INTRODUCTION

My name is Emily Coward. I am a North Carolina attorney and I direct the Inclusive Juries Project within the Center for Criminal Justice and Professional Responsibility at Duke University School of Law. Launched in late 2022, the Inclusive Juries Project partners with lawyers, scholars, students, court actors, and community members on initiatives aimed at ending juror discrimination and ensuring a fair, inclusive, and transparent jury system. Through research, scholarship, consulting, and educational initiatives, the Inclusive Juries Project contributes to jury reform efforts, develops tools and strategies to address juror discrimination, and works to uphold the constitutional promise of the American jury.

The jury serves as the "criminal defendant's fundamental protection of life and liberty against race or color prejudice." *McCleskey v. Kemp*, 481 U. S. 279, 310 (1987) (cleaned up). As the U.S. Supreme Court has recognized, "racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the state." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (internal quotations omitted). Addressing racial bias in our jury system enables "our legal system [to come] ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Id.*

In *Batson v. Kentucky*, 476 U.S. 79, 93 (1986), the U.S. Supreme Court announced the modern framework for reviewing claims of unconstitutional juror discrimination. For the last decade, *Batson* research, litigation support, and education has been a major component of my work. I have studied the *Batson* jurisprudence of the U.S. Supreme Court and the North Carolina appellate courts, reviewed research into flaws in the *Batson* framework and the continuing legacy of jury discrimination, and contributed to efforts to explore and promote *Batson* reform. I frequently teach attorneys and judges how to litigate and adjudicate *Batson* challenges. In partnership with the NC Governor's Task Force for Racial Equity in Criminal Justice (TREC), I helped draft jury reform recommendations, led discussions of these recommendations, and published Suggested Jury Practices for District and Superior Court Judges as part of the TREC's model policy project.

"Pretext" is an important concept in the *Batson* context. When a peremptory strike is challenged as discriminatory and defended with race-neutral explanations, courts must determine whether the proffered race-neutral explanation reflects "the true reason" for the strike, or whether it is pretext masking an unlawful motive. *Johnson v. California*, 545 U.S. 162, 172 (2005) (the question is whether the reasons stated by the prosecutor are "the reasons the prosecutor actually harbored") (internal citations omitted). In several opinions over the last two decades, the United States Supreme Court has provided guidance on determining when a proffered explanation for a challenged juror strike is pretextual. *See, e.g.*, *Foster v. Chatman*, 578 U.S. 488 (2016).

Attorneys representing Hasson Bacote asked me to review materials from fifteen capital cases ("the reviewed cases") for factors identified by the United States Supreme Court as indicative of pretext. The reviewed cases include capital cases tried between 1990 and 2011 in District 11 (Johnston & Harnett County) along with capital cases tried by Assistant District Attorney Gregory C. Butler in Sampson County and Onslow County.[1] My review has been limited to the materials that I have been

[1] These cases include *State v. Hasson Jamaal Bacote* (*"State v. Bacote"*), 07-CRS-1865-66 and 07-CRS-51499 (Johnston County); *State v. Iziah Barden* ("*State v. Barden*"), 98-CRS-3716 and 98-CRS-3718 (Sampson County); *State v. Antwaun Kyral Sims and Bryan Christopher Bell* ("*State v. Sims/State v. Bell*"), 01-CRS-2989, 2990, 2991, 2993, 2994, and 2995 (Onslow County); *State v. Robert Franklin Brewington and Henry Michael McKeithan* ("*State v. Brewington/State v. McKeithan*"), 97-CRS-7203-7208, 8153; 97-CRS-7216-7221, 8155 (Harnett County); *State v.*

provided, which include transcripts, prosecutors' affidavits, juror questionnaires, juror charts and notes, an Onslow County Superior Court Order in *State v. Bell/Sims* dated Jan. 25, 2023, and juror strike charts, a juror dismissal chart, and juror race charts prepared by Mr. Bacote's legal team. As requested, I reviewed relevant sections of the provided materials to consider the possible presence of factors suggestive of pretext. The following report documents instances in the reviewed materials where I identified such factors. It is illustrative rather than comprehensive. Erwin Byrd, an experienced North Carolina attorney, Kourtney Kinchen, a Duke Law student, both assisted in the preparation of this report.

I. DISPARATE TREATMENT OF JUROR TRAITS

Comparative juror analysis is a critical and required method of reviewing claims of unconstitutional juror discrimination. When prospective jurors of different races, genders, or ethnicities are treated differently with respect to similar traits, such treatment constitutes evidence that the resulting strikes were motivated by unlawful factors. *See State v. Hobbs*, 374 N.C. 345, 358 (2020) (trial court erred in failing to "examin[e] the comparisons in the white and black potential jurors' answers."); *Flowers*, 139 S.Ct. 2228, 2248 (2019) ("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 v. Dretke ("Miller-El II")*, 545 U.S. 231, 241 (2005) ("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."); *see also State v. Clegg*, 380 N.C. 127, 161 (2022) ("disparate questioning and exclusion of [a Black potential juror] compared to substantially comparable white potential jurors who were questioned and accepted by the prosecutor," should have been considered by the trial court, and failure to do so was erroneous).

Courts reviewing claims of juror discrimination do not require an exact comparison between potential jurors. When comparing accepted white venire members with struck jurors of color, the Court must not insist the prospective jurors are identical in all respects. 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."). Disparate treatment of Black and white potential jurors regarding a specific trait is relevant evidence bearing upon the determination of whether a strike explanation is pretextual.[2] *See Flowers*, 139 S.Ct. at 2249 (comparing jurors who knew individuals involved in the case); *Foster*, 578 U.S. at 505-506, 512 (comparing different jurors with regard to marital status, age, and employment history); *Snyder v.*

Johnny Ray Daughtry ("*State v. Daughtry*"), 92-CRS-4203, 4304 (Johnston County); *State v. Eugene Tyrone DeCastro* ("*State v. DeCastro*"), 92-CRS-2591, 2592, 2659 (Johnston County); *State v. David Gainey* ("*State v. Gainey*"), 98-CRS-3143 (Harnett County); *State v. Malcolm Geddie, Jr.* ("*State v. Geddie*"), 92-CRS-14307, 14308 (Johnston County); *State v. Angel Guevara* ("*State v. Guevara*"), 95-CRS-12696, 95-CRS-12695 (Johnston County); *State v. Jerry Hill* ("*State v. Hill*"), 94-CRS-1631 (Harnett County); *State v. Mitchell David Holmes* ("*State v. Holmes*"), 99-CRS-892, 99-CRS-2445, 2446 (Johnston County); *State v. Jimmy Wayne Lawrence* ("*State v. Lawrence*"), 97-CRS-736, 738, 1006, 11847, 11848 (Harnett County); *State v. Johnny Street Parker* ("*State v. Parker*"), 94-CRS-7958-59, 96-CRS-6903, 6911 (Harnett County); *State v. Davy Gene Stephens* ("*State v. Stephens*"), 95-CRS-787-791, 2855 (Johnston County); *State v. Eddie Lamar Taylor* ("*State v. Taylor*"), 03-CRS-57461-62, 57465-66 (Harnett County).

[2] This report follows the conventions adopted by the Associated Press and the New York Times regarding the capitalization of "Black". *See, e.g.*, Nancy Coleman, *Why We're Capitalizing Black*, N.Y. TIMES, July 5, 2020.

Louisiana, 552 U.S. 472, 483 (2008) (comparing "relevant jurors" with a "shared characteristic, i.e., concern about serving on the jury due to conflicting obligations").

a. Death Penalty Reservations

In the United States, and particularly the South, the death penalty arose "out of a racially specific history of the use of white violence to oppress African Americans," and state executions paralleled lynchings in many ways. James D. Unnever et al., *Race, Racism, and Support for Capital Punishment*, 37 CRIME & JUST. 45, 82 (2008). Throughout the late 19th and early 20th Centuries, lynchings and executions occurred "in concert" and disproportionately impacted Black North Carolinians by a factor of 4 to 1 relative to white residents. Charles David Phillips, *Exploring Relations among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889-1918*, 21 L. & SOC'Y REV. 361, 368–69 (1987). Between the end of the Civil War and 1910, 74% of the 160 people executed in North Carolina were African American. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2053 (2010).

This extreme disparity continued through the decades that followed. Between 1930 and 1980, Black Americans across the United States were executed at five times the rate of white Americans. Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 SOC. PSYCH. Q. 67, 68–69 (1991). In North Carolina, 78% of the 362 people executed between 1910 and 1961 were African American. Kotch and Mosteller*, The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. at 2039. Between 1990 and 2009, 100% of Black capital defendants with Johnston County juries were sentenced to death, compared to 44% of white capital defendants sentenced by Johnston County juries. Motion for Appropriate Relief, *State v. Hasson Bacote*, Aug. 10, 2010.

Not surprisingly, modern opinions about the death penalty are not equally distributed across racial lines. *See, e.g.*, Pew Research Center, *Most Americans Favor the Death Penalty Despite Concerns About Its Administration* 8 (2021) (reporting that "support for the death penalty differs across racial and ethnic groups" and finding the lowest rates of support among Black people). For this reason, death qualification—the disqualification and removal of individuals from capital juries based on their unwillingness to consider imposing the death penalty—can exacerbate the underrepresentation of Black people on capital juries. *See generally* Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision-Making and Death-Qualified Juries*, 40 L. & POL'Y 148, 153, 157 (2018); Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 IND. L.J. 113, 137 (2016) (study of data from Louisiana death penalty trials revealed Black jurors almost twice as likely to be excluded through death qualification than white jurors).[3]

The underrepresentation caused by death qualification may be further compounded by disparate questioning about the death penalty and disparate treatment of ambiguous statements about the death penalty. Even when not removed for cause for their unwillingness to impose the death penalty, Black jurors may be removed with discretionary peremptory strikes at higher rates for expressing less

[3] Even outside of the capital context, removals for cause have a racially disparate impact. *See* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020) (arguing that removals for cause are a major and under-examined source of racial exclusion from juries more generally); Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data As A Political Issue,"* 2018 U. ILL. L. REV. 1407, 1410 (study involving 1,300 felony trials and almost 30,000 prospective jurors finding that North Carolina "[t]rial judges . . . removed nonwhite jurors for 'cause' about 30% more often than they removed white jurors"); *see generally Report: Race and the Jury: Illegal Discrimination in Jury Selection*, Equal Justice Initiative, 2022.

support for capital punishment. *See* page 4, *infra*. This pattern cannot be untangled from the history of racial terror lynchings and the continuing disparities in capital charging and sentencing. Ultimately, capital jury formation process risks reproducing the very racism that produced African American mistrust in capital punishment in the first place.

Across the fifteen reviewed cases, prosecutors removed 59 Black jurors with discretionary peremptory strikes.[4] State Post-Trial Affidavits. With respect to 39 of those 59 strikes, prosecutors stated that the decision to remove the Black prospective juror was motivated at least in part on the basis of the juror's statements about the death penalty. *Id.*; *State v. Bell/State v. Sims* T. v. 12 p. 2245. It is by far the most common reason provided for striking Black jurors in the reviewed cases, appearing in 13 of the 15 cases. Many of the reviewed cases also included white prospective jurors who expressed hesitancy about the death penalty and were accepted by the State. Courts have found such comparisons to be indicative of pretext. *See Miller-El v. Dretke*, 545 U.S. at 262 (observing that "white panel members who expressed similar opposition [to] or ambivalence [about the death penalty]" were treated differently by prosecutors and ultimately upholding defendant's claim of juror discrimination).

Jury formation in *State v. Bacote* illustrates how the intersection of these factors produces racial exclusion from capital juries. Eighteen Black potential jurors participated in jury selection in *State v. Bacote*. Bacote Juror Race Chart. As explained below, the removals of thirteen of the eighteen prospective Black jurors—approximately 72% of all Black people included in the venire—related to their death penalty statements.[5] Bacote Juror Race Chart; Bacote Jurors Dismissed.

Ten Black jurors in the *Bacote* case were removed for cause.[6] Eight of the ten removed for cause were removed due to death disqualification; seven of the eight removed on this basis were removed at the request of the prosecutor.[7] In other words, approximately 44% of all eighteen Black prospective jurors were removed for cause on the basis of death disqualification. *Id.* By contrast, of the eighty white prospective jurors who participated in jury selection, twelve were removed for cause for death penalty opposition, accounting for 15% of all white prospective jurors.[8]

Of the eight Black prospective jurors who survived the death qualification process and were not removed for cause, six were struck by the State using peremptory strikes and two were seated on the jury.[9] State Post-Trial Affidavit; Bacote Juror Race Chart. Of the State's six strikes of Black jurors,

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[4] The race of one struck juror for whom the State submitted an affidavit in the case of *State v. Daughtry*, Ms. Williams, is disputed; therefore, she is not included in this count.

[5] Black prospective jurors Ronnie Bell, Delores Curtis, Steven McSwane, Anthony Rogers, Kevin Washington, Donald Williams, Donnie Williams, and Harold Williams were removed for cause on the basis of their death penalty opposition; all but Steven McSwane were removed on this basis at the request of the prosecutor. Bacote Jurors Dismissed. The State identified statements about the death penalty as at least one of the reasons for striking Roshonda Moore, Eula Barnes, Barbara Sanders, Raymond Lyons, and Kenneth Piner. *See infra* Table 1.

[6] The ten Black prospective jurors removed for cause were Ronnie Bell, Delores Curtis, Steven McSwane, Anthony Rogers, Kevin Washington, Donald Williams, Donnie Williams, Harold Williams, Kimiko Leach, and Porshe Ingram. Bacote Jurors Dismissed.

[7] *See* fn 2, *supra*.

[8] White prospective jurors Danny Brown, Bridgette Cagle, Richard Creech, Jonathan Garland, Donald Johnson, Rebecca Johnson, Stephanie Lee, Douglas Michael, Mary Morris, Thomas Price, Joyce Ray, and Heather Zacek were removed for cause on the basis of their death penalty opposition. Thirty-four other white prospective jurors were removed for cause for reasons other than death penalty opposition. Bacote Jurors Dismissed.

[9] In addition to the struck Black jurors identified in the chart below, Leonard Frink was struck by the State for reasons other than death penalty opposition.

five were explained by referencing the Black panelist's statements about the death penalty. *Id.* For three of those five strikes, the Black panelist's death penalty statements were the sole reason identified by the prosecutor defending the strike. *Id.* Six white potential jurors who also expressed reservations about the death penalty were accepted by the State, as reflected in Table 1, below.

Table 1: *State v. Bacote* Comparative Juror Analysis - Death Penalty Statements

Juror name	**Juror race**	**Struck or accepted by State?**	**Equivocal statements regarding death penalty? Example?**	**Stated reason(s) for strike**
Roshonda Moore	Black	Struck	Yes Could she be part of death penalty sentence? "If I have to, but I don't want to." T. p. 1185.	Equivocal on the death penalty. T. v. 7. p. 1364.
Eula Barnes	Black	Struck	Yes After stating opposition to death penalty and inability to impose it, later states that she could vote for death penalty "in appropriate cases, I guess yes." T. p. 111.	Equivocal on the death penalty. T. v. 3. p. 463-64.
Barbara Sanders	Black	Struck	Yes Could you vote for the death penalty? "Probably could." T. p. 273.	Equivocal on the death penalty. Believes "Lord is the final judge." T. v. 3. p. 461.
Raymond Lyons	Black	Struck	Yes Regarding a death sentence, "I feel I could be a part, but I wouldn't want to be a part." T. p. 132.	Equivocal views on death penalty. Did not believe death penalty was a "necessary law." Prefers not to sit on the case. Cousin convicted of 2nd degree murder. T. v. 3 p. 462.
Kenneth Piner	Black	Struck	Yes After stating he's on the fence about the death penalty, he is asked if the State meets its burden of proof in the sentencing phase, could he vote for death? "If the State could present me with that, enough information that I have to make that decision, I believe I can." T. p. 561.	Equivocal and evasive on death penalty. Might be distracted by family responsibilities. T.v.3.p. 601-02.
Kelly Dinubila	White	Accepted	Yes "I'm kind of in between." T. v. 8. p. 1810.	n/a

Vaughn Hopson	White	Accepted	Yes "It's one that makes me uneasy." T. v. 10 p. 2195.	n/a
Brenda Barbee	White	Accepted	Yes "I don't know. I don't want to." T. v. 12 p. 2544.	n/a
Jason Hill	White	Accepted	Yes "I'm not real sure about that."T. v. 4 p. 758.	n/a
Tammy Ford Barbour	White	Accepted	Yes When asked about delivering a death sentence she initially said, "I don't think I can do that." T. v. 8. p. 1716.	n/a
Margaret Vaughn	White	Accepted	Yes "I wouldn't want to, but if it shows he was guilty I could." T. v. 3. p. 551.	n/a

In *State v. Barden*, of the ten Black potential jurors who were not removed for cause, eight were struck by the State using peremptory strikes. Barden Juror Race Chart. Of the State's eight strikes of Black prospective jurors, three were defended in part by reference to the potential juror's statements concerning the death penalty. State Post-Trial Affidavit. Three white potential jurors who also made equivocal statements about their ability to impose the death penalty were accepted by the State, as reflected in Table 2, below.

Table 2: *State v. Barden* Comparative Juror Analysis - Death Penalty Statements

Juror name	**Juror race**	**Struck or accepted?**	**Equivocal death penalty statements? Example?**	**Stated reason(s) for strike**
Brenda DeVane Corbett	Black	Struck	Yes Could she vote to impose a death sentence? "I don't know. It depends on the case." T. v. 3. p. 540. "If they deserved the death penalty, yes." T. v. 3. p. 541.	Post-Trial: Would not be a strong leader, generally or on the death penalty. State Post-Trial Affidavit.

Lemiel D. Baggett	Black	Struck	Yes Is the death penalty appropriate in some cases? "Well in some cases." T. v. 3. p. 538. Could you vote to impose the death penalty? "Yes; think so." T. v. 3. p. 539.	2003 *Batson* Remand Hearing: Equivocal on death penalty, hesitant, not a strong leader. 2008 *Batson* Remand Hearing: Hesitant in support for death penalty, soft spoken, demeanor (body language, eye contact, hesitancy) suggested Mr. Baggett would not be a strong leader. Unintelligent. 2012 State Post-Trial Affidavit: Not a strong leader, generally or on the death penalty.
Jane Goodwin	Black	Struck	Yes When asked about her ability to impose the death penalty she replies that "I'd like to hear the evidence." T. v. 1. p. 145. She is asked "if you've heard everything and it's appropriate, could you vote to give someone the death penalty?" She responds, "Yep." T. v. 1. p. 146.	Evasive response to death penalty questions. Defense counsel represented son on parole violation. Discussed case at work. Studied psychology. Cared for two grandchildren. Concern about financial hardship. State Post-Trial Affidavit.
Teresa Oates Burch	White	Accepted	Yes When asked if she could impose the death penalty she said, "It would depend what happened" and later "Yes, I think I could." T. v. 3. p. 538.	n/a
Joseph Berger	White	Accepted	Yes "I guess I could, yes." T. v. 3. p. 579.	n/a
Betty Lou Blanchard	White	Accepted	Yes Opinion on death penalty? "I don't hardly know." T. v. 1. P. 245. "I hate to sentence someone and then find out later they were not the one." T. v. 1. p. 246. Could she impose the death penalty? "I think so." "I think so, yes." T. v. 1. P. 249.	n/a

In *State v. Bell/State v. Sims*, tried together, of the eleven Black potential jurors who were not removed for cause, nine were struck by the State using peremptory strikes. Bell/Sims Juror Race Chart. Of the State's nine peremptory strikes of Black jurors, four were defended in part on the basis of the Black potential juror's statements about the death penalty. State Post-Trial Affidavit. One

white potential juror who also expressed reservations about the death penalty was accepted by the State, as reflected in Table 3, below.

Table 3: *State v. Bell/State v. Sims* Comparative Juror Analysis - Death Penalty Statements

Juror name	**Juror race**	**Struck or accepted by prosecutor?**	**Equivocal Statements regarding death penalty?**	**Stated reason(s) for strike**
Milford Hayes	Black	Struck	Yes "I don't believe in capital punishment." First states he couldn't impose death sentence, later states that he could do so. T. p. 262-275.	At trial: Only death penalty reservations. T. v. 2. p. 360. Post-trial affidavit: Death penalty reservations. Request for deferral. Heart problems. Late to court because of medical appointment.
Diana Roach	Black	Struck	Yes Lifelong opposition to death penalty, but could vote for death sentence where appropriate. "Following the law, yes, I could do that." T. p. 1713-15.	At trial: Only death penalty reservations. T. v. 9. p. 1732. Post-trial affidavit: Death penalty reservations. Criminal history.
June Leaks	Black	Struck	Yes [Death penalty] "kind of makes me uneasy, I guess." T. p. 1968.	Death penalty reservations. Uncomfortable demeanor when discussing death penalty. T. v. 10. p. 1968-69.
Mary Adams	Black	Struck	No "I think [death penalty is] appropriate." Could she could vote to give somebody the death penalty? "Yes, sir." No equivocal Statements, other than that it's "necessary at times," which aligns with the legal requirement that jurors could impose it in appropriate circumstances. T. p. 2236-38.	At trial: First factor identified is death penalty statement, although Ms. Adams stated that the death penalty is appropriate. Homemaker and homemakers are more lenient. Special needs child. Involvement in fraudulent criminal activity – failure to pay sales tax. "Those are some of the reasons we put together." T. v. 12. p. 2245-46. Post-trial: Ms. Adams's statement regarding the death penalty is abandoned as an explanation for her removal.

Merilyn Thomasson	White	Accepted	Yes "That's a very difficult question." T. v. 12. p. 2288.	n/a

In *State v. Guevara*, of the ten Black potential jurors who were not removed for cause, six were struck by the State using peremptory strikes. Guevara Juror Race Chart. All six strikes were explained in a post-trial affidavit by referencing the Black potential jurors' statements about the death penalty. State Post-Trial Affidavit. Two struck Black jurors made statements similar to an unstruck white juror who was seated on the jury. Alma Richardson, a Black woman, stated that "Well, really and truly, I really hadn't thought about it, but it depends on how the person took the life, I guess, and what made him provoked to take that life." T. v. 5 p. 924. Gloria Mobley, a Black woman, stated "Well, I believe that if a person sort of sets out – just go out and kill someone, I sort of believe that they should get the death penalty then. But if it is like an accident or they didn't intentionally mean to do it, then I don't feel like they should get it." T. v. 8 p. 1483-84. Dennis Wayne Wooten, a white man, stated "I think it's reasonable, if - - if the crime was a thought out plan or something as such and they did - - not so much saying in the heat of passion, but they - - they did it in an aggravated sense or somewhere as, you know, uncontrolled or something like that." T. v. 9 p. 1678. The State struck Ms. Richardson and Ms. Mobley and accepted Mr. Wooten. T. v. 5 p. 930, T. v. 8 p. 1488, T. v. 9 p 1681.

In *State v. Lawrence*, the strike of Black potential juror Milton Monk followed an exchange regarding his ability to impose the death penalty. In a post-trial affidavit, this strike is explained in part on the basis of Mr. Monk's death penalty reservations. He was not opposed to the death penalty, but he did have reservations about imposing it himself based on his conscience, morals, and church membership, and stated that he would rather someone else make that decision. T. p. 174-77. At the end of his exchange with the prosecutor, he is asked if he could impose the death penalty if it was the appropriate given the facts and the law, to which he replies, "As a citizen, I guess I would have to, you know, return a right verdict, if he's guilty, of the death penalty." T. p. 179.

Similarly, when asked if he could impose the death penalty, white potential juror Sam Altman stated that "I've never had to do that, but I think I could. I'd hate to, but the law's the law. Yes, I believe I could." T. p. 243. Mr. Altman responds—six separate times—to questions regarding his ability to impose the death penalty in appropriate circumstances by stating, "I think I could" or "I think so." The prosecutor asks several questions seeking to clarify whether Mr. Altman's "I think so" statements reflect hesitation, but Mr. Altman continues using the same equivocal language throughout their exchange. Mr. Altman is accepted by the State and seated on the jury. T. p. 241-249.

In *State v. DeCastro*, the State posed essentially the same question to all potential jurors: "What are your feelings about the death penalty?" Black juror Harry James responded:

> My personal feelings about the death penalty is that if the law requires it and the act is committed, I don't have a problem with it. If there's clear evidence, I don't have no problem at all with it. T. v. 2 p. 141.

The State struck Mr. James, and later defended the strike in part because he "qualified his belief regarding the death penalty with 'if the law requires it.' Because there is some level of discretion in the juror's ultimate decision, I might have concerns regarding that statement." State Post-Trial Affidavit. Certainly, the law doesn't ever "require" the imposition of the death penalty. However, it

is clear from Mr. James's complete voir dire that he would apply his own discretion to the sentencing decision. He stated that he wouldn't have a problem listening to the evidence and applying the law as to capital punishment, and that he could make a fair decision if the evidence supported it. T. v. 2. p. 142. By comparison, the answers of several white jurors who were accepted by the State, reflected below in Table 4, could raise similar concerns for a prosecutor.

Table 4: *State v. DeCastro* - Statements Regarding Ability to Impose Death Sentence

Name of white juror accepted by the State	**Statement regarding ability to impose death sentence**
Billy Boyette	"I feel if that's what the law requests, I could go along with it. That's all I can say. If that's what it requires." T. v. 6 p. 130.
Myrtle Durham	"I believe in some instances, that is very few, very few now, but I believe it sometimes applies. It's a hard thing to say." T. v. 2 p. 200.
David Barnes	"Well, I don't actually - - I can't say that I 100 percent object to it or agree with it. It would depend on the circumstances of the case." Follow up: Do you think you could apply the law: "I think so." T. v. 2 p. 106.
Lewis Hall	"Kind of hard to say. I've never had to make that decision, but I guess my real beliefs are if a person is convicted of premeditated murder, I don't think that their life is worth any more than the victim. So I believe in capital punishment." T. v. 6 p. 12.
Roderick Spivey	"If it's decided by a jury, I would say that then I'm for the death penalty." T. v. 3 p. 108.
David Flood	"Well, if the crime fits the punishment, then I think that's what should happen. I've don't believe that it's just to kill anybody, but if there's enough evidence set forth before me, I think I would be compelled to bring that verdict down." T. v. 6 p. 47.
Robert Dunn	"Well, I feel as though you have to see what happens in the case and see what happens thereafter, and if we feel it might be mandatory, then I might would vote yes for it." T. v. 4 p. 26.

Raymond House	"Well, I think when the crime calls for it, capital punishment should be carried out." T. v. 4 p. 140.

In *State v. Taylor,* of the eight Black potential jurors who were not removed for cause, four were struck by the State using peremptory strikes. All four of the State's peremptory strikes of Black potential jurors were defended in part based on the Black potential juror's statements about the death penalty. The State, in an affidavit, submitted that one of the Black potential jurors, Sharone Stepney, was struck in part because:

> Juror Stepney answered with a qualifier regarding personally giving the death penalty ("If I'm convinced . . . yes") versus life without parole ("yes").

State Post-Trial Affidavit.

This explanation frames Mr. Stepney's answers as indicative of a preference for the punishment of life in prison over that of the death penalty because Mr. Stepney qualified his answer concerning the death penalty and did not qualify his answer about life imprisonment. A close reading of the transcript reveals that Mr. Stepney wasn't necessarily qualifying his answer concerning whether or not he could return a verdict of death, given that the question posed to him was: "[I]f you, yourself, are convinced beyond a reasonable doubt that based on the facts and circumstances of the case and the law as His Honor gives it to you that the death penalty is the appropriate punishment, could you, yourself, return a verdict of death?" and he responded by restating a portion of the question in his answer by stating that he could do so, if he was "convinced." T. v. 8. p. 1743. Notably, two white jurors also stated that they could impose the death penalty if they were "convinced": Sylvia Tew and Gregory McComber. T v. 2. p. 277; T v. 9. p. 1847. Both were accepted by the State.

Of the 25 white jurors who were accepted by the State, 10 answered the question concerning their ability to return a verdict of death with a qualified "yes," and answered simply "yes" to the question concerning their ability to return a verdict of life without parole. These answers are captured in Table 5, below.

Table 5: *State v. Taylor* - Statements Regarding Ability to Impose Death Sentence and LWOP

Name of white juror accepted by the State	**Statement regarding ability to impose death sentence**	**Statement regarding ability to impose life without parole**
Thomas Ridgeway	"Under those circumstances, yes." T. v. 2. p. 298.	"Yes." T. v. 2. p. 298.
Denise Winnie	"I could, but then, again, it depends on the evidence and everything else." T. v. 4. p. 784.	"Yes." T. v. 4. p. 785.

Audrey Godwin	"If, based on the facts and I –- you know, I would take it very seriously. I would think through everything. I'd probably put myself in that situation. If I came to that –- if I made that decision, then, yes." T. v. 4. p. 816.	"Yes." T. v. 4. p. 816.
Stanton McIntosh	"If that's what the facts indicate, yes." T.v. 2 p. 303	"Yes, I could." T.v. 2 p. 304.
Ricky Ruppert	"If it's appropriate, yes." T. v. 4 p. 747.	"Yes." T.v. 2 p. 747
Rob Snedeker	"Depending on the evidence, yeah. I mean, I'd have to hear the evidence and everything involved in that." T.v. 2 p. 309	"Yeah" T.v. 2 p. 310.
Roy Avery	"After listening to the evidence, yes, sir." T.v. 7 p. 1429.	"Yes, sir." T.v. 7 p. 1429.
Tara Wescott	"I believe so." T.v. 8 p. 1567.	"Yes." T v. 8 p. 1567.
Amy Burr	Answer to death question first time ("[C]ould you return a sentence of death?"): "I could. I'd have to -- you know, if we're talking about a person's life, you'd have to take it all into perspective." After asked death question again: "Yes. If it came to that point, yes." T.v. 4 p. 708-709.	"Yes." T.p. 708-709.
Daniel Howell	"I believe I could." T.v. 8 p. 1708.	"Yeah." T.v. 8 p. 1709.

b. Justice System Involvement – Self or Family Members

In several of the reviewed cases, strikes of Black potential jurors were explained in whole or in part on the basis of the potential juror's connection to the criminal justice system. This raises concerns, as researchers have found that strikes on this basis are a major source of juror discrimination. *See* Elisabeth Semel et al., *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors*, Berkeley Law Death Penalty Clinic (2020) at 37-40; *see also* Washington State General Rule 37(h) (explaining that contact with law enforcement officers and close relationships with people stopped, arrested, or convicted of a crime are peremptory strike explanations that "have been associated with improper discrimination in jury selection in Washington State"). Disparities in the policing, charging, conviction, and sentencing of people of color are reproduced in the jury box when Black citizens are struck because of their own or their family member's justice system involvement.

In *State v. Lawrence*, the prosecutor's decision to strike Black prospective juror Milton Monk is explained in part on the basis of his DWI charge, which occurred 10-15 years before the trial. T. v. 1

p. 30-32. White prospective juror David Overby was convicted of a DWI 8 years before the *Lawrence* trial and lost his license for a year. T. v. 3. p. 39. He was also convicted at trial of Assault on a Female for an incident involving his wife. *Id.* at. 15-18. That conviction occurred one year and seven months before jury selection in the *Lawrence* trial. *Id.* at 17. Both prospective jurors stated that these incidents would not impact their ability to be fair and impartial jurors. T. v. 1. p. 32; T. v. 3 p. 18. However, Mr. Overby represented that the experience of his arrest for assaulting his wife was an especially bad experience that left him with a bad taste in his mouth regarding law enforcement officers. He stated that he was attacked by a dog and assaulted by an arresting officer. Nevertheless, Mr. Overby was accepted as a juror by the State. T. v. 3 p. 20-21.

In *State v. Barden*, the strikes of three Black potential jurors were explained in part on the basis of their personal or family member's involvement in the justice system. These panelists were Mabelene Harris, Hugh Chavious Jr., and Evelyn Frontis. State Post-Trial Affidavit. Five white panelists accepted by the State also had relationships to the criminal justice system. These panelists were Julie Autry (Juror Questionnaire), Annacarol Miller Tyndall (T. p. 303), Betty Lou Blanchard (T. p. 305-06), Darrell Scott Blackman (Juror Questionnaire), and Edgar Bullard (T. p. 438-440). Four of these prospective jurors were seated, and one was struck by the defense. Barden Juror Race Chart.

In *State v. Bell/State v. Sims*, three Black potential jurors were removed with strikes explained in part on the basis of their own justice system involvement, or that of a family member. The State represented that Mary Adams and Donald Morgan were struck in part because of their own justice system involvement, and the strike of La'Star Collins was explained in part on the basis of her brother's justice system involvement. State Post-Trial Affidavit. Five white jurors accepted by the State had either personal justice system involvement or a family member with justice system involvement, or both. These were Charles Medlock, T. p. 2308; Brian Lebretto, *Id.* at 1332-33, 1516; Charlene Dail, T. p. 434; Gary Northern, T. p. 1772-74; and William Tagmyer, T. p. 318-19. Two of the white prospective jurors accepted by the State, William Tagmyer and Brian Lebretto, had been charged with assault, and Mr. Lebretto pled guilty to such charges. *Id.* Additionally, Mr. Lebretto's father was convicted of manslaughter for the killing of his mother when Mr. Lebretto was a child at *Id.* at 1332-35. Mr. Medlock's step-son had been charged with first degree rape the same year of the *Bell/Sims* trial. *Id.* at 2308.

In *State v. Parker*, the peremptory strike of Black potential juror George McNeil was explained on the basis of his brother's involvement in the justice system. T. p. 852. Four white potential jurors with justice-involved family members were accepted by the State: James Earl Herring, Brenda Jean Boyd Oldham, Charlotte Stewart, and Montgomery Ballard. Mr. Ballard didn't know much about his brother's situation. T. p. 935. Mr. Herring's cousin and Ms. Stewart's uncle were both convicted of murder. T. p. 394; T. p. 919. Ms. Oldham's sister has a "long criminal record." T. p. 307. Ms. Stewart and Ms. Oldham were seated as jurors. Parker Juror Race Chart.

In *State v. Holmes*, the State exercised a peremptory strike to excuse potential Black juror Raynelle Farmer. T. v. 1 p. 140. In responding to a *Batson* challenge, the State offered one reason for striking Ms. Farmer: "She's the only juror up there who's had a son convicted of manslaughter who spent 10 years in prison for it." Id. at 141. Ms. Farmer had testified during voir dire that her eldest son was convicted of involuntary manslaughter when he was 19 years old, and was in prison for 10 years, a sentence that had ended 4 years earlier. Id. at 88-89. Ms. Farmer testified that her son's conviction would not affect her ability to be a completely fair and impartial juror. *Id.* at 89.

Two white potential jurors who were accepted by the State, one of whom was seated on the jury, also had family members who went to prison for crimes. Johnnie Lynn Hodge, a seated juror in the case, testified that her brother assaulted a man, causing severe injury ("he had a blood clot on the brain

and it's caused him to be mentally impaired"), and was currently in prison for that assault. T. v. 3 p. 139. Crystal Johnson, who was accepted by the State, testified that her first cousin was in prison for rape. T. v. 2 p. 82. Another white juror who sat on the jury in the same case, Jerry King, had himself been convicted of assault on a female and misdemeanor larceny. T. v. 3 p. 139.

c. Family Responsibilities and Other Hardships

In *State v. Bacote*, the State's removal of Black potential juror Kenneth Piner was explained in part based on the prosecutor's concern that he might be distracted by his family responsibilities, namely, his role as the financial provider for two children with cerebral palsy. The State explained that, while Mr. Piner didn't think that his family responsibilities would have interfered with his ability to focus, he recognized that other jurors might have those concerns, and the State had such concerns. State Post-Trial Affidavit.

Four white jurors accepted by the State had family responsibilities that may have interfered with their ability to be present and focused, namely, Brenda Barbee, Sherry Hudson, Mary Simpson, and Linda Sutton.

Two of the accepted white jurors—Sherry Hudson and Linda Sutton—also had children with disabilities. Ms. Hudson has a child with cerebral palsy, like Mr. Piner. She was responsible for taking him to appointments. The prosecutor asked if she could make other arrangements to which she responded, "it will be hard." T. p. 2052. After being reminded of the importance of jury duty, she was asked the leading question, "You feel like you could resolve it so it wouldn't be a distraction to you or anything?" She said that she could. *Id.* Ms. Sutton was not asked about whether her son's autism and PDD would interfere with her ability to serve. Nor was she asked about whether her responsibilities related to her four-year-old daughter may interfere with her ability to serve. T. p. 1351.

Brenda Barbee was the primary caregiver for her two children ages 3 and 5. No questions were asked about whether her family responsibilities would interfere with her ability to serve as a juror and focus on the trial. T. p. 1296. She was accepted by the State and seated as an alternate. T.p. 1530.

White seated juror Mary Simpson volunteered that a family concern—her 100-year old aunt who had taken a turn for the worse in Kansas—might interfere with her ability to serve. T. p. 2061. The prosecutor responded to this information with leading questions suggesting that her family responsibility would not interfere with her ability to serve: "But in light of that – you feel like you could – that you can take the issue, discuss it with the Court and that would be – are you fine with serving on the jury though?" T. p. 2062. She answered in the affirmative and was accepted by the State. *Id.*

In *State v. Barden*, Jane Goodwin, a Black woman, was struck in part because of her custody of her grandchildren and the financial difficulty she would experience being away for two weeks. State Post-Trial Affidavit. She was not questioned about this topic. T.p. 110-111. Four white jurors accepted by the State also had young children: Roxanne Scott, (T. p. 700), Kimberly Anne Parker-Breedlove (Juror Questionnaire), Andrea Mercer (Juror Questionnaire), and Adrian Powell III (Juror Questionnaire). All four were either seated as jurors or alternates.

In *State v. Brewington/State v. McKeithan*, tried together, the strike of Black potential juror Pamela Simon was explained in part on the basis of the fact that she was "divorced, receives no child support and is the sole financial provider." State Post-Trial Affidavit. Ms. Simon had sought to be dismissed from the juror pool for these alleged hardships, ("I'm a single parent with one income and I have to pick my kids

up from the day care . . .by five o'clock"), but the Court did not excuse her. T. v. 1 p. 22-23. The State examined Ms. Simon about these issues and she clarified that, if she had to serve on the jury, someone else could pick up her children, she thought that her employer would pay her during her jury service, and she could continue to work in the interim between being chosen for the jury and the beginning of trial. *Id.* at 71-72. The State used a peremptory strike to eliminate her from the jury pool, identifying, in a post-trial affidavit, these hardships as an explanation for the decision to remove her from the jury. *Id.* at 127; State Post-Trial Affidavit.

Two white jurors in the same case were accepted by the State, despite hardships. Barbara Roller, also a single mother, alerted the Court that she might not be able to serve on the jury due to scheduled surgery for cervical and uterine cancer that she did not expect to be successful. T. v. 4, p. 4, 34.[10] The Court did not excuse her. The State questioned Ms. Roller about her surgery, including whether she could reschedule it in order to serve as a juror. *Id.* at 34-35. Even though the State acknowledged that the trial might coincide with Ms. Roller's scheduled surgery, it accepted her as a juror. *Id.* at 71.

Another white potential juror, Douglas Parker, sought to be excused because he owned a restaurant for which he and his wife were the only cooks. T. v. 6 p. 27. The Court did not excuse him. Mr. Parker, upon further questioning by the State, said that he had had to close his restaurant to be in court that day and that he would have to find additional staff to make it possible for him to serve on the jury. He was accepted by the State and seated as an alternate following the below exchange:

> MR. LOCK: Fully understanding that jury service would be a hardship for you, would you be able to get along for a period of time a jury were to serve if you got seated on the jury?
>
> JUROR PARKER: It's hard for me to answer that because at this particular moment I closed the restaurant for being here right now. This afternoon if we were to go with the appropriate help, it would be fine. It's hard for one person to do, but if we could find help this afternoon, there's not a problem.
>
> MR. LOCK: Is it fair to say that if you can find some temporary help to cook you could get by?
>
> JUROR PARKER: Yes, sir.

T. v. 7, p. 277-79.

d. Religion

In *State v. Brewington*/*State v. McKeithan*, the State explained that Black potential juror Ursula McLean was struck peremptorily by the State in part because she indicated, in her juror questionnaire, that she attended Church "frequently."[11] State Post-trial Affidavit. Of the thirty-nine white potential jurors who were accepted by the State, some of whom were seated on the jury, sixteen indicated very frequent church attendance on their juror questionnaires.[12] One Hispanic potential juror, also accepted by the State,

[10] Though Ms. Roller indicated on her juror questionnaire that she was single and had three young children, she also stated that her children did not live with her. T. v. 4 p. 34.

[11] In fact, Ms. McLean selected, in her juror questionnaire, that she attended church "very frequently"; "frequently" was not one of the options presented.

[12] The white potential jurors who were accepted by the State and selected "very frequent" church attendance on their juror questionnaires were: Roger Johnson, Eugenia Stewart, Linda Butler, Elizabeth Wood, Kimberly Anderson,

selected on the questionnaire that he attended church "very frequently." Regular church attendance did not seem to weigh against white jurors during jury selection, given that more than half (23 of 39) of the white jurors accepted by the State circled that they attended Church "very frequently" or "often." Juror Questionnaires.

e. Age, Marital, Relationship, and Household Characteristics

In *State v. Brewington*/*State v. McKeithen*, the State explained its strike of Black potential juror Belina Moore-Longmire in part on the basis of her age. Ms. Moore-Longmire was 22 years old. The State accepted three white jurors of similar ages: Chad McLamb (21 years old), Jerry Tew (24 years old), and Paul Craig Newcom (23 years old). Juror Questionnaires.

In *State v. Taylor*, the State's affidavit explaining the strike of Black potential juror Sharone Stepney states that Mr. Stepney was struck because he "revealed" in voir dire "that he was still living with his parents." State Post-Trial Affidavit. A seated white juror, Joy Tart, told the Court during jury selection that "Right now, we're staying with my dad. We don't have any place right now, really." The State later questioned her about this statement before deciding to accept her. T. v. 1. p. 147-48.

In the same case, the strikes of three Black potential jurors were explained, in part, on the basis of their status as "single." State Post-Trial Affidavit. These potential jurors were Angie Thomas, Janet Monroe, and Sharone Stepney. *Id.* Six white potential jurors were accepted by the State who were also single: Audrey Godwin, James Brown, Tara Wescott, Henrietta Thetford, Rob Snedeker, and Kenneth Todd. Juror Questionnaires.

f. Soft-Spokenness

When Lemiel Baggett was struck from the jury in the case of *State v. Barden*, his strike was explained in part on the basis of his soft-spokenness. State Post-Trial Affidavit. This is a trait that is not typically captured in the transcript, but nevertheless, the record reflects that three accepted white jurors were apparently also hard to hear. When Teresa Burch began answering questions, the trial judge asked her to "speak up," suggesting that she, too, was soft spoken. T. p. 526. Ms. Burch was a white woman who was accepted by the State. The judge, defense attorney, and prosecutor all expressed difficulty hearing Annacarol Tyndall, a white woman who was accepted by the State. T. p. 278. The prosecutor tells Larry McLamb to speak up and states that he is having trouble hearing him. T. p. 105. He was a white man who was accepted by the State.

g. Victimization

In *State v. Parker*, two prospective jurors had close family members who were murdered. When white prospective juror Donald Ray Lee was twenty five, his sixteen-year old brother was shot and killed when he was twenty five and his brother was sixteen. T. p. 288-89. Black prospective juror William Dixon had a son who was robbed and killed three years before the *Parker* trial. T. p. 30, 338. Both prospective jurors were asked by the prosecutor whether they were satisfied with how the case against their family member's alleged killer was handled, and both expressed satisfaction. *Id.* at 289, 239. The State struck William Dixon but accepted Donald Ray Lee. Parker Juror Race Chart. In explaining the reasons for the strike of William Dixon, the State identified the murder of Mr. Dixon's son and Mr. Dixon's statement during the Court's review of hardship excuses that, because of that experience, "I don't think I could do this." State Post-Trial Affidavit. However, prosecutors

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Edward Bennett, James Dorman, Melane Faucette, Dee Langdon, Terry Manahan, Craig Matthews, Williams Matthews, Mary Murphy, Kimberly Snead, Cindi Wilburn, and Marie Wilson.

did not ask about this statement during voir dire, but instead limited questions concerning the murder of Mr. Dixon's son to his perspective on the prosecution of his son's killer. As discussed in more detail below, the "failure to meaningfully voir dire a potential juror on a subject used later to justify a strike could be evidence an explanation is pretextual." *State v. Bennett,* 282 N.C. Ap. 585, 613 (2022).

II. UNLAWFUL STRIKE JUSTIFICATIONS

Providing an unlawful reason in defense of a challenged peremptory strike establishes discrimination in jury selection. *See State v. Bonnett*, 348 N.C. 417, 433 (1998) (prosecutor will not prevail at step two of at *Batson* inquiry where "discriminatory intent is inherent in the prosecutor's explanation."). Where the State did not offer a race-neutral reason for each challenged peremptory strike, the North Carolina Court of Appeals has sustained *Batson* challenges and reversed convictions. *State v. Ruth*, 281 N.C. Ap. 304 (2022); *State v. Wright*, 189 N.C. Ap. 346 (2008).

In two of the reviewed cases, the prosecutor made sworn statements conceding that unlawful factors motivated certain challenged peremptory strikes.

In *State v. Bell/State v. Sims*, tried together, the prosecutor conceded that Viola Morrow, a Black woman, was struck in part because the "State had used fewer than half its peremptories and the 10 seated jurors were all women. 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." State Post-Trial Affidavit. In January 2023, a trial court considering a Motion for Appropriate Relief relied on this affidavit in concluding that the strike of Viola Morrow was improperly motivated by discriminatory intent. *State v. Sims/State v. Bell*, No. 297PA18 and 86A-02-2, Findings of Fact and Conclusions of Law, Jan. 25, 2023.

In *State v. Barden*, the prosecutor identified a discriminatory reason for the removal of Elizabeth Rich, a Black woman, and Carolyn Tyndall, a white woman. In a post-trial affidavit, the prosecutor explained that the "State was way ahead on preemptory challenges and was looking for strong male jurors. Took off Ms. Rich and a white female at the same time who both answered Death Penalty questions satisfactorily but I used preemptory challenges to get someone stronger." State Post-Trial Affidavit. Additionally, in the first of two remand hearings on Mr. Barden's *Batson* challenge to the strike of Black juror Lemiel Baggett, the prosecutor described factors weighing in favor of accepting white female prospective juror Lesa Spell Jackson in a manner that was not race-neutral:

> [Juror questionnaire] says that Ms. Jackson was a nursing student. **She was a white female**. I'll go back; **she's a white female**, 34 years of age, she had a twelfth-grade education, she had law enforcement members in her family. She had a sister that was employed with the sheriff's department. **All those matters, on its face, your Honor, she's as good if not a better** than [another juror accepted by the State].

(emphasis added). Transcript, *State v. Barden Batson* Remand Hearing, June 4, 2008, p. 28. This statement was made in a *Batson* remand hearing regarding the strike of Black prospective juror Lemiel Baggett. *Id.* The prosecutor here explains that even though Ms. Jackson had traits the prosecutor viewed as favorable—including her race—she was struck because she was a woman and wasn't strong enough. These statements reflect a discriminatory approach to jury selection and a reliance on stereotypes in deciding which jurors to strike and which jurors to seat.

III. DISPARATE QUESTIONING OF POTENTIAL JURORS

Disparate questioning—asking jurors of different races significantly more questions or different questions—constitutes evidence of discriminatory jury selection. *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"); *see also State v. Hobbs*, 384 N.C. 144, 149 (2023) (reviewing trial court's consideration of whether the prosecutor engaged in disparate questioning of white and Black jurors); *State v. Campbell*, 384 N.C. 126, 134 (2023) ("prosecutor's questions . . . during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose") (internal quotations removed); *State v. Cuthbertson*, ___ N.C. Ap. ___; 886 S.E.2d 882, 889 (2023) (identifying as relevant "prosecutor's disparate questioning and investigation of Black and white prospective jurors in the case").

The transcript in *State v. Bacote* contains evidence of differential questioning concerning perspectives on the death penalty. For example, white juror Margaret Vaughn tells the prosecutor that she wouldn't want to impose the death penalty. T. p. 551. The prosecutor does not follow up on this statement, but instead accepts her as a juror and passes her to the defense for questioning. T. p. 552. By contrast, struck Black potential jurors Raymond Lyons and Rashonda Moore received more questions about their statements that they wouldn't want to impose the death penalty and are ultimately struck, in part, based on such statements. T. p. 132-36; 1183-90.

White jurors in *State v. Bacote* are asked leading questions regarding their ability to impose the death penalty. For example, the prosecutor asked white potential juror Jason Hill about his ability to be a part of the machinery of death by asking, "you could sit and be part of that, could you not, sir?" T. p. 761. Similarly leading questions are asked of Tammy Ford Barbour. T. p. 1716-1717. By contrast, struck Black potential juror Rashonda Moore is asked so many questions about her death penalty views that at one point she states, "I don't know what you're looking for from me." T. p. 1188. This contrast suggests an attempt to uncover disqualifying statements from Black juror Rashonda Moore about her death penalty views, while engaging in only a superficial inquiry into the death penalty views of white potential jurors.

In the cases of *State v. Bell/State v. Sims*, a trial court recently held that "[t]h[e] disparity between the questioning of juror Morrow and the treatment of jurors Northern and Burris is 'a clue that the prosecutor may have been seeking to paper the record [at trial] and disguise a discriminatory intent.'" *State v. Sims/State v. Bell*, No. 297PA18 and 86A-02-2, Findings of Fact and Conclusions of Law, Jan. 25, 2023, *quoting Flowers v. Mississippi*, 139 S. Ct. at 2248.

IV. LIMITED INQUIRY INTO FACTOR ALLEGEDLY MOTIVATING STRIKE

The failure to question a juror on an area of alleged concern is evidence that the strike is discriminatory. *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); *see also State v. Cuthbertson*, 886 S.E.2d 882, 896 (N.C. Ap. 2023) ("we first note the failure to follow-up can contribute to a *Batson* violation as evidence of disparate investigation").

In *State v. Bell/State v. Sims*, tried together, the strike of Black potential juror Milford Hayes was explained, in part, on the basis of his request for a deferral, his lateness to court because of a medical condition, and his heart condition. State Post-Trial Affidavit. However, no questions were asked of Mr. Hayes regarding any of these issues and how they might influence his ability to serve as juror. T. p. 95-96. In the same trial, the prosecutor explained his strike of Black potential juror LaStar Collins

Williams by referencing several factors, one of which was that "She is with child, and it's my feeling that her being -- carrying a life insider her body at the time to make a decision whether to take a life of another person would be very difficult for her." T. p. 979. Ms. Collins Williams was not asked whether her pregnancy would impact her ability to make such a decision. T. p. 919-21.

In *State v. Bacote*, Black potential juror Leonard Frink was struck in part because of his work as a teacher's assistant in a behavioral education classroom in a high school. State Post-Trial Affidavit. During jury selection, the prosecutor asked Mr. Frink only two questions about whether his work in this setting would cause him to "lean more towards one side or the other" if the evidence of behavioral issues is presented. He says that he would not. He is then asked "Would you be more sympathetic to a person who had behavioral issues in the past?" He responds, "No." Transcript 2460-61.

When the defense raised a *Batson* challenge to the strike of Mr. Frink—a strong supporter of the death penalty—the prosecutor identified Mr. Frink's work in a behavioral education classroom as one of the reasons for the strike and states that "I did want to hear what he had to say and see if they could change my position on that." T. p. 2465. However, the prosecutor only asked two questions about this subject, both of which were met with assurances that Mr. Frick's work in a behavioral education classroom would not interfere with his ability to be fair and impartial. T.p. 2460-61. It's not clear what else Mr. Frink could have said to change the prosecutor's position on that.

When questioning struck Black juror Jane Goodwin in *State v. Barden*, the prosecutor asked no questions regarding the financial impact of jury service, though the same prosecutor later identified this reason as a factor motivating his decision to strike her. State Post-Trial Affidavit. According to the prosecutor's affidavit, Ms. Goodwin's juror questionnaire indicated that she cared for her two grandchildren and being away from work for two weeks would put them in financial trouble. Again, however, this topic was not explored with Ms. Goodwin during jury selection. T. p. 107-111.

V. SHIFTING EXPLANATIONS FOR A STRIKE

The United States Supreme Court has held that shifting explanations for a peremptory strike constitute evidence of discriminatory intent. *See Foster v. Chatman*, 578 U.S. 488, 512-513 (2016) (identifying the prosecutors' shifting explanations for their challenged peremptory strikes as "circumstantial evidence that bears upon the issue of racial animosity"); *see also State v. Clegg*, 380 N.C. 127, 154 (2022).

In *State v. Barden,* the State's explanation for their strike of Black potential juror Lemiel Baggett shifted over time. Although the defense raised a *Batson* challenge to the strike of Mr. Baggett at trial, the prosecutor did not State his reasons for the strike at the time because the court found no prima facie case. T. p. 554-55. When explaining the motivations for the challenged strikes in 2003 during a *Batson* remand hearing, the prosecutor stated that Mr. Baggett was struck because he was soft spoken and did not express unequivocal support for the death penalty. In the 2008 *Batson* remand hearing, the prosecutor added two reasons to the list of motivations underlying the strike of Mr. Baggett: his demeanor (including eye contact, body language, and hesitancy) and his allegedly low intelligence. Transcript, *State v. Barden Batson* Remand Hearing, June 4, 2008, p. 24. The post-hoc explanation of "low intelligence" is a "particularly suspicious explanation given the role that the claim of 'low intelligence' has played in the history of racial discrimination from juries." *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1265 (2009) ("The fact that one of the State's proffered reasons for striking multiple African American jurors is unsupported by the record and historically tied to racism should have been included in the third step of *Batson*"). In a 2012 sworn affidavit, the prosecutor abandoned the explanations of demeanor and low intelligence and, as in 2003, explained that Mr. Baggett was struck because he was soft spoken and lacked

unequivocal support for the death penalty. These shifting reasons constitute evidence of discriminatory intent.

In *State v. Bell/State v. Sims*, the strikes of six Black potential jurors were explained differently at different times over the years. The removal of Black potential juror Viola Morrow was, at trial, explained by the hardship of her rheumatoid arthritis alone. T.p. 1731-32. In a post-trial affidavit, the prosecutor defended the strike of Ms. Morrow on three bases: (1) her rheumatoid arthritis; (2) the similarity in age between her children and the defendants; and (3) the State's interest in "male jurors" and a "potential foreperson." The removal of Black potential juror Milford Hayes was originally defended only with reference to his opposition to the death penalty. T.p. 375. In a later affidavit, the State added three new reasons for their decision to strike Mr. Hayes: his request for a medical excusal, his lateness to court as a result of a medical appointment, and his heart condition. Similarly, the strike of Diana Roach was originally defended only on the basis of her hesitancy about imposing the death penalty. T. p. 1728-29. In a later affidavit, the prosecutor stated that the decision to strike Ms. Roach was made not only on the basis of her death penalty hesitation, but also on her involvement in the criminal justice system. State Post-Trial Affidavit.

In the same trial, the first consideration mentioned when defending the strike of Black potential juror Mary Adams was her statement about the death penalty, which was followed by three additional reasons.[13] T. p. 2245-46. In a post-trial affidavit, there is no mention of her statement about the death penalty in the explanation of the Adams strike. With respect to the strike of LaStar Collins Williams, her apparent attitude and her sister's work as a mental health professional were identified as some of the reasons for her strike at trial, but abandoned in a post-trial affidavit. T. p. 975; State Post-Trial Affidavit. In that affidavit, her apparent sleepiness and the similarity of her family status to the defendants' were listed as reasons for her strike, neither of which were stated during the defense of the strike at trial when defending her strike. *Id.* The prosecutor identified a total of seven reasons for striking Black potential juror Yvonne Midgette. Five reasons were given at trial, and an overlapping but different list of six reasons was provided in a post-trial affidavit. T. p. 1094-96. Shifting explanations for a strike are indicia of discriminatory intent.

VI. MISCHARACTERIZATION OF THE RECORD

In *State v. Bell/State v. Sims*, a post-trial affidavit explains that Black prospective juror Yvonne Midgette was struck in part because of a statement she made about the legal concept, "acting in concert." This is a misleading characterization of the record. Following an exchange about this legal concept with Ms. Midgette, the prosecutor conceded that his questions may have been confusing and the judge describes the concept as one that lawyers also have trouble understanding. Eventually Ms. Midgette provides an explanation of "acting in concert" that the prosecutor expresses satisfaction with, describing it as a "pretty good analogy." The record does not suggest that Ms. Midgette would have difficulty applying this legal standard. Additionally, this reason was not given at trial, rendering it inherently suspect.

In *State v. Taylor*, one reason for striking Black potential juror Sharone Stepney, according to the State's affidavit, was that he "has kids." This statement is contradicted by the record. Neither Mr. Stepney's answers on his juror questionnaire, which specifically asked whether the jurors had children, nor his answers during voir dire, indicate that he was a parent. Even if he had indicated that he had children, such

[13] After discussing the four reasons, the prosecutor concluded by noting that "those are some of the reasons we put together." The *Batson* inquiry requires the striking party to reveal their actual motivations for a strike; the statement that the four justifications for striking Ms. Adams were "put together" suggests a possible misunderstanding of the nature of the inquiry.

a reason for striking him would appear to be pretextual, given that all but three of the twenty-five jurors accepted by the State had children.

In *State v. Angel Guevara*, the State, in an affidavit, justified its exclusion of juror Gloria T. Mobley solely because:

> This juror states that if a person just goes out and kills someone then it may be appropriate but if there is provocation then the death penalty [is] not appropriate.

State Post-Trial Affidavit.

One defense theory was that Mr. Guevara's actions were justified because was provoked in his home, and the State appears to have struck Ms. Mobley because she might not have imposed the death penalty in a case in which the murderer was provoked. *Id.* However, the State's explanation for striking Ms. Mobley is factually inaccurate: she did not express any hesitation about using the death penalty in cases of provocation. Rather, Ms. Mobley answered all the State's questions concerning her willingness to impose the death penalty in the affirmative, with the exception of the following exchange:

> Q. Tell me, if you would, in your own words your attitudes, or opinions, or beliefs about the death penalty as a punishment for first degree murder?
>
> A. Well, I believe that if a person sort of sets out - - just go out and kill someone, I sort of believe that they should get the death penalty then. But if it is like *an accident or they didn't intentionally mean to do it*, then I don't feel like they should get it.

T. v. 8 p. 1483-84 (emphasis added). The State's proffered reason for striking Ms. Mobley was not supported by the record.

VII. "LAUNDRY LIST" OF REASONS FOR A STRIKE

The United States Supreme Court instructs that it is inherently suspect to defend a challenged strike with a "laundry list" of reasons. *Foster v. Chatman*, 578 U.S. 488, 502 (2016); *see also People v. Smith*, 4 Cal. 5th 1134, 1157-1158 (2018) (explaining that "[t]his 'laundry list' approach carries a significant danger: that the trial court will take a shortcut in its determination of the prosecutor's credibility, picking one plausible item from the list and summarily accepting it without considering whether the prosecutor's explanation as a whole, including offered reasons that are implausible or unsupported by the prospective juror's questionnaire and voir dire, indicates a pretextual justification."). A lengthy list of objections to a struck juror can, itself, be an indication of pretext.

In *State v. Barden*, the prosecutor identified five or more reasons for the strikes of Black prospective jurors Jane Goodwin and Evelyn Frontis. These struck jurors each shared two identified traits with several white jurors accepted by the State. Both Ms. Goodwin's strike and Ms. Frontis's strike were explained in part on the basis of their relationship to mental health care. State Post-Trial Affidavit. White jurors accepted by the State Kenneth Williams (T. p. 616-18), Betty Lou Blanchard (T. p. 310), Dan Croom (T. p. 184), and Vivian Tyndall (T. p. 568-69), also had personal connections to mental health care. Ms. Frontis's strike was also explained on the basis of her connection to a nephew charged with criminal activity. State Post-Trial Affidavit. Five white jurors, namely, Julie Autry (Juror Questionnaire),

Annacarol Tyndall (T. p. 303), Betty Lou Blanchard (T. p. 305), Darrell Blackman (Juror Questionnaire), and Edgar Bullard (T. p. 438), also had either connections to family members charged with criminal activity or had been charged themselves with criminal activity. Ms. Goodwin's family responsibilities were identified as a reason for her strike, but four white jurors—Roxanne Scott (T. p. 700), Kimberly Anne Parker-Breedlove (Juror Questionnaire), Andrea Mercer (Juror Questionnaire), and Adrian Powell III (Juror Questionnaire)—identified similar family responsibilities.

VIII. RELIANCE ON DEMEANOR OR BODY LANGUAGE

Strike justifications referencing a juror's demeanor or body language should be viewed with "significant suspicion" and not credited unless corroborated by the trial court. *Clegg*, 380 N.C. at 155, 867 S.E.2d 907; *see also Snyder*, 552 U.S. at 477 (refusing to credit uncorroborated demeanor-based justification); *State v. Alexander*, 274 N.C. App. 31, 44 (2020) (recognizing that demeanor-based justifications "are not immune from scrutiny or implicit bias" and holding "that trial court erred in failing to address Defendant's argument that prosecutor's justifications were based on "racial stereotypes.").

In *State v. Bell/State v. Sims*, the strike of LaStar Collins was explained in part on the basis of her apparent unhappiness, attitude, sleepiness/tiredness, and inattentiveness. T. p. 975-76. The defense attorney contested these characterizations, and the trial court made no findings regarding Ms. Collins's demeanor on the record. In *State v. Barden*, the strike of Black prospective juror Lemiel Bagget was explained on the basis of his demeanor and low intelligence, which both find no support in the record and invoke racist stereotypes of African Americans.

IX. NONSENSICAL REASONS

The United States Supreme Court, in *Foster v. Chatman*, observed that nonsensical explanations for strikes are evidence of pretext. *See Foster*, 578 U.S. at 509. Nonsensical reasons for strikes were identified in the reviewed cases.

In *State v. Brewington*/*State v. McKeithan*, Black potential juror Cheryl Reed "listed 'Jerry Springer' as one of her favorite shows." Juror Questionnaire. The removal of Ms. Reed was explained in part on this basis. State Post-Trial Affidavit. Black potential juror Belinda A. Moore-Longmire's "hyphenated last name was circled by one of the prosecutors" and identified when explaining the strike in a post-trial affidavit. The strike of Black potential juror Ursula McLean was explained on the basis that "[h]er favorite TV program is 'religious programs.'" State Post-Trial Affidavit.

X. STRUCK JURORS OF PARTICULAR CONCERN

Sharone Stepney, *State v. Taylor*. As described above, Mr. Stepney's strike was defended in part on the basis of his allegedly qualified description of his willingness to impose the death penalty. Several other aspects of this strike bear indicia of pretext. Three other reasons for striking Mr. Stepney, according to the State's affidavit, were that he was "28 years old, single and has kids."[14] As mentioned above, one of these proffered reasons, that Mr. Stepney had children, is unsupported by the record. Neither Mr. Stepney's answers on his juror questionnaire, which specifically asked whether the jurors had children, or his answers during voir dire indicate that he was a parent. Even if he had children, such a reason for striking

[14] The final reason given for striking Mr. Stepney was that he lived with his parents. This trait cannot be compared with other jurors because neither the transcript nor juror questionnaires contains information on which jurors may have lived with their parents; Mr. Stepney appears to be one of the only jurors asked about this. As mentioned *supra*, a seated white juror, Joy Tart, informed the Court and then the State that she was living with her father.

him would appear to be pretextual, given that all but three of the twenty-five white jurors accepted by the State had children.

As perhaps best illustrated by Table 6 below, Mr. Stepney shared characteristics with many white jurors whom the State did not strike. He was struck from the jury due to his age, but five of the accepted white jurors, three of whom also "qualified" their response concerning imposing the death penalty, were also around 28 years old (between 24 and 31 years old). Six of the accepted white jurors, three of whom also qualified their answer concerning imposing the death penalty and two of whom were close to 28 years old, were also single. One accepted white juror, Tara Westcott, shared all four of those alleged characteristics with Mr. Stepney: she was 25 years old, single, had a child, and qualified her answer concerning her ability to impose the death penalty. T. p. 1567.

Table 6: White Accepted Jurors With Shared Characteristics with Struck Juror Stepney
(*s indicate number of characteristics each white juror shared with the struck Black juror):

Reason for strike	**Number of accepted White jurors with same characteristic**	**Names of accepted White jurors**
Answered death question with a qualifying statement and answered life question with no qualifying statement (see Table 5, *supra*)	10	Tara Westcott**** Audrey Godwin*** Rob Snedeker*** Denise Winnie*** Thomas Ridgeway** Ricky Ruppert** Roy Avery** Amy Burr** Daniel Howell** Stanton McIntosh*
Single (Juror Questionnaires)	6	Tara Wescott**** Audrey Godwin*** Rob Snedeker (divorced)*** Kenneth Todd (divorced)** James Brown* Henrietta Thetford (divorced)**
Similar age to 28 (Juror Questionnaires)	5	Tara Wescott (24 y.o.)**** Audrey Godwin (29 y.o.)*** Denise Winnie (27 y.o.)*** Joy Tart (30 y.o.)** Shannon Warren (31 y.o.)*
Had children (Juror Questionnaires)	22	Tara Wescott**** Denise Winnie*** Rob Snedeker*** Joy Tart** Thomas Ridgeway** Amy Burr** Henrietta Thetford** Stanton MacIntosh** Ricky Ruppert** Roy Avery**

		Kenneth Todd** Daniel Howell Jr.** Gregory MeComber* James Stephenson* Sylvia Tew* Elizabeth Connelly* Anne Lanier* Johnny Byrd* Deborah Williams* Thomas Collins* Teresa Hayes* Georgia Daniel*

Harry James, *State v. DeCastro*. The strike of Harry James from the jury pool was defended on the basis of three factors: a statement about the death penalty; a "dispute involving [a] landlord tenant situation"; and a subject he studied in college. State Post-Trial Affidavit. As described above, *see* Table 4, *supra*, his statement regarding the death penalty was similar to statements made by several white jurors by the State. The other two reasons proffered also bear indicia of pretext.

Potential jurors in the *DeCastro* case, which involved a landlord killed by a tenant, were questioned about their status as tenants or landlords, and whether they had ever had disputes or difficulty with landlords or tenants. Mr. James, when asked these questions, responded that he'd "never had a problem with any of [his] landlords," but that he had once rented out his house to a tenant whom he had sued in small claims court. He clarified that the suit was over rent payment and that the dispute had not involved physical conflict. T. v. 2 p. 134-135, 138, 144. Three accepted white jurors, two of whom were seated on the jury, also had been involved in disputes with either landlords or tenants. Myrtle Durham, a seated white juror, had had a dispute with her landlord over sewage maintenance issues. *Id.* at 184-85. Roy Munden, an accepted white juror, had gone to court to sue a tenant who wrote a bad rent check. T. v. 3 p. 80. Roderick Spivey, a seated white juror, said he had been involved with a dispute with a tenant over the timeliness of rent payment. *Id.* at 105. None of the white jurors were asked, as Mr. James was, whether their disputes involved physical conflict.

Finally, Mr. James was struck from the jury because he was a "sociology major" who thus might be more sympathetic to defendants due to socioeconomic circumstances. State Post-Trial Affidavit. In fact, Mr. James did not indicate that he majored in sociology. Rather, upon being asked about his educational background, he stated that he had two years of college in the military, in which he had trained mostly in sociology, taking "a lot of courses in and dealing with human relationships." At the time of this questioning, Mr. James was a 17-year member of the Army who was deployed "a lot" and who specialized in chemical weapons of warfare. T. v. 2 p. 129, 131, 143.

Lemiel Baggett, *State v. Barden*. Mr. Baggett's strike reflects several indicia of pretext: shifting explanations, demeanor-based explanations, an explanation associated with derogatory stereotypes of African Americans (low intelligence), and revealing comparative juror analysis.

The strike justifications reflected in the State's post-trial affidavit (the most recent explanation of this strike) are Mr. Baggett's (1) quietness, (2) hesitancy and equivocation in his support for death penalty, and (3) the State's belief that he "would not be a strong leader." State Post-Trial Affidavit. All are either shared by an accept white juror or jurors, or uncorroborated by the record.

The quietness of three white jurors accepted by the state is reflected in the record. *See* I.f. Soft-spokenness, *supra*. Three white jurors accepted by the state were equivocal in their expressions of support for the death penalty. *See* Table 2, *supra.* Demeanor-based explanations that are not corroborated by the record, such as those that might raise questions about a juror's leadership potential, are not valid race-

neutral explanations. *See Snyder v. Louisiana*, 552 U.S. 472, 479 (2008) (demeanor-based explanations cannot be relied upon without "specific finding [by the trial judge] on the record concerning [the potential juror's] demeanor"). Moreover, for the reasons discussed above, demeanor-based explanations constitute inherently suspicious strike explanations. *See* VIII. Reliance on Demeanor or Body Language, *supra*. This is particularly true of non-specific demeanor descriptions such as eye contact and body language, cited by the State in its explanation of the Baggett strike during the 2008 *Batson* Remand Hearing. Transcript, *State v. Barden Batson* Remand Hearing, June 4, 2008. In sum, none of the State's explanations for this strike survive a pretext analysis.

Brenda Corbett, *State v. Barden*. In the State's Post-Trial Affidavit, the explanation for the Brenda Corbett strike is as follows: "the State believed that Ms. Corbett's words and manner of response indicated that she would not be a strong leader and that she was not a strong and unequivocal supporter of the Death Penalty." Post-Trial Affidavit. This statement is identical to the State's explanation of its strike of Mr. Lemiel, *supra.* Other than her equivocal statements about imposing the death penalty, the State identified no race-neutral reason for removing Ms. Corbett from the jury. As discussed above, three white jurors accepted by the state also made equivocal statements about imposing the death penalty. *See* Table 2, *supra.* Comparative juror analysis suggests that the reasons justifying the strike of Ms. Corbett may have beenf pretextual.

CONCLUSION

Pretextual explanations for discriminatory strikes often elude detection. For this reason, jury selection records should be carefully scrutinized for factors suggestive of discriminatory intent. Mr. Bacote's legal team asked me to examine the reviewed cases for factors that have been identified by the United States Supreme Court and the North Carolina Supreme Court as suggestive of pretext. The examples identified and discussed above reflect instances in the records where I located such factors.