.C. Feb. 12, 2015); *Cook v. Smith*, No. 1:08CV300, 2011 WL 1230793, at *2 (M.D.N.C. Mar. 28, 2011)).

Certain events, such as the commitment of far more people to a facility than it was built to hold, have been found so disruptive to the provision of prisoner healthcare as to amount to "a systemic violation of the Eighth Amendment" for which the only solution is "a reduction in the prison system population." *Brown v. Plata*, 563 U.S. 493, 500 (2011). Any such event in North Carolina prisons would likely also violate Article I, Section 27 of the North Carolina Constitution, which "mirrors the Eighth Amendment," *State v. Hill*, 262 N.C. App. 113, 120 (2018), and "historically has [been] analyzed . . . the same." *State v. Green*, 348 N.C. 588, 603 (1998).

Prison outbreaks of COVID-19, if not adequately controlled, might be "events" significant enough to warrant habeas relief. *Cf. Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (stating Eighth Amendment violation lies where "official knows of and disregards an excessive risk to inmate health"); *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (stating failure to provide prisoners with adequate "medical care, and reasonable safety . . . transgresses . . . the Eighth Amendment"). State habeas thus may provide a remedy for people endangered by the virus. Relief might be an order for home confinement, transfer to a prison hospital or safer correctional facility, or something in between. The statutes offer courts the discretion and authority to set terms other than unconditional release. *See* G.S. 17-38 (stating those "set at large upon any writ of habeas corpus" may be "detained . . . by the legal order or process of the court"); *see also State v. Leach*, 227 N.C. App. 399, 411 n.6 (2013) (stating there is no merit to argument that "the only relief available in a habeas corpus proceeding is discharge from incarceration"). Because of this flexibility, some courts, considering such a petition for perhaps the first time and under unprecedented circumstances, may find the remedy appropriate.

Appeal Bonds

Appeal bonds are another mechanism that advocates might consider using during the COVID-19 pandemic as a means of deferring their clients' entry into the prison system or getting them out of custody. They are available to any person who has filed and has pending an appeal of their conviction. The relevant statute provides that a "defendant whose guilt has been established in the superior court and is either awaiting sentence or has filed an appeal from the judgment entered may be ordered released upon conditions[.]" G.S. 15A-536(a). When considering a request for an appeal bond, a judge is to "take into account all evidence available to him which he considers reliable and is not strictly bound by the rules of evidence applicable to criminal trials." G.S. 15A-536(f).

The request for release pending appeal is normally made in court by trial counsel on conviction, but the statutes also permit appellate counsel at a later date to apply to the superior court to set release conditions or to ask for reconsideration of a denial of an appeal bond. The bonds have an intuitive appeal in cases in which the active sentence imposed is measured in

© 2020. School of Government. The University of North Carolina at Chapel Hill.

months. Without one, a defendant may otherwise serve his entire sentence before having a conviction vacated. *Cf. Ellis v. United States*, 79 S. Ct. 428, 428 (1959) (admitting to bail, in the U.S. Chief Justice's capacity as Circuit Justice for the Court of Appeals for the District of Columbia, a defendant who otherwise "might of necessity serve more than the minimum term of his sentence before there is an adjudication in the Court of Appeals"). Appeal bonds are also available for, and have sometimes been granted to, people convicted of serious felony offenses.

In seeking an appeal bond, attorneys might argue that defendants committed to custody during the height of the COVID-19 pandemic, particularly those with acute medical conditions that make them especially vulnerable, face exposure to an unreasonable risk of infection. Attorneys can point to the state's suspension of transfers to the Division of Adult Corrections, which reflects its concern about the effects of an increase in population density. Ames Alexander and Gavin Off, *Hoping to Slow Coronavirus Spread, NC Prisons Sharply Limit Inmate Movements*, Charlotte Observer, Apr. 6, 2020. Attorneys seeking appeal bonds also might argue the inequity of committing someone to an active sentence at a time when jail-prison transfers have been suspended and people lack the ability to avail themselves of earned time as they normally would in a state prison. *See* James M. Markham, *An Update on Prisons and Jails as the Courts Expand Operations*, N.C. Crim. L. Blog (UNC School of Government, June 3, 2020) (discussing "legitimate concern" of "some sentenced inmates stuck in a holding pattern in the jails . . . serving more time than they would if promptly transferred").

The little case law on appeal bonds provides that the decision to grant or deny post-trial bond is in the discretion of the superior court. *State v. Sparks*, 297 N.C. 314, 320–21 (1979); *State v. Crabtree*, 66 N.C. App. 662, 665 (1984); *State v. Keaton*, 61 N.C. App. 279, 283 (1983). Advocates seeking a bond can assure the court that a delay in executing a sentence of imprisonment in no way precludes its subsequent enforcement. *State v. Vickers*, 184 N.C. 676 (1922); *State v. Cockerham*, 24 N.C. 204 (1842). To the extent a court may be concerned about the impact of a convicted defendant's release on public safety, it has the authority to impose "conditions" on an appeal bond, including electronic monitoring. The court may require as a condition of the bond that defendants await their active sentence on home confinement. Home confinement would not constitute credit against the sentence. *State v. Jarman*, 140 N.C. App. 198, 207 (2000).

Across the country, attorneys for federal defendants in custody are seeking, and in some cases obtaining, temporary release from prison under the federal appeal bond statute, citing the dangers posed by COVID-19. *See, e.g., Clark v. Hoffner*, No. 16-11959, 2020 WL 1703870, at *5 (E.D. Mich. Apr. 8, 2020) (granting bond to defendant who received life sentence for 2003 murder conviction, citing COVID-19 outbreak); Emergency Motion for Appeal Bond, *United States v. Xiulu Ruan*, Appeal No. 17-12653-D (11th Cir. April 2, 2020). Advocates in North Carolina might consider doing the same. Unlike in the federal system, there are no statutory preconditions in North Carolina to the court granting an appeal bond.[4] Rather, the power to release a defendant pending disposition on appeal is vested solely in the discretion of the court. *See* G.S. 15A-536(a).

4. Appeal bonds, historically, have been favored in the federal system. *Cf. Rhodes v. United States*, 275 F.2d 78, 82 (4th Cir. 1960) (stating that "normally bail should be allowed pending appeal, and it is only in an unusual case that denial is justified"). Under common law, "[d]oubts whether [bail] should be granted or denied [were] always . . . resolved in favor of the defendant." *Herzog v. United States*, 75 S. Ct. 349, 351 (1955). The law did "not require applicants for bail to show that they [were] entitled to a reversal. And it [was] not the duty of the judge hearing such application to pass upon the merits of the case." *United States v. Motlow*, 10 F.2d 657, 663 (7th Cir. 1926). In 1966, Congress passed federal bail reform with

© 2020. School of Government. The University of North Carolina at Chapel Hill.

It is difficult to determine how frequently appeal bonds are granted in North Carolina, but they have been issued even in serious felony cases before the pandemic. In 2018, for example, a defendant in Catawba County convicted of serious sexual offenses and sentenced to 600 to 840 months active imprisonment entered oral notice of appeal in open court, was granted an appeal bond, and was released from custody. *See* Appellate Entries, *State v. Mize*, 16-CRS-50126-50127 (May 15, 2018) (allowing "execution of a secured bond in the amount of $100,000" and directing defendant to have "no contact with prosecuting witnesses"); *State v. Mize*, 836 S.E.2d 783 (N.C. Ct. App. 2020). The circumstances of the case suggest the bond may have been granted largely on account of the defendant's advanced age. For older defendants or people whose health is most likely to be compromised by an active prison sentence, the case illustrates the potential appeal bonds hold as a means of keeping people out of custody during the pandemic, and for those now in custody, as a means of securing their release.

Joint Motions for Appropriate Relief

Another tool that attorneys might consider when attempting to secure the release from custody of people who are particularly vulnerable to COVID-19 is a "Joint" (sometimes called "Consent") Motion for Appropriate Relief (MAR). MARs can provide a means to amend a sentence of imprisonment or vacate a criminal conviction. *See* G.S. 15A-1417. In 2012, legislative changes to the state MAR statute "authorized the court to grant a MAR if the State and defendant consent." *See* John Rubin, Motions for Appropriate Relief, *Relief from a Criminal Conviction* (2018 ed.); Jessica Smith, *Motions for Appropriate Relief* 14 (Aug. 2017), *in* North Carolina Superior Court Judges' Benchbook. The legislative change that made this possible was the addition of language to the statute permitting parties to an action to enter "into . . . an agreement as to any aspect, procedural or otherwise, of a motion for appropriate relief." G.S. 15A-1420(e). In the years since, many attorneys, often working in Clean Slate clinics, have filed MARs with the consent of district attorneys on behalf of people seeking to improve their employment prospects by vacating old criminal convictions. These motions are also available to people serving active sentences. *State v. Chevallier*, 824 S.E.2d 440, 448 (N.C. Ct. App. 2019).

As of June 1, at least sixteen people in North Carolina are known to have had orders issued for their release in response to MARs filed pursuant to G.S. 15A-1420(e) and based on concerns about their personal safety in the face of the pandemic. Judges in Durham, Orange, and Wake Counties have granted such motions. The motion in Orange County did not cite any of the grounds for relief in G.S. 15A-1415(b), resting instead on the State's stipulation that the defendant had not received the benefit of mitigation factors at sentencing. All of the motions

---

the Bail Reform Act of 1966, "with the express purpose of assuring 'that all persons, regardless of their financial status, . . . not needlessly be detained . . . pending appeal[.]' " *United States v. Provenzano*, 605 F.2d 85, 90 n.13 (3d Cir. 1979) (quoting Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214). It was not until the Bail Reform Act of 1984 that a more demanding standard was enacted at the federal level, requiring defendants to demonstrate "that the[ir] appeal 'raise[d] a substantial question of law or fact likely to result in reversal or an order for a new trial.' " *United States v. Giancola*, 754 F.2d 898, 899 (11th Cir. 1985) (quoting 18 U.S.C. § 3143). While federal appeal bonds have become harder to obtain because of Congressional bail reform, North Carolina has never deviated from the common law standard statutorily. North Carolina does not have a "substantial question of law" standard; the power to release a defendant pending disposition on appeal is vested in the discretion of the court. *See* G.S. 15A-536(a).

© 2020. School of Government. The University of North Carolina at Chapel Hill.

in Durham cited to G.S. 15A-1415(b)(8). Under that provision, a defendant may seek relief on the grounds that the "sentence imposed . . . is . . . invalid as a matter of law." Attorney Ben Finholt, Director of the Just Sentencing Project at North Carolina Prisoner Legal Services, who brought the motions in Durham, argued that the continued in-custody service of the particular sentences, under the "specific and wholly unique circumstances" of the COVID-19 pandemic, violated the Eighth Amendment to the United States Constitution and Article I, § 27 of the North Carolina Constitution. *See* Motion for Appropriate Relief, *State v. McDonald*, No. 97-CRS-10365 (April 2020); Virginia Bridges, *Durham DA, Judge OK Early Release of Convicted Drug Traffickers over COVID-19 Concerns*, News & Observer, Apr. 9, 2020. All people released so far had served a significant majority of their sentences and had release dates between 2020 and 2022.

Various formulations have been proposed and adopted with respect to who should be considered for release pursuant to a joint MAR, with some suggesting people aged 65 or older or those who have served 75 percent of their sentences as especially appropriate candidates. *Id.* The rationale behind most of the sentence modifications that have been granted is essentially that the risk from the continued service of the small proportion of the sentence yet to be served, as compared to the potential health consequences of contracting COVID-19 and likelihood of catching it in a particular prison environment, is so disproportionate as to be constitutionally suspect. *Cf. Graham v. Florida*, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment."). There is precedent in North Carolina for these kinds of sentence modifications. *See, e.g., State v. Wilkerson*, 232 N.C. App. 482, 490–91 (2014) (rejecting "State's argument that . . . trial judges have no authority to grant postconviction sentencing relief on Eighth Amendment grounds"); *State v. Stubbs*, 232 N.C. App. 274, 279 (2014) (affirming ability of trial courts to modify sentences that the court determines are "unconstitutionally excessive under . . . the Eighth Amendment to the United States Constitution . . . and Article I, Section 27 of the North Carolina Constitution").

In the case of the modifications in Durham, attorney Finholt obtained consent from District Attorney Satana Deberry, who said she agreed to join the motions "in the interests of justice." *See* Bridges, *Durham DA, Judge OK Early Release*. Deberry described her decision as consistent with her civic responsibility as an elected official to help "reduc[e] the spread of COVID-19 and protect[] vulnerable people," a population that she said "includes the people who work and live in state prison." *Id.; cf. Branti v. Finkel*, 445 U.S. 507, 519 n.13 (1980) (noting "the broader public responsibilities of . . . a prosecutor"). Deberry's county and nearby Caswell County have each had correctional staff die of COVID-19 in recent weeks, while the federal facility at Butner, which sits on the Durham-Granville County line, has suffered one of the most deadly outbreaks of any prison in the country.

A few district attorneys have publicly questioned whether they have the power to seek these sentencing modifications. *Id.* However, multiple courts have granted the motions and issued orders for release. *See, e.g.*, Consent Order Regarding Sentencing, *State v. McDonald*, No. 97-CRS-10365 (April 2020); *see also State v. Chevallier*, 824 S.E.2d 440, 448 (N.C. Ct. App. 2019) (stating "the failure to raise [an] issue [on appeal] . . . does not prevent the parties to th[e] action from entering into an agreement for appropriate relief under N.C. Gen. Stat. § 15A-1420(e)"). Advocates for people in prison who are genuinely imperiled by COVID-19—particularly those who have served a substantial majority of their sentence and who are in facilities where there have been outbreaks—might consider seeking consent from their local district attorney on a Joint Motion for Appropriate Relief in support of their client's release.

© 2020. School of Government. The University of North Carolina at Chapel Hill.

Petitions for Unscheduled Parole Review "In the Interests of Justice"

Approximately 2,000 of the 31,000+ people in North Carolina prisons, primarily those convicted and sentenced between 1981 and the 1994 Fair Sentencing reforms, remain eligible for release via the state's Parole Commission. *See Hunt v. Rand*, No. 5:10-CT-3139-FL, 2011 WL 3664340, at *1 (E.D.N.C. Aug. 18, 2011) (stating that "Section 15A–1371(b)(2) was repealed in 1994 . . . but remain[s] effective for prisoners convicted of crimes that occurred prior to the Structured Sentencing Act"), *aff'd*, 461 F. App'x 327 (4th Cir. 2012). Due to the age of their convictions, parole-eligible people also tend to be among the cohort of those incarcerated who are most vulnerable to the effects of COVID-19. The state's four parole commissioners, appointed by the governor, vote on decisions for parole in the course of their annual, bi-annual or tri-annual review of individual files, which are prepared by prison case managers and reflect the views of interested parties, who can include victims, district attorneys, the local sheriff of the person's home county, and, if they have one, the prospective parolee's attorney.

The state's parole statute can be challenging to parse. Some of the operative language in the current law is found in recent session laws that have yet to be published in the current edition of the General Statutes. The law provides that most eligible people are entitled to have their case considered by the state Parole Commission at least once a year, with the exception of those convicted of sexually violent offenses, who are to receive review every two years, and those convicted of first- or second-degree murder, who are to receive review every three years. Importantly, for purposes of the COVID-19 pandemic, "the [Parole] Commission may give more frequent parole consideration *if it finds that exigent circumstances or the interests of justice demand it*." *Atwater v. Butler*, No. 5:15-CT-3229-FL, 2018 WL 4623634, at *2–3 (E.D.N.C. Sept. 26, 2018) (emphasis added) (quoting S.L. 2015-228, § 1 (DE 65-14), *amending* G.S. 15A-1371(b)), *aff'd*, 764 F. App'x 397 (4th Cir. 2019); *Perry v. Perry*, No. 5:16-CT-3290-FL, 2019 WL 1440269, at *3–4 (E.D.N.C. Mar. 29, 2019) (quoting S.L. 2008-133, § 1, *amending* G.S. 15A-1371(b)). While it appears the Commission has rarely acted pursuant to its authority to grant people more frequent consideration "in the interests of justice," it is known to have exercised the authority on at least one occasion this year, voting to release a Greensboro man, John Coleman, otherwise not scheduled for review, who was sentenced to life in 1969, after receiving a petition on his behalf and evidence that called his fifty-year-old conviction into question. *See generally* Motion for Immediate Consideration of Parole, *State v. Coleman* (on file with author).

The "exigent circumstances" and "interests of justice" language only became part of the statute in recent years. It appears to have been added during the passage of the session laws that reduced the frequency of parole reviews for people convicted of certain sex and homicide offenses to help the law withstand challenges on *ex post facto* grounds. *See Atwater*, 2018 WL 4623634, at *3; *Perry*, 2019 WL 1440269, at *8. The addition of this language, as the *Coleman* case illustrates, provides advocates an opportunity to petition the Commission for an unscheduled parole review of eligible people who, either because of their health, the conditions in their facility, or some combination of the two, are uniquely endangered by COVID-19. In recent months, many courts around the country have invoked similar provisions to take action to protect vulnerable people. *E.g., Marlowe v. LeBlanc*, No. CV 18-63-BAJ-EWD, 2020 WL 1955303, at *3 (M.D. La. Apr. 23, 2020) ("Because . . . COVID-19 . . . [has the] ability to spread with great rapidity . . . [in] prisons, the interests of justice demand action by the Court on an

© 2020. School of Government. The University of North Carolina at Chapel Hill.

emergency basis."); *United States v. Roeder*, No. 20-1682, 2020 WL 1545872, at *3 (3d Cir. Apr. 1, 2020) ("In light of the exigent circumstances surrounding the COVID-19 pandemic . . . we were compelled to grant relief . . .").

Most people are without representation during parole reviews, and the overall process for seeking parole is rather opaque. Unlike in most states, potential parolees in North Carolina are not entitled to meet or interact with the parole commissioners. *See* Dashka Slater, *Can You Talk Your Way Out of a Life Sentence?*, N.Y. Times Magazine (Jan. 1, 2020) (identifying North Carolina and Alabama as the two states where "inmates are not even allowed to be present for the [parole] hearing"). However, applicants are permitted to be represented by counsel, and attorneys for parole applicants and other interested parties may, on request, meet in person with one of the four commissioners for half an hour and bring up to four witnesses. They also may submit written materials for consideration by the whole Commission.

Information about the Parole Commission's decisions can also be difficult to come by. However, as of this writing, at least one person is known to have been released due to the advocacy of attorneys who raised concerns about his vulnerability to COVID-19. The man, given a life sentence in 1991 for second-degree murder, had previously been approved for a Mutual Agreement Parole Program contract by the Commission and was otherwise scheduled to be released in 2021. Other attorneys are actively working on getting more cases before the Commission in the near future. At the same time, the Commission is reported to be accelerating its review of people believed to be acutely vulnerable to COVID-19. Attorneys representing parole-eligible people with special vulnerabilities to the virus who have not been notified of an unscheduled parole review should consider filing a petition asking the Commission to exercise its authority to grant one.

© 2020. School of Government. The University of North Carolina at Chapel Hill.

Use of this publication for commercial purposes or without acknowledgment of its source is prohibited.
Reproducing, distributing, or otherwise making available to a non-purchaser the entire
publication, or a substantial portion of it, without express permission, is prohibited.
For permissions questions or requests, email the School of Government at copyright_permissions@sog.unc.edu.
Other School bulletins can be accessed on the Publications page of our website: sog.unc.edu/publications.

2019 North Carolina Conditions of Release Report

Jessica Smith, W.R. Kenan Jr. Distinguished Professor, UNC School of Government &
Director, Criminal Justice Innovation Lab
Ross Hatton, UNC MPA Graduate Research Assistant
February 2020

We previously produced information about the prevalence of secured bonds at the state and county level. In this report we update that work with 2019 data and look at changes in the imposition of financial and non-financial conditions in North Carolina. A few key takeaways from our research:

- Notwithstanding North Carolina's statutory preference for imposition of nonfinancial conditions except when specified circumstances are present, G.S. 15A-534(b), in 2019 secured bonds continued to be the most commonly imposed condition of pretrial release.
- At the state level in 2019 for cases in which conditions were set, secured bonds were imposed in 66.2% of misdemeanor cases and in 79% of felony cases.
- There is considerable variability regarding the use of secured bonds at the county-level. In misdemeanor cases, for example, the county at the lowest end imposed secured bonds in 36.1% of cases; the county at the highest end imposed secured bonds in 86.8% of misdemeanor cases.
- The two counties with the greatest decrease in use of secured bonds in misdemeanor cases were Haywood and Jackson Counties. Those counties adopted consensus bail reforms in 2018 that took effect January 1, 2019. A report on that project is here.

Before we get to county level information, we offer a few notes about the data and the purpose of this report. First, our information comes from NC AOC data runs showing the *last condition* imposed in 2018 and 2019 cases. There is no way to extract from the existing case management system a history of conditions imposed in individual cases; the only way to get that information is to pull case files. Thus, the last condition in our spreadsheets may include the initial condition set by a magistrate; the condition set by a judge at the first appearance; or the condition set at a subsequent court proceeding. Second, apparently there is no field to code release to a pretrial services program. Thus, for counties that provide for that form of release, local practices will dictate how cases are reported in the data run. For example if they are coded as custody releases, they would show up in that number. We do not know for sure, but suspect that in some counties release to a pretrial services program is coded as a secured bond, possibly inflating secured bond numbers in counties that have such programs. Third, the report only shows cases for which conditions were imposed. If charges were initiated by citation or summons and the defendant was not later arrested in connection with those charges, the case is not included in this report. Finally, *we are not making any judgment about the data; stakeholders have asked for information about how their pretrial systems are functioning and this report provides one lens to look at those systems*. We understand, for example, that counties with relatively high violent crime rates might see higher rates of imposition of secured bonds in felony cases. In a forthcoming analysis, we hope to provide more information about the types of charges at the county level, giving more context to these data.

And now the 2019 county-level data. Table 1 below shows the ten North Carolina counties with the highest percentage of secured bonds imposed in highest charge misdemeanor cases. Table 2 shows the ten counties with the lowest percentage of secured bonds in those cases. Table 3 shows the ten counties with the greatest decrease, from 2018-2019, in the percentage of misdemeanor cases that received a secured bond.

Want to know where your county stands? A spreadsheet with all of our 2018 and 2019 data is here.

Table 1: 10 Counties with Highest Percentage of Secured Bonds in Misdemeanor Cases, 2019

County	Percentage of Misdemeanor Cases with Secured Bond
DARE	86.8%
FRANKLIN	85.8%
PITT	85.7%
WAKE	82.5%
HENDERSON	81.8%
BRUNSWICK	81.3%
IREDELL	81.3%
ALAMANCE	80.8%
MCDOWELL	79.7%
WATAUGA	79.1%

Table 2: 10 Counties with Lowest Percentage of Secured Bonds in Misdemeanor Cases, 2019

County	Percentage of Misdemeanor Cases with Secured Bond
JACKSON	36.1%
HAYWOOD	39.1%
GATES	40.2%
TYRRELL	41.3%
CLAY	45.9%
MECKLENBURG	46.2%
BUNCOMBE	48.8%
HYDE	49.1%
CHEROKEE	49.5%
DURHAM	53.7%

Table 3: 10 Counties with Greatest Decrease in Imposition of Secured Bonds—Misdemeanor Cases, 2018-2019

County	2019-2019 Percentage Change, Misdemeanor Cases with Secured Bond
JACKSON	-18.0%
HAYWOOD	-14.8%
GRAHAM	-13.7%
CLAY	-11.8%
DURHAM	-7.9%
ASHE	-7.9%
CARTERET	-7.7%
HARNETT	-6.8%
BUNCOMBE	-6.4%
WASHINGTON	-6.3%

For more information about North Carolina's bail system, visit the Criminal Justice Innovation Lab website: http://cjil.sog.unc.edu/.

Bail Reform in North Carolina—Why the Interest?

Author : Jessica Smith

Categories : Procedure, Uncategorized

Tagged as : bail, bond, policy, pretrial release, reform

Date : February 14, 2019

Bail reform is a hot topic in North Carolina. It was recommended by Chief Justice Mark Martin's North Carolina Commission on the Administration of Law and Justice (report here) and jurisdictions across the state are embarking on reform. In this post I discuss some of the reasons why stakeholders are interested in the issue. In a companion post, I discuss reforms that they are implementing and evaluating.

Public Safety

One reason for the interest in bail reform is a concern that the current system undermines public safety. Although North Carolina law provides for five different conditions of pretrial release, the most commonly imposed condition is the secured bond. Because a secured bond requires money to obtain release, money plays a significant role in North Carolina's pretrial justice system. As a result, wealthy but high-risk defendants can "buy" their way out of jail. Consider the drug trafficking defendant who receives a $2 million secured bond. If that defendant has financial resources he can post the bond himself or pay a bondsman to secure it. Either way the defendant walks out of jail and the bond is not forfeited if he engages in further drug crimes or kills or intimidates witnesses so that he can't be brought to trial on the original charges. Because the bond only is forfeited if the defendant fails to appear in court, nothing inherent in the bond protects the public. It is argued that this type of under-supervision of dangerous defendants undermines public safety. Moreover, some assert that the system undermines public safety by over-supervising low risk defendants, by for example requiring them to report in or submit to drug testing. Some research shows that low risk defendants perform better on release--meaning fewer rearrests--when they are released without conditions. Thus, it is argued, placing conditions of release on these defendants undermines public safety. Additionally, some evidence shows that pretrial detention creates crime. A lot of people sit in jail pretrial for some period of time because they can't pay their secured bonds. A number of studies show that low risk individuals who are detained pretrial are more likely to commit new crimes following release. For example, a recent study of almost 400,000 misdemeanor cases in Harris County, Texas (the third largest county in the nation) found that although detention reduced criminal activity in the short-term through incapacitation, by 18 months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stanford Law Review 711, 718 (2017) [hereinafter *Downstream Consequences*]. These differences persisted even after fully controlling for the initial bail amount, offense, demographic information, and criminal history characteristics. *Id.* at 717-18 Studies like this have amplified concerns about the negative impact pretrial detention has for public safety.

Costs

Another reason for interest in bail reform is cost. One aspect of cost is providing jail beds for defendants who are detained pretrial. On any given day US jails house nearly 500,000 pretrial detainees at a cost of about $14 billion a year. If these pretrial detention costs were necessary for public safety, few would object to them—for example if the evidence showed that jails were filled with the highest risk defendants who cannot safely be released into the community. The evidence however shows that we are detaining surprisingly high numbers of defendants charged with low level crimes. The Texas study noted above found that more than half of all misdemeanor defendants are detained pretrial. Researchers report similar numbers in other jurisdictions. Thus, advocates for reform argue: we are spending

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.

enormous sums of money detaining the wrong people. One alternative to pretrial detention is release or release with supervision. Even when the cost of pretrial supervision is considered, significant savings can be achieved by reducing incarceration of low-risk defendants. Additionally, as noted, research shows that pretrial detention of low-risk defendants causes crime. That crime has costs too--to victims, law enforcement, and the justice system.

Fairness

Another reason for interest in pretrial justice reform is fairness. For decades researchers confirmed the prominent role of wealth in the pretrial system, specifically, that whether a person is detained pretrial depends largely on whether he or she can afford to pay the bond imposed. This appears to be true even when relatively low amounts are required to secure release. For example one study found that in Philadelphia almost half of defendants who only needed to post a $500 deposit to obtain release failed to do so within three days of the bail hearing. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Affects Case Outcomes*, Journal of Law, Economics & Organization (forthcoming) (manuscript at 10-11) [hereinafter *Distortion of Justice*]. That researcher noted that while a percentage may prefer to stay in jail, it is reasonable to infer that many would post bail if they could afford it. Additionally, the Texas study noted above found that only about 30% of defendants from the wealthiest ZIP codes were detained pretrial versus 60-70% of defendants from the poorest ones. *Downstream Consequences* at 737. As the United States Court of Appeals for the Fifth Circuit stated in a case declaring the bail system in Harris County, Texas unconstitutional: The system causes "[a] . . . basic injustice: poor arrestees . . . are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond." ODonnell v. Harris County, 892 F.3d 147, 162 (5th Cir. 2018). Additionally, research suggests that pretrial detention increases the likelihood of conviction, of receiving a sentence to prison or jail, and the length of sentence to prison or jail. For example, the Texas study found that compared to similarly situated defendants who are released, misdemeanor defendants who are detained are 25% more likely to be convicted; 43% more likely to be sentenced to jail; and on average their sentences are nine days longer, more than double that of similar defendants who were released pretrial. *Downstream Consequences* at 717. Similarly, a Philadelphia study found that pretrial detention leads to a 13% increase in the likelihood of being convicted and 42% increase in the length of sentence. *Distortion of Justice* at 3. These studies are consistent with other research finding substantial correlations between pretrial detention and these negative case outcomes. Additionally, there are concerns about coerced pleas. Research as early as 1964 shows that pretrial detention increases the likelihood that a defendant will plead guilty. The Texas study found that pretrial detention increases the likelihood of pleading guilty by 25% for no reason relevant to guilt. *Downstream Consequences* at 771.

Racial & Ethnic Disparities

Another reason to engage in pretrial justice reform is to address racial and ethnic disparities. Nationwide, Black defendants make up 35% of the pretrial detainee population despite constituting only 13% of the US population. In fact, racial and ethnic disparities in pretrial outcomes have been well documented.

Litigation Risk

A final reason for interest in pretrial justice reform is litigation risk. Opponents of money-based bail systems have successfully brought litigation throughout the country. For example, last June the Fifth Circuit held unconstitutional the bail system in Harris County, Texas, finding that it violated indigent arrestees' right to equal protection. It explained:

"[T]he essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not.

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.

As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree."

ODonnell, 892 F.3d at 163. Cases like this have amplified concerns about money-based bail systems.

Having presented this outline of why stakeholders are interested in pretrial reform, in my next post I'll discuss the types of pretrial reforms that stakeholders are implementing and evaluating.

This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.

Bail Reform for Local North Carolina Jurisdictions—Options for Each Stage of the Pretrial Process

Jessica Smith, UNC School of Government, May 2019

ARREST	INITIAL APPEARANCE	FIRST APPEARANCE	SUBSEQUENT COURT PROCEEDINGS
Citation in lieu of arrest policies	Adhere to statutory preference for nonfinancial conditions	Adhere to statutory preference for nonfinancial conditions	Enhanced court date reminder systems
Summons in lieu of arrest policies	Implement better risk assessment tools and provide a structure for pretrial conditions decision	Implement better risk assessment tools and provide a structure for pretrial conditions decision	Offer appropriate pretrial services (e.g., mental health, transportation) and supervision (e.g., check-ins) with no up-front costs to defendants
Pre-charge diversion (e.g., mental health, substance use, youth, etc.)	Require reasons for secured bond	Require reasons for secured bond	Align procedures for OFAs after FTAs with goals (e.g., check on detention before issuing OFA; judge sets conditions in OFA to avoid mandatory bond doubling when appropriate)
Data collection & reporting	Require ability to pay determinations before financial conditions are imposed on appearance bonds	Require ability to pay determinations before financial conditions are imposed on appearance bonds	Regular review of jail rolls by jail administrator or judicial official, with court hearings scheduled as needed
	Set first court date prior to officer's next court date	Timely first appearances for all defendants, including those charged with misdemeanors	Require counsel (or waiver after opportunity to consult with counsel) for time served pleas
	Data collection & reporting	Early involvement of public defender or appointed counsel in release determination, including counsel's access to defendant in jail & to prior history record	Expedited trials for detained defendants
		Require counsel (or waiver after opportunity to consult with counsel) for time served pleas	Data collection & reporting
		Hold detention bond hearings for those detained on detention bonds	
		Data collection & reporting	

LOCAL BOND POLICY

LOCAL CULTURE