

## 7.3 Legal Restrictions on Peremptory Challenges

### A. Statutory Right to Peremptory Challenges in North Carolina

There is no constitutional right to peremptory challenges; they are a statutory creation. *See Rivera v. Illinois*, 556 U.S. 148, 157 (2009). In North Carolina, the State and each defendant in a non-capital case are entitled to six peremptory challenges. *See* G.S. 15A-1217. If there are co-defendants, the State gets six additional peremptory challenges per co-defendant. G.S. 15A-1217(b). Generally, trial judges do not have authority to grant additional peremptory challenges. *State v. Hunt*, 325 N.C. 187, 198 (1989). The court has found no error, however, where the trial judge granted each defendant an additional peremptory challenge because one juror who had been accepted by all parties was dismissed because of a family emergency. *State v. Barnes*, 345 N.C. 184, 208 (1997). Trial judges may take away peremptory challenges as a sanction. *State v. Banks*, 125 N.C. App. 681 (trial judge stripped State of two peremptory challenges for failure to preserve evidence), *aff'd per curiam*, 347 N.C. 390 (1997).

For further discussion of the laws governing peremptory challenges in North Carolina, see 2 NORTH CAROLINA DEFENDER MANUAL § 25.5B (Statutory Right to Peremptory Challenges) (2d ed. 2012).

### B. Overview of *Batson* Challenges

**Generally.** The U.S. Supreme Court has held that racial and ethnic discrimination in the exercise of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Hernandez v. New York*, 500 U.S. 352 (1991). Discrimination in jury selection also violates article I, section 26 of the N.C. Constitution, which provides that no person may be “excluded from jury service on account of sex, race, color, religion, or national origin.” *See State v. White*, 349 N.C. 535 (1998) (racial discrimination in jury selection violates both state and federal constitutions). The North Carolina Supreme Court has held that the test for proving a violation of article I, section 26 of the N.C. Constitution is identical to the three-part test in *Batson*. *State v. Augustine*, 359 N.C. 709, 715 (2005).

**Standing.** There is no standing requirement for *Batson* claims. In *Powers v. Ohio*, 499 U.S. 400 (1991), the U.S. Supreme Court held that the defendant does not have to be of the same race as improperly excluded jurors to raise a *Batson* challenge. Any defendant has standing to assert the equal protection rights of jurors. *See also State v. Locklear*, 349 N.C. 118 (1998) (explaining *Powers*); *State v. Williams*, 343 N.C. 345 (1996) (same).

**All racial groups protected under *Batson*.** *Batson* challenges can be raised in response to the use of discriminatory peremptory strikes against venire members of all races. For example, Native Americans are recognized as “a racial group cognizable for *Batson* purposes.” *State v. Locklear*, 349 N.C. 118, 136 (1998) (quoting *State v. Porter*, 326 N.C. 489, 499 (1990)); *see also United States v. Iron Moccasin*, 878 F.2d 226 (8th Cir. 1989); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987).

**Strikes based on gender prohibited.** The Equal Protection Clause also prohibits peremptory strikes based on gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *see also State v. Maness*, 363 N.C. 261, 272, (2009) (“A party alleging either a race-based or gender-based discriminatory peremptory challenge of a prospective juror must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike.” (quotations omitted)).

**Subgroups.** The U.S. Supreme Court has not decided whether subgroups, such as African American women, are a cognizable group under *Batson*. If the only African Americans accepted without peremptory challenge by the State are men, arguably there is a *Batson/J.E.B.* violation. In *State v. Best*, 342 N.C. 502 (1996), the defendant argued that the prosecutor had discriminated against African American women, but the court found the claim had not been preserved and did not address it.

### C. *Batson* Step One: The Prima Facie Case

*Batson v. Kentucky*, 476 U.S. 79 (1986), held that the party raising an equal protection challenge to a peremptory strike must first establish a prima facie case of discrimination. *See, e.g., State v. Golphin*, 352 N.C. 364 (2000) (citing *Hernandez v. New York*, 500 U.S. 352, 358–59 (1991)). In considering whether the party has established a prima facie case, the trial judge must consider all circumstances relevant to a claim of discrimination. *See Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (prima facie claim will be evaluated based on “the totality of the relevant facts” (quotations omitted)); *Snyder v. Louisiana*, 552 U.S. 472 (2008) (“[I]n considering a *Batson* objection . . . all of the circumstances that bear upon the issue of racial animosity must be consulted.”); *Golphin*, 352 N.C. 364, 426; *State v. White*, 349 N.C. 535, 548. Some of the circumstances relevant to establishing a prima facie case include the percentage of minorities challenged peremptorily; disparate questioning of minority and non-minority potential jurors; the race of the defendant, victim, and witnesses; and historical data, such as sustained *Batson* challenges against the prosecutor in prior cases. For an illustrative list of evidence, see *infra* “Evidence supporting defendant’s prima facie case at step one” in § 7.4B, Presenting an Effective *Batson* Challenge.

“Step one of the *Batson* analysis, a prima facie showing of racial discrimination, is not intended to be a high hurdle for defendants to cross.” *State v. Hoffman*, 348 N.C. 548, 553 (1998). *Hoffman* ruled that the trial judge erred in failing to find that the defendant had made out a prima facie case with respect to the prosecutor’s peremptory challenge of certain Black jurors where the defendant was Black, the victim was White, and the prosecutor had filled eleven seats with White jurors and struck every other Black prospective juror not excused for cause. The case was remanded so that the prosecutor could place his or her reasons for the strikes on the record. *See also State v. McCord*, 140 N.C. App. 634 (2000) (remanding for *Batson* hearing after trial judge erroneously failed to find prima facie case).

**Improper strike of one juror sufficient.** If even one juror is struck for racial reasons, there is constitutional error in the jury selection. *State v. Robbins*, 319 N.C. 465, 491

(1987) (“Even a single act of invidious discrimination may form the basis for an equal protection violation.”); *see also* *United States v. Vasquez–Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) (“the Constitution forbids striking even a single prospective juror for a discriminatory purpose”; quoted with approval in *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)); *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (striking a single black prospective juror for a discriminatory reason violates equal protection guarantees, even where prosecutor accepts other black jurors). *See also infra* “Comparative juror analysis at step one” in § 7.4B, Presenting an Effective *Batson* Challenge.

**Significance of minority acceptance rate.** North Carolina appellate courts have often considered the “minority acceptance rate” or “Black juror acceptance rate” when evaluating the defendant’s prima facie *Batson* claim on appeal. *See, e.g., State v. Smith*, 328 N.C. 99, 121 (1991) (observing that an important consideration bearing on whether a prima facie case is established is whether the prosecutor uses a disproportionate number of peremptory challenges to strike Black jurors). This number reflects the percentage of eligible minorities accepted, rather than peremptorily stricken, by the prosecutor. For example, if a prosecutor used peremptory strikes to remove three of five Black venire members, the acceptance rate of Black jurors would be 40%. *See, e.g.,* Excerpt from Motion for Appropriate Relief - *Batson* Claim in the Race Materials Bank at 6 in the Race Materials Bank at [www.ncids.org](http://www.ncids.org) (select “Training and Resources”) (calculating acceptance rate of Black potential jurors). The N.C. Supreme Court has found that the defendant failed to establish a prima facie case at step one where the minority acceptance rate was 66%, *State v. Ross*, 338 N.C. 280 (1994); 50%, *State v. Nicholson*, 355 N.C. 1, 24 (2002); 40%, *State v. Fletcher*, 348 N.C. 292, 320 (1998), and 37.5%, *State v. Gregory*, 340 N.C. 365, 398 (1995). The N.C. Supreme Court reversed a finding that a defendant failed to make out a prima facie case of discrimination when the prosecutor’s acceptance rate of Black jurors was 28.6%, and the overall minority acceptance rate was even lower. *State v. Barden*, 356 N.C. 316, 344–45 (2002). In that case, the court stressed that “numerical analysis of the type employed here is not necessarily dispositive.” *Id.* at 344.

In order to make arguments regarding strike rates during voir dire, the defense team will need to take careful notes of strikes and continually calculate acceptance rates as voir dire progresses. *See* Scott Holmes’s Spreadsheet for Calculating Juror Strike Ratios and Cassandra Stubbs’s Strike Data Spreadsheet in the Race Materials Bank at [www.ncids.org](http://www.ncids.org) (select “Training and Resources”). Where a prosecutor’s “acceptance rate” of minority jurors is low, defense attorneys should make note of this fact in support of a *Batson* challenge.

However, defense attorneys should not refrain from challenging strikes that appear to be race-based simply because the minority acceptance rate is not one that North Carolina appellate courts have found to be evidence supporting a prima facie claim of discrimination. The U.S. Supreme Court has observed that disparate strike rates are not a necessary element of a defendant’s prima facie *Batson* claim: “More powerful than . . . bare statistics . . . are side-by-side comparisons of some Black venire panelists who were

struck and white panelists who were allowed to serve.” *Miller-El*, 545 U.S. 231, 241. Additionally, defense attorneys should carefully consider the circumstances surrounding the prosecutor’s strikes. For example, a minority acceptance rate of 60% reflecting the acceptance of three of five Black jurors may mask the fact that, when the three Black jurors were accepted by the prosecutor, he or she was running low on peremptory strikes. Under these circumstances, the prosecutor’s acceptance of three Black jurors does not necessarily constitute evidence supporting a race-neutral justification for striking the other two Black jurors. *See Miller El*, 545 U.S. 231, 249 (fact that the State grew more “sparing with peremptory challenges as the jury selection wore on . . . weaken[s] any suggestions that the State’s acceptance of . . . the one Black juror [towards the end of the jury selection] shows that race was not in play”). As the Supreme Court has recognized, strike rates in a given case may not accurately represent the degree to which race played a role in peremptory challenges.

#### **D. Batson Step Two: The Prosecutor’s Race-Neutral Justification**

If the defendant establishes a prima facie showing of discrimination, the burden of production shifts to the State to provide a race-neutral reason for the strike. *Purkett v. Elem*, 514 U.S. 765 (1995); *Hernandez v. New York*, 500 U.S. 352 (1991). A bare denial of discrimination will not suffice. “The [State’s] explanation must be clear and reasonably specific, but need not rise to the level justifying exercise of a challenge for cause.” *State v. Bonnett*, 348 N.C. 417, 433 (1998) (quotation omitted). In *Purkett*, the U.S. Supreme Court held that, at step two, the proffered race-neutral explanation does not have to be persuasive or even plausible as long as it is facially non-discriminatory; however, the Court recognized that an implausible reason will probably fail at step three, when the court determines whether the reason offered is pretextual. 514 U.S. 765, 768; *see also State v. Fletcher*, 348 N.C. 292 (1998) (following *Purkett*); *Bonnett*, 348 N.C. 417, 433 (“unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral” (quotation omitted)). For a discussion of identifying and challenging justifications that are not race-neutral, see *infra* “Challenging justifications that are not race-neutral at step two” in § 7.4B, Presenting an Effective *Batson* Challenge.

#### **E. Batson Step Three: The Pretext Determination**

In the third step of a *Batson* challenge, the trial judge assesses the State’s proffered reason and determines whether the defendant has met the burden of proving purposeful discrimination. Before the trial judge makes this determination, the defendant is entitled to an opportunity to rebut the proffered race-neutral reasons for excusing the juror. *See, e.g., State v. Gaines*, 345 N.C. 647, 668 (1997); *State v. Peterson*, 344 N.C. 172 (1996). If the judge finds that the prosecutor’s proffered reasons are pretextual and the real reason for the strike is discriminatory, the judge must find an equal protection violation. *Hernandez*, 500 U.S. 352, 359; *Gaines*, 345 N.C. 647, 668. “At [this] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.” *Purkett*, 514 U.S. 765, 768 (1995).

Because it is relatively easy for the State to proffer a race-neutral reason for a strike, defense counsel should be prepared to show that the State's proffered explanations for strikes are not credible. Implausible reasons unrelated to the juror's fitness to serve, such as demeanor or a remote connection to a relatively minor State witness, may be pretextual. Also, if a prosecutor accepts a White juror with certain characteristics, and then challenges a Black juror based on those same characteristics, defense counsel has grounds to argue that the stated reasons for the challenge are pretextual. For example, if the prosecutor claims he struck a Black juror because she was young, list for the judge the young White jurors accepted by the prosecutor. For an illustrative list of evidence that may support a finding of pretext, see *infra* "Evidence supporting a determination of pretext at step three" in § 7.4B, Presenting an Effective *Batson* Challenge.

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**Practice note:** At step three, you must renew your objection to the challenged strikes. The North Carolina Supreme Court has held that a defendant's failure to attempt to demonstrate that the prosecutor's strike justifications were pretextual amounts to an expression of satisfaction with the explanations offered. *State v. Porter*, 326 N.C. 489, 501 (1990). Thus, silence following a prosecutor's proffer of race-neutral reasons supporting a challenged peremptory strike can be fatal to your *Batson* claim.

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**Suspect strike justifications.** North Carolina appellate courts have been deferential to trial court decisions on *Batson* challenges. Some appellate decisions have remanded the defendant's *Batson* claims for further hearing (*see, e.g., State v. Barden*, 356 N.C. 316, 344–45 (2002) (remanded for *Batson* hearing when judge improperly rejected the defendant's prima facie case); *State v. Barden*, 362 N.C. 277 (2008) (remanded for additional *Batson* hearing in light of U.S. Supreme Court cases clarifying *Batson* standards)), but only one North Carolina appellate decision has found a *Batson* violation. In that case, the prosecutor did not offer any race-neutral reason for striking at least one, and possibly two, Black jurors. *State v. Wright*, 189 N.C. App. 346 (2008).

Courts from other jurisdictions have more often found certain types of reasons for strikes insufficient. Reasons that have been viewed as indicative of pretextual discrimination include juror age, neighborhood, hairstyle, membership in predominantly African American organizations, demeanor, intelligence, and clothing. These decisions provide guidance in assessing the reasons offered by the State for peremptory challenges. *See infra* "Challenging justifications that are not race-neutral at step two" in § 7.4B, Presenting an Effective *Batson* Challenge.

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**Practice note:** If the prosecutor explains that a challenged strike of a panelist was motivated by an objectionable demeanor that you did not observe, you should ask the court to require the prosecutor to describe the demeanor with particularity, contest the prosecutor's allegations when appropriate, and offer your own characterization of the juror's demeanor for both the trial judge and the record for possible appellate review. *See, e.g., Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 518 (Tex. 2008) ("Peremptory strikes may legitimately be based on nonverbal conduct, but permitting strikes based on an assertion that nefarious conduct 'happened,' without identifying its nature and without any additional record support, would strip *Batson* of meaning.").

For example, if the prosecutor states that a potential juror appeared nervous, and the panelist appeared calm and comfortable to you, you should make the judge aware of your disagreement with the prosecutor's characterization. You may do so by, when possible, presenting testimonial evidence of a courtroom witness such as an investigator or paralegal. Otherwise, you may note your disagreement and ask the judge to make findings based on the judge's observations. Unless you have created a record, deference will be given on appeal to a trial judge's rulings on demeanor. *Snyder*, 552 U.S. 472, 477 ("determinations of credibility and demeanor lie peculiarly within a trial judge's province" (quotation omitted)); *see also Thaler v. Haynes*, 559 U.S. 43 (2010) (per curiam) (holding that although a judge must take into account, among other things, his or her observations of a juror's demeanor when a challenge is based thereon, neither *Batson* nor *Snyder* require that a "demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor"). Additionally, if the allegedly objectionable demeanor was exhibited by an accepted panelist of a different race, be sure to note this on the record.

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**No right to cross-examine prosecutor on race-neutral explanation.** The North Carolina Supreme Court has held that a defendant does not have the right to call the prosecutor as a witness to show that his or her proffered explanations are pretextual. *State v. Porter*, 326 N.C. 489, 497 (1990); *State v. Jackson*, 322 N.C. 251 (1988). Courts in other jurisdictions have allowed defendants to cross-examine prosecutors regarding their reasons for peremptory strikes (*see, e.g., Keeton v. State*, 749 S.W.2d 861 (Tex. Crim. App. 1988); *Ex Parte Lynne*, 543 So. 2d 709, 712 (Ala. 1988)); and divergent judicial approaches to this question were recently the subject of a petition for certiorari to the U.S. Supreme Court. Petition for Writ of Certiorari, *Drake v. Louisiana*, No. 09-998, 2010 WL 638483 (Feb. 18, 2010). Although the petition was denied (560 U.S. 925 (2010)), the issue is potentially subject to reconsideration, particularly in light of U.S. Supreme Court holdings stressing that *Batson* claims turn on prosecutorial credibility. *See, e.g., Purkett*, 514 U.S. 765, 769 (court's determination of racial motivation "turn[s] primarily on an assessment of [the prosecutor's] credibility").

**Defendant does not have to show race was the "sole factor" motivating the peremptory strike.** At times, a peremptory strike may be motivated by both constitutional race-neutral factors and unconstitutional race-based factors. A *Batson* challenge will succeed when, during the third step, the court determines that "race was *significant* in determining who was challenged and who was not." *State v. Waring*, 364 N.C. 443, 480 (2010) (quoting *Miller-El*, 545 U.S. 231, 252 (emphasis added in *Waring*)). The defendant does not have "to establish that race was the sole reason" for the prosecutor's use of a peremptory strike. *Waring*, 364 N.C. 443, 480–81 (holding that "sole basis" is not the correct standard and observing that the significant or motivating factor standard is "less stringent" than the "sole basis" standard; remanded for further hearing).

The U.S. Supreme Court has not determined whether the "significant factor" standard permits a peremptory strike when the "party defending the action [can] show that [the unconstitutional] factor was not determinative." *Snyder v. United States*, 552 U.S. 472,

485 (2008) (declining to reach the question). The N.C. Supreme Court's treatment of the question in *Waring* indicates that, in North Carolina, the party raising the *Batson* challenge must demonstrate only that race was a significant factor, and not a determinative one, behind the peremptory strike. The N.C. Supreme Court has not adopted a "but for" test, which would require a showing that, but for the venire person's race, the State would not have used a peremptory strike. Justice Marshall has explained that such a test "is inappropriate in the *Batson* inquiry . . . because of the special difficulties of proof that a court applying that standard to a prosecutor's peremptory-challenge decisions necessarily would encounter." *Wilkerson v. Texas*, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting from denial of cert.); see also *Cook v. Lamargue*, 593 F.3d 810, 815 (9th Cir. 2010) (summarizing circuit split on treatment of strikes in which race plays some role but is not necessarily a determinative factor and holding that a *Batson* challenge should succeed whenever race was a substantial motivating factor).

There is some support for arguing that a standard less stringent than the "substantial motivating factor" one should apply in cases of mixed prosecutorial motives for peremptory strikes. *Batson* announced an "unqualified requirement that the State offer a neutral explanation for its peremptory challenge. To be neutral, the explanation must be based wholly on nonracial criteria." *Wilkerson v. Texas*, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting from denial of cert.) (emphasis in original) (internal citation omitted); Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. LAW. REV. 279, 311 (2012) (observing that mixed-motive explanations are not neutral). Defense attorneys can argue that the "significant factor" standard should be interpreted to mean that a strike motivated in part by race is unconstitutional. "A judicial inquiry designed to safeguard a criminal defendant's basic constitutional rights should not rest on the unverifiable assertions of a prosecutor who, having admitted to racial bias, subsequently attempts to reconstruct what his thought process would have been had he not entertained such bias." *Wilkerson*, 493 U.S. 924, 927–28 (Marshall, J., dissenting from denial of cert.). This reasoning also would apply to instances in which racial motivations were not admitted but were detected by the judge at step three of the *Batson* test. Such a standard would be consistent with research recognizing the difficulty of assigning different weights to multiple motivations. See, e.g., Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. LAW. REV. 279 (2012).

**Comparative juror analysis at step three.** *Miller-El v. Dretke*, 545 U.S. 231, 241–46 (2005), identified side-by-side comparisons between Black and White panelists as an important type of evidence at step three of the *Batson* test. If a prosecutor accepts a White juror with certain characteristics, and then uses those characteristics to strike a Black juror, discrimination can be inferred. For example, in *Miller-El*, the prosecutor claimed that he struck a Black venireman because the venireman purportedly expressed the opinion that he would vote against the death penalty if he believed the defendant could be rehabilitated. This was not a race-neutral reason, the Court found, where the prosecutor accepted White jurors with comparable views. Further, the Court noted that the prosecutor's justification for the strike was a mischaracterization of the venireman's stated position regarding rehabilitation and the death penalty. Defense counsel's

challenge to this mischaracterization at voir dire prompted the prosecutor to offer the additional explanation that the strike was based on the venireman's indication that his brother had prior criminal convictions. The Court found this explanation for the strike to be pretextual based on its timing and lack of inquiry by the prosecutor into the venireman's relationship with his brother or whether the prior convictions had any influence on the venireman.

In 2008, the U.S. Supreme Court reemphasized the importance of comparative juror analysis in *Snyder v. Louisiana*, 552 U.S. 472 (2008). In *Snyder*, the Court found that the trial judge erred in overruling the defendant's *Batson* objection to the State's use of a peremptory challenge to remove a prospective Black juror. The State had offered two race-neutral explanations for striking the juror: (1) the juror looked very nervous during the questioning; and (2) the juror was a student teacher and was concerned about missing class. As a result of the juror's concerns, the prosecutor asserted that he felt that the juror might agree to a lesser verdict in order to bypass the penalty phase and finish quickly. The Court did not rule on the first proffered explanation because the record did not show that the trial judge made a determination about the juror's demeanor. However, the Court found the prosecutor's second explanation implausible and highly speculative because the prospective juror had not seemed overly concerned about the student-teaching situation once his dean was contacted and gave assurances that the class time could be made up. The Court compared the testimony of the juror who was struck with that of two White jurors who also were concerned about conflicting obligations. Although one of those jurors had asked to be excused based on a hardship and related obligations that seemed "substantially more pressing" than the struck juror's concerns, the prosecutor did not strike him. *Snyder*, 552 U.S. 472, 484. A second White prospective juror also expressed concern about serving, stating that he would "have to cancel too many things," including an urgent appointment at which his presence was essential." *Id.* Despite these concerns, the prosecutor did not strike this juror. Based on these circumstances, the Court held that discriminatory intent was a substantial or motivating factor in the actions taken by the prosecutor and reversed the lower court's decision upholding the validity of the peremptory strike. *Miller-El* and *Snyder* both stand for the principle that side-by-side comparisons of jurors can be powerful evidence of discriminatory intent. *See also infra* "Comparative juror analysis at step one" in § 7.4B, Presenting an Effective *Batson* Challenge.

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**Practice note:** It is improper for the judge to substitute a better reason than the prosecutor offers. *See, e.g., Galarza v. Keane*, 252 F.3d 630, 639 (2d Cir. 2001) (where trial court judge did not evaluate prosecutor's race neutral justifications for three challenged peremptory strikes and stated that "either side could have struck [one of the stricken jurors] for cause," failure to consider prosecutor's own justifications constituted reversible error). If you find that the trial judge is "saving" the prosecutor's explanations, you should object and make a record of the difference between the reason advanced by the prosecutor and the reason found by the judge.

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**Disparate questioning.** In *Miller-El*, the Court held that intentional discrimination can be shown by patterns of questioning or other conduct—for example, if a prosecutor asks

questions of Black jurors that he or she does not ask of White jurors, such as whether they think the criminal justice system is fair. In *Miller-El*, the Court found discrimination where the prosecutor described the death penalty vividly and explicitly to Black jurors but blandly to White jurors. The following types of disparate questioning practices may constitute evidence of discrimination:

- Asking repetitive, scrutinizing questions only of Black jurors. *See, e.g., Golphin Order* at 114 (describing this practice); *Miller-El v. Dretke*, 545 U.S. 231, 249 (2005) (prosecutor “repeatedly questioned [a Black juror] on his capacity and willingness to impose a sentence of death” while failing to do so of a White juror who expressed concern that the death penalty was too easy on a convict).
- Asking follow-up questions only of Black jurors when White jurors make the same or similar statements. *See, e.g., Miller-El*, 545 U.S. 231, 245 (observing that “nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror’s belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to [the law]”).
- Providing prefatory information before asking questions of Black jurors that differs from the prefatory information provided before asking questions of other jurors, which may reflect an attempt to elicit different answers from Black jurors to support challenges for cause or peremptory strikes. *See, e.g., Miller-El*, 545 U.S. 231, 256 (6% of White potential jurors, but 53% of Black potential jurors, were provided a graphic description of capital punishment before questioning on their views concerning the death penalty).
- Asking race-related questions of Black jurors that are not asked of non-Black jurors. *See, e.g., Golphin Order* at 114 (describing case in which a prosecutor asked a black juror if her “black friends” would criticize her if she voted to convict the defendants).

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**Practice note:** Texas, where *Miller-El* originates, allowed any party to “shuffle” the venire cards during jury selection. The U.S. Supreme Court criticized the prosecutor’s practice of shuffling the cards when there were several Black jurors in the next group of jurors to be called into the box. The effect of the shuffling was to move those jurors back in line. A North Carolina equivalent might occur where jurors are divided into panels—for example, if at the end of a panel there are two Black venire members left and no Whites, and the prosecutor asks to merge the remaining members of the panel with the next panel. *See* 2 NORTH CAROLINA DEFENDER MANUAL § 25.1C (Random Selection Requirement) (2d ed. 2012).

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## F. Remedy for *Batson* Violations at Trial

*Batson* does not specify the proper remedy for a violation that is found at trial. *Batson*, 476 U.S. 79, 99 n.24 (declining to determine whether it is “more appropriate in a particular case . . . to discharge the venire . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire”). In *State v. McCollum*, 334 N.C. 208 (1993), the N.C. Supreme Court held that if the trial

judge finds that the State has violated *Batson*, the better practice is to dismiss the venire and begin jury selection again. The *McCullum* court did not preclude the court from exercising its discretion to seat improperly struck jurors, but noted that reseating a juror improperly struck by the State may not be appropriate where the juror knows that he or she was struck and may have difficulty being impartial.

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**Practice note:** Concerns regarding the impartiality of an improperly struck juror might be addressed two different ways, both of which may increase confidence that an improperly struck juror could be seated and remain impartial. The favored method is to conduct all peremptory strikes at the bench, out of hearing of the jurors. If this approach is taken, counsel should make sure that the bench hearing is on the record. Alternately, if the peremptory strikes are made within earshot of the potential jurors, judicial questioning of an improperly struck juror may be able to resolve questions about the juror's impartiality.

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North Carolina trial courts have not always dismissed the venire in response to a *Batson* claim. In *State v. Fletcher*, 348 N.C. 292 (1998), the prosecutor initially struck a juror because the juror was a member of the NAACP. When the trial judge found the prosecutor's reason to be discriminatory, the prosecutor withdrew his strike and accepted the juror. The trial judge then found no *Batson* violation, and the N.C. Supreme Court affirmed. Chief Justice Mitchell, dissenting in *Fletcher*, would have ordered a new trial, emphasizing that dismissing the venire is the better practice where the prosecutor makes an invalid strike. In *State v. Parker*, a capital trial reviewed by a superior court judge ruling on an RJA claim, the trial court judge seated the improperly struck juror after sustaining the defendant's *Batson* challenge. [Golphin Order](#) at 71.

Trial courts in other jurisdictions have fashioned different remedies for *Batson* violations. In *Foster v. State*, 111 P.3d 1083 (Nev. 2005), the Nevada Supreme Court observed:

In implementing *Batson*, the states have generally followed one of three different approaches. Some jurisdictions require the trial courts to disallow a peremptory strike made in violation of *Batson* or to reseat the improperly stricken juror. Other jurisdictions require the trial courts to discharge the venire and commence jury selection anew from an entirely new venire. The majority of courts, however, have delegated to the discretion of the trial judge the determination of the appropriate remedy for a *Batson* violation.

*Id.* at 1089 (internal quotation omitted); *see also McCrory v. Henderson*, 82 F.3d 1243, 1247 (2d Cir. 1996) (“If the objection is raised during jury selection, the error is remediable in any one of a number of ways. Challenges found to be abusive might be disallowed; if this is not feasible because the challenged jurors have already been released, additional jurors might be called to the venire and additional challenges granted to the defendant; or in cases where those remedies are insufficient, the jury selection might begin anew with a fresh panel.”)

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**Practice note:** Judges may ask the parties for suggestions regarding the proper remedy. *See, e.g., State v. McCollum*, 334 N.C. 208, 235 (1993) (after sustaining defendant’s *Batson* objection, “[t]he trial court then inquired as to how the defendant and the State desired to proceed to correct the *Batson* violation”). Defense attorneys should consider one or more of the following remedies depending on the circumstances of the case:

- reseating of the improperly struck juror, especially if the strike and *Batson* challenge were conducted out of the hearing of the struck juror; *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, 1110–12 (2011) (explaining that the benefits of this remedial procedure include the voiding of the unconstitutional act, vindication of improperly struck juror’s right to equal protection, the procedure’s express contemplation by the *Batson* Court, and relative administrative efficiency);
- mistrial;
- discharging the entire venire and reseating a new venire from which juror panels are drawn;
- discharging the jury panel and assembling a new panel;
- denying the prosecutor peremptory strikes;
- returning individuals struck by the prosecutor to the panel.

Discharging an entire venire may not be a desirable outcome because it essentially upholds the improper strike, wastes judicial time and resources, does not vindicate the improperly struck juror’s equal protection rights, and may not deter racially motivated peremptory strikes. *See generally Powers v. Ohio*, 499 U.S. 400 (1991) (prospective juror’s right not to be excluded from jury service because of race is protected by the Equal Protection Clause).

The N.C. Superior Court Judges’ Benchbook, an online compilation from the School of Government, states that if a judge finds a discriminatory use of a peremptory challenge, the judge “must get rid of the whole jury panel and start over” and may not reseat the wrongly excused juror. [Jury Selection \(Criminal\)](#) at 2–3 (“*Batson* challenges in a nutshell”), in N.C. SUPERIOR COURT JUDGES’ BENCHBOOK (Jessica Smith ed.). The discussion does not address the authorities or alternatives discussed in this section.

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### **G. *Batson* Challenges to a Defendant’s Strikes**

The *Batson* rule applies to defendants as well as to the State. The Equal Protection Clause prohibits criminal defendants from exercising peremptory strikes in a manner that discriminates on the basis of race, gender, or other suspect characteristic. *Georgia v. McCollum*, 505 U.S. 42 (1992); *accord State v. Locklear*, 349 N.C. 118 (1998) (citing *McCollum*); *State v. Cofield*, 129 N.C. App. 268 (1998) (same).

A challenge to a defendant’s exercise of peremptory challenges, referred to as a “reverse *Batson* claim,” is made in the same way as a *Batson* claim. First, the State must show a

prima facie case of discrimination. The burden then shifts to the defendant to explain his or her strikes in a race-neutral manner. The judge then assesses whether the reason offered by the defense attorney is pretextual, and determines whether the State has met its burden of proving purposeful discrimination.

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**Practice note:** In defending against a *Batson* challenge, note for the record how many African American or other minority jurors were passed to you for questioning. It may be that you exercised 90% of your strikes against White jurors, but that 95% of the jurors passed to you were White, either because the panel was not racially diverse, or because Black or other minority jurors had already been excused for cause or struck by the State.

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Reverse *Batson* claims have rarely been made in North Carolina, possibly as a result of a fear by prosecutors that if the trial judge is deemed to have erred in disallowing a defendant's peremptory challenge, the appellate court will grant the defendant a new trial. See, e.g., *State v. Scott*, 749 S.E.2d 160, 165 (S.C. Ct. App. 2013) (where the State's *Batson* claim was erroneously granted, the court vacated the defendant's conviction and remanded for a new trial); see also Jeff Welty, [Rivera v. Illinois](#) and "Reverse Batson," N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 7, 2009).

Although the question of the remedy for improperly denied challenges has not been directly answered, the U.S. Supreme Court discussed it in *Rivera v. Illinois*, 556 U.S. 148 (2009). In *Rivera*, the judge, based on his own concerns about discrimination, required the defendant to explain his peremptory challenge of a Black female juror. After hearing the explanation, the judge denied the defendant's peremptory challenge and required that the juror be seated on the jury. That juror later became the jury foreperson. On appeal, the defendant argued that the trial judge's error in denying his peremptory challenge violated his rights under the Due Process Clause and amounted to structural error—that is, the defendant was entitled to a new trial without having to show prejudice. The Illinois Supreme Court found that the defendant was deprived of his state right to exercise his peremptory challenges but determined that the error was harmless beyond a reasonable doubt in light of the overwhelming evidence against him. The U.S. Supreme Court affirmed the decision of the lower court, holding that "the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws." *Id.* at 157. The Court noted that structural errors requiring automatic reversal are typically reserved for the type of error that "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 160 (quotation omitted). The Court held that "the mistaken denial of a state-provided peremptory challenge," under the circumstances presented in *Rivera*, did not constitute an error of that magnitude. *Id.* at 161.

No North Carolina decision has addressed the remedy available on appeal where the trial court improperly denies the defendant's peremptory challenge.

## H. Implicit Bias and the *Batson* Framework

In *State v. Saintcalle*, 309 P.3d 326 (Wash. 2013), the Washington Supreme Court considered the place of implicit bias in the *Batson* framework. Justice Wiggins' lead opinion in the case called for explicit recognition of implicit bias in the analysis. He reasoned that the prevalence of implicit biases "upends the *Batson* framework," and he called for the replacement of the state's *Batson* test with a more robust one that "necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion." *Id.* at 336, 339. Justice Wiggins noted that "trial courts may often interpret [the requirement of purposeful discrimination] to require conscious discrimination." *Id.* at 338. If the "purposeful discrimination" standard excludes acts motivated by implicit bias, sustaining a *Batson* challenge requires a trial judge to "look a member of the bar in the eye and level an accusation of deceit or racism. And if the judge chooses not to do so despite misgivings about possible race bias, the problem is compounded by the fact that we defer heavily to the judge's findings on appeal." *Id.* Explicit recognition of implicit bias in the *Batson* framework, according to Justice Wiggins, "would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a *Batson* challenge . . . [and thus] simplify the task of reducing racial bias in our criminal justice system, both conscious and unconscious." *Id.* at 339.

The recognition of implicit bias by judges and attorneys involved in litigation of *Batson* challenges may engender a more accurate and complete consideration of the possible role of race in the exercise of peremptory strikes. Additionally, if court actors accept that a prosecutor's race-neutral justification for a strike may be sincerely held but the strike nevertheless may be motivated by unconscious racial motivations, the defense attorney challenging an apparently discriminatory strike does not have to level a charge of overt racism and intentional discrimination; the prosecutor defending the strike does not face the potential stigma attached to a finding of a violation; and the judge ruling on the strike does not have to conclude that the prosecutor lied to conceal an intentional violation of the constitution. 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, 1121–23 (2011). In light of the fact that defense attorneys, prosecutors, and judges are repeat actors who interact with each other both in and out of the courtroom on a regular basis, the alleviation of these disincentives to raising and sustaining *Batson* claims could improve the effectiveness of the *Batson* framework.

Some argue that under current equal protection jurisprudence, race-based peremptory strikes motivated by implicit biases are already captured within the *Batson* framework. See *State v. Saintcalle*, 309 P.3d 326, 338 n.8 (Wash. 2013) (observing that the argument that strikes motivated by implicit bias violate *Batson* under existing jurisprudence "makes sense," but declining to consider it as it was not raised by the parties). Professors Ralph Richard Banks and Richard Thompson Ford argue that the line of cases requiring proof of "discriminatory purpose" to sustain an equal protection claim does not distinguish between conscious and unconscious bias. Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58

EMORY L. J. 1053 (2009). In their view, peremptory challenges based on race violate the Equal Protection Clause whether the reliance was conscious or unconscious: “[t]here is no exemption for strikes that are discriminatory, but not intentionally so.” *Id.* at 1099 (but cautioning about the evidentiary difficulty in succeeding on a claim of covert bias); *see also* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1094–97 (1998) (explaining why peremptory challenges motivated by race may be successfully challenged without proof of conscious intent to discriminate).

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**Practice note:** In recent years, judicial recognition of the influence of implicit bias on decision-making has increased. *See* Equal Justice Society, [Packet on Scholarship and Jurisprudence Related to Implicit Bias and the Intent Doctrine](http://www.equaljusticesociety.org), EQUALJUSTICESOCIETY.ORG (last visited Aug. 13, 2014). In cases without evidence of overt racial discrimination on the part of the prosecutor, incorporating implicit bias research into your *Batson* challenge may strengthen your claim. Consider arguing that whether motivated by unconscious or conscious bias, a strike influenced by race contravenes the guarantee of equal protection. Raising this issue may lead to the adoption of a broader understanding of the “purposeful discrimination” standard in *Batson* claims, and allow court actors to move away from allegations of overt discrimination.

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