STATE OF NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE**
	SUPERIOR COURT DIVISION
GASTON COUNTY	**03 CRS 4557-58**

STATE OF NORTH CAROLINA

vs.

JEFFERY NEAL DUKE

EVIDENTIARY HEARING BRIEF SUBMITTED ON BEHALF OF MR. DUKE

NOW COMES Jeffery Neal Duke, through undersigned counsel, and hereby submits this Evidentiary Hearing Brief to aid the Court in presiding over the upcoming evidentiary hearing in this matter.

I. INTRODUCTION

The Court previously granted an evidentiary hearing on three (3) of Mr. Duke's pending post-conviction claims. The hearing is currently scheduled to begin September 3, 2024. Mr. Duke anticipates at this time that his presentation of evidence will take approximately 5-7 court days.

The three claims scheduled to be heard are as follows:

- ***Batson* Violation** (Claim VIII; filed 9/11/19)
- **Ineffective Assistance of Counsel** (Claim II.1; filed 6/29/07, amended 11/4/16)
- **Jury Misconduct** (Claim III; filed 6/29/07, amended 11/4/16)

As the moving party, Mr. Duke has the burden of proving by a preponderance of the evidence every fact essential to support his claims. *See* N.C.G.S. 15A-1420(c)(5). Because Mr. Duke's claims are grounded in the federal and state constitutions, a violation of Mr. Duke's rights is prejudicial unless the Court finds that it was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b).

II. ***BATSON* VIOLATION**

Mr. Duke alleges that the prosecution struck an otherwise eligible Black juror (Patrick Odems) during jury selection in violation of the federal and state constitutions. The impermissible exclusion of even a single juror violates *Batson v. Kentucky*, 476 U.S. 79 (1986). *See Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

The evidence will show that the State's voir dire of Mr. Odems in 2003 was brief and unremarkable. The evidence will further show that in 2011, the lead trial prosecutor stated under penalty of perjury that he could not explain his reason for striking Mr. Odems. Conspicuously absent from the prosecution's unsuccessful attempt to explain its removal of Mr. Odems from the jury was any reference to the prosecution's comment made during jury selection that Mr. Odems, according to the prosecution, liked "all-white comedy shows." (This comment was written in the prosecution's copy of Mr. Odems's juror questionnaire.)

The prosecution's race-conscious analysis of Mr. Odems and his expressed interests is the *only* conceivable reason for the prosecution's removal of him from the jury. *See Foster v. Chatman,* 578 U.S. 488, 510 (2016) ("But the record persuades us that Hood's race, and not his religious affiliation, was Lanier's true motivation."). Further, it is also highly relevant to the Court's analysis that the prosecution has failed – over decades and in the face of repeated court orders – to ever disclose the fact that it had made the race-focused comment about Mr. Odems before striking him.

"Striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, even when other black jurors are seated and even when valid reasons are articulated for challenges to other black prospective jurors." *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (citing *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989)); *see also United States v. Lane*, 866 F.2d 103, 105 (1989) (striking even one prospective juror for a discriminatory reason violates a defendant's rights, "even when other black jurors are seated, and even when valid reasons are articulated for challenges to other black prospective jurors").

A. Brief Forecast of the Evidence

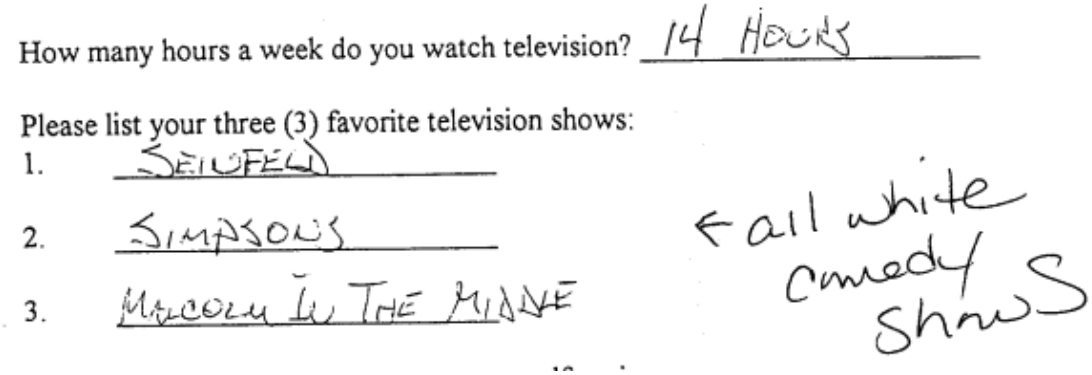
Evidence will include testimony from trial prosecutor Mikko Red Arrow, Mr. Odems, relevant parts of the prosecutors' trial files, and the court file.

Evidence will also include Mr. Red Arrow's 2011 affidavit in which he sought to defend the removal of nine Black jurors in three different capital cases, including Mr. Duke's. In his affidavit, Mr. Red Arrow offered race-neutral justifications for the removal of every juror except Mr. Odems.

24. Juror Patrick Odems, African-American Male, was excused by the State and at the time that he was excused, no *Batson* challenge was raised. I do not specifically recall questioning this juror. I did not indicate any reasons for the strike in my notes nor was I asked to place reasons on the record. It should be noted, however, that this was the 4th African-American Juror questioned. One of the other three jurors was stricken by the State and two were seated as jurors. The materials indicate that a total of four African-Americans served on this jury. The juror's race had absolutely no bearing on the State's decision for the strike.

[Affidavit of Mikko Red Arrow (2011.11.10)]

Further, Mr. Red Arrow's affidavit made no mention of the prosecution's race-focused comment about Mr. Odems.


How many hours a week do you watch television? 14 HOURS

Please list your three (3) favorite television shows:

1. SEINFELD
2. SIMPSONS
3. MALCOLM IN THE MIDDLE

← all white comedy shows

[Prosecution Copy, Juror Questionnaire, Patrick Odems]

Evidence will further show that the State of North Carolina has never produced this questionnaire with the race-conscious note – nor any other questionnaires that were analyzed by the prosecution during jury selection.

Mr. Duke believes that when the Court considers all of the competent evidence in question, it will be left with "the firm conviction" that the removal of Mr. Odems from Mr. Duke's jury was "motivated in substantial part by discriminatory intent." *Foster v. Chatman*, 578 U.S. 488, 513 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 485 (2008)).

B. Legal Issues

***1. Overview of* Batson v. Kentucky**

Under *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), it is a violation of the Equal Protection Clause for either party to exercise a peremptory challenge based on a prospective juror's race or sex. The North Carolina constitution also prohibits discrimination in jury selection. *State v. Waring*, 364 N.C. 443, 474 (2010). The defendant need not be of the same race or gender as the prospective juror who was excused in order to assert that the State improperly

challenged the juror. *Powers v. Ohio*, 499 U.S. 400, 415 (1991); *State v. Locklear*, 349 N.C. 118, 140 (1998).

2. Procedure

When a party contends that the other side has exercised a peremptory challenge in a discriminatory manner the trial judge must follow a three-step process to resolve the issue:

- **Establishing a prima facie case**. The party making the *Batson* claim must make a prima facie showing that the other side exercised a peremptory challenge based on race. *State v. Cummings*, 346 N.C. 291, 307-08 (1997). "A defendant meets his or her burden at step one 'by showing that the totality of the relevant facts gives rise to [an] inference of discriminatory purpose.'" *State v. Tucker*, 385 N.C. 471, 487 (2023) (quoting *State v. Campbell*, 384 N.C. 384, 126, 134 (1997)).

- **Neutral justification.** If a prima facie showing has been made, the other side must offer a justification for its use of its peremptory challenge that is not based on race or gender. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019) ("the State must provide race-neutral reasons for its peremptory strikes"). If the State proceeds to give "a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination," however, "the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991). Step one will not be rendered moot if "the trial court determines that the 'defendant failed to make a prima facie showing before the prosecutor articulated his reasons for the peremptory challenge[.]" *Tucker*, 385 N.C. at 488 (citations and emphasis omitted).

- **Pretext for purposeful discrimination.** The party making the *Batson* claim then may attempt to show that the nondiscriminatory justification is pretextual and that the other party in fact engaged in purposeful discrimination. At this step, the court must "determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers*, 139 S. Ct. at 2241. "The ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent." *Tucker*, 385 N.C. at 488 (citing *Flower*, 139 S. Ct. at 2244) (cleaned up).

3. Mr. Duke's Excusal for Failing to Making a Timely Objection at Trial or Raising This Issue on Direct Appeal

Mr. Duke raised his *Batson* claim during his original post-conviction litigation. An MAR claim is procedurally barred where a defendant was, on direct appeal or in a previous MAR, "in a

position to adequately raise the ground or issue underlying the present motion but did not do so." N.C.G.S. § 15A-1419(a)(1) and (3). Because Mr. Duke was not privy to the prosecution's race stereotyping comment about Mr. Odems during trial or on direct appeal, he was not previously "in position to adequately raise the ground or issue underlying the present motion." *Id.*

4. Because the Trial Court Never Determined That Mr. Duke Failed to Make a Prima Facie Showing Before the State Articulated Its (Non) Reasons for Striking Mr. Odems, Step One is "Moot"

As noted above, "the preliminary issue of whether the defendant had made a prima facie showing becomes moot" if the State gives "a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination." *Hernandez*, 500 U.S. at 359. Unlike in *Tucker*, where the Court held that step one will *not* be rendered moot if "the trial court determines that the 'defendant failed to make a prima facie showing before the prosecutor articulated his reasons for the peremptory challenge," *Tucker*, 385 N.C. at 488 (citations and emphasis omitted), here there was no such failure on Mr. Duke's part. Rather, the State of North Carolina affirmatively attempted to offer its race-neutral reason(s) for striking Mr. Odems through Mr. Red Arrow's post-trial affidavit.

5. The State's Inability to Explain Its Challenge of Patrick Odems Constitutes Error

Mr. Red Arrow's affidavit from 2011 attempts to provide race-neutral explanations for previous strikes of potential jurors in three different capital cases, including Mr. Duke's 2003 trial. Mr. Red Arrow offers detailed explanations for eight of those strikes. He is unable, however, to offer any explanation or reason for striking Mr. Odems during Mr. Duke's 2003 trial.

When the proponent of a strike (here, the State) fails or is unable to explain its challenged strike, the *Batson* claim must be granted. As the court explained in *State v. Wright*, 189 N.C. App. 346, 658 S.E.2d 60 (2008):

> We appreciate the challenges faced by the prosecutor and the trial court in attempting to comply with the requirements of *Batson*; however, we are duty bound to follow the plain language of the law. As the prosecutor failed to provide a race-neutral explanation as to *each* challenged juror mentioned by the defendant the trial court clearly erred in not granting defendant's *Batson* motion.

189 N.C. App. at 352-54, 658 S.E.2d at 64-65. This basic principle has been affirmed since *Wright* was decided. *See*, *e.g.*, *State v. Hobbs*, 374 N.C. 345, 353, 841 S.E.2d 492, 499 (2020) (citing *Wright* for the holding that "where the State failed to meet its burden of offering

race-neutral reasons for the exercise of each of its peremptory challenges to strike black jurors, a *Batson* violation was established"); *State v. Bennett*, 282 N.C. App. 585, 605-06, 871 S.E.2d 831, 847 (2022) (citing *Wright* for "finding error when prosecutor failed to articulate any reason for striking some jurors"). *See also State v. Ruth*, No. COA20-657-2, 290 N.C. App. 680, 892 S.E.2d 272 (2023) (unpublished) ("Here, however, as we discussed in *Ruth I*, the State never offered a race-neutral reason for its peremptory challenge of Ms. Quinn, so even if the trial court provided findings for us to review, we still would have to remand the matter to the trial court for a new trial."); *Upshaw v. Stephenson*, 97 F.4th 365, 378 (6th Cir. 2024) ("the State's failure to put forth any justification for excluding this juror provides grounds for relief"); *Harrison v. Ryan*, 909 F.2d 84, 87-88 (3d Cir. 1990) (concluding that though he could recall the reasons for striking five Black jurors, the prosecutor's inability to remember why he struck the sixth black juror was insufficient to meet the Step 2 requirement in *Batson*).

Without a prosecutor's explanation, the Court cannot meaningfully evaluate whether that explanation is mere pretext for discrimination. *See Mitleider v. Hall*, 391 F.3d 1039, 1047 (9th Cir. 2004) (the court "has a duty to evaluate meaningfully the persuasiveness of the prosecutor's race-neutral explanation to discern whether it is a mere pretext for discrimination"). As the U.S. Supreme Court has made clear, "A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." *Miller-El v. Dretke,* 545 U.S. 231, 252 (2005).

As Mr. Red Arrow attempted in 2011 through his affidavit, "a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id*. "Although there may be 'any number of bases on which a prosecutor reasonably might believe that it is desirable to strike a juror who is not excusable for cause, the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge.'" *Id.* at 239 (brackets and ellipses omitted) (quoting *Batson*, 476 U.S. at 98 n.20).

The absence of any explanation as to the trial prosecutor's actual reason(s) has convinced courts to find *Batson* violations without more. *See Bui v. Haley*, 321 F.3d 1304, 1315 (11th Cir. 2003) ("With nothing in the record . . . from which to find that Brooks was in fact presenting [trial counsel] Evans's reasons (for excusing eight black jurors), we find the trial judge's contrary finding an 'unreasonable determination of the facts.' Without finding this subsidiary fact, the circuit court would have been unable to find that the State had carried its burden, and would have granted Bui relief."); *Hardcastle v. Horn*, 368 F.3d 246, 259 (3rd Cir. 2004) ("absent [actual proffered] justification for the striking of Venirepersons 11 and 12, we cannot conclude that the Pennsylvania Supreme Court's decision to proceed to step three in justifying the strikes of Venirepersons 11 and 12 was an objectively reasonable application of Batson.").

6. Speculation is Not Permitted

The inability of a party to state a reason for a strike, whether due to a refusal or because of the passage of time, does not permit either the party or the court to engage in speculation. For example, at the remand hearing in *Paulino v. Harrison*, 542 F.3d 692, 696-97 (9th Cir. 2008), the prosecutor testified that she had no recollection of the reasons for any of her peremptory challenges, including her strikes of five African-American prospective jurors. Instead, she offered "hypothetical race-neutral reasons" based on her reading of the trial transcript. *Paulino*, 542 F.3d at 695-96. The Ninth Circuit distinguished between a circumstantial reconstruction of reasons and what the prosecution offered there, which was "mere speculation." *Paulino*, 542 F.3d at 700. The court concluded that where "there is no race-neutral evidence to weigh," the opponent of the strike will prevail "in most cases." *Paulino*, 542 F.3d at 703; *Shirley v. Yates*, 807 F.3d 1090, 1105 (9th Cir. 2015) (relying on *Paulino* and agreeing that even where the prosecution fails to offer an explanation at the second stage, the court must make the ultimate determination, "and the defendant will prevail at Step Three . . . in almost all such cases"). Thus, courts must be wary of arguments that "reek[] of afterthought." *Miller-El*, 545 U.S. at 246.

7. General Denial of Discriminatory Motive is Not Satisfactory

Neither the general denial of a discriminatory motive nor an assertion of good faith will satisfy the requirement that the proponent provide a neutral reason for the strike. "The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties." *Batson*, 476 U.S. at 94. "Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'" *Id.* at 98. "Rather, the State must demonstrate that 'permissible racially neutral selection criteria" were followed in wielding the strikes. *Id.* at 94. *See also McGahee v. Alabama Dep't Corr.*, 560 F.3d 1252, 1259 (11th Cir. 2009) (holding that "the State's general explanations and affirmation of good faith" were insufficient).

8. The Significance of the Prosecution's Race-Focused Comment in Mr. Odems's Questionnaire

The U.S. Supreme Court explained in *Foster v. Chatman*, 578 US 488 (2016), "As we have said in a related context, '[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial … evidence of intent as may be available." *Id.* at 498 (quoting *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977)). In *Foster*, the Court emphasized that documents produced by the prosecution during the capital trial were precisely the kind of "circumstantial evidence" that required its attention.

> Despite questions about the background of particular notes, we cannot accept the State's invitation to blind ourselves to their existence. We have "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted."

Foster, 578 U.S. at 500 (quoting *Snyder,* 552 U.S. at 478). In *Foster*, the Court ultimately held that "[c]ontents of the prosecution's file plainly belie the State's claim that it exercised its strikes in a "color-blind" manner." *Id.* at 513.

9. The Evidence Indicates "That Discrimination May Have Infected the Jury Selection Process."

The combination of the State's voir dire of Mr. Odems, which elicited barely any information other than to confirm his fitness for jury service; Mr. Red Arrow's affidavit, which was unable to offer a race-neutral reason for striking Mr. Odems despite a "circumstantial reconstruction"; and the prosecutors' copy of Mr. Odems' questionnaire, indicates that "that discrimination may have infected the jury selection process," *Johnson v. California*, 545 U.S. 162, 172 (2005), and that "the State was motivated in substantial part by discriminatory intent." *Tucker*, 385 N.C. at 488 (citing *Flower*, 139 S. Ct. at 2244) (cleaned up).

10. The State of North Carolina's Repeated Failure to Produce the Prosecution's Copies of Juror Questionnaires to Mr. Duke is a Discovery Violation and, at a Minimum, Justifies an Adverse Inference

As detailed more fully in previously filed pleadings, the State of North Carolina has repeatedly failed to produce the full balance of its prosecutorial files in Mr. Duke's case. Notably, despite the State's persistent inability to produce any of the prosecutors's copies of juror questionnaires to Mr. Duke, it was somehow able to locate a handful of those questionnaires for Mr. Red Arrow to use in 2011 in an effort to defend his striking of Black jurors in a number of capital cases, including Mr. Duke's.

Yet neither before nor after 2011 has the State been able to share the very same information it shared with Mr. Red Arrow – much less the full balance of the prosecution's copies of juror questionnaires. As a result of the State's failure, Mr. Duke will request that the Court apply an adverse inference. *See United States v. Johnson*, 996 F.3d 200, 206 (4th Cir. 2021) ("Even absent a due process violation, a criminal defendant may be entitled to an adverse inference instruction pursuant to the spoliation of evidence rule. Under that evidentiary rule, 'an adverse inference may be drawn against a party who [loses or] destroys relevant evidence.'").

Further, Mr. Red Arrow's failure to mention the race-focused note in his 2011 affidavit raises significant issues. There was no mention of the note, which he was certainly aware of. There was no effort to disavow it or place it into context. Combined with the State's withholding of the note, the justification for an adverse inference is further strengthened.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Duke asserts that he was denied his right to the effective assistance of counsel under the United States and North Carolina Constitutions because trial counsel's performance was deficient (*i.e.*, fell below an objective standard of reasonableness) and resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, trial counsel unreasonably failed to present readily available evidence that strongly supported self-defense or imperfect self-defense.

Evidence will show that Mr. Duke's defense team staked its entire theory of the case around self-defense (or imperfect self-defense) – explicitly promising the jury during opening statements that it would hear this evidence, in fact – but then unreasonably failed to present any such evidence. *See State v. Moorman*, 320 N.C. 387 (1987) (finding ineffective assistance of counsel due in part to trial counsel's failure to produce evidence promised in the opening statement); *id.* at 402 (citing similar cases).

Despite having powerful and readily available information about threats made by Ralph Arthurs that he planned to "get" Mr. Duke, and despite promising the jury that they would hear such information, trial counsel decided mid-trial not to present any information at all. The decision that trial counsel made fell below an objective standard of reasonableness. Evidence presented during the hearing will establish that trial counsel lacked any reasonable justification, strategic, tactical, or otherwise, for their unreasonable decision, and that their decision prejudiced Mr. Duke.

A. Forecast of the Evidence

Evidence will include testimony from former members of Mr. Duke's trial team who are still alive, including investigator Jan Barefoot and attorney Jean Lawson; predecessor post-conviction counsel Faith Bushnaq, who obtained and copied trial counsel files from Harold Bender and Joseph VonKallist (Mr. Duke's now-deceased trial counsel); Robin Williams, who provided the evidence that was never used by trial counsel; and Lisa Dubs, who will testify as a *Strickland* expert. Evidence will also include relevant parts of trial counsel's files, Ms. Barefoot's investigative files, and the court file.

1. Mr. Duke's Defense Team Developed Strong Evidence of Prior Threats Against Mr. Duke

Jan Barefoot, the defense team's lead investigator, will testify about her investigation and the information she gathered from Robin Williams about prior threats made by Ralph Arthurs against Mr. Duke. Ms. Barefoot's contemporaneous files, including handwritten notes, typed reports, and audio recordings of Ms. Williams, establish that Ms. Williams shared consistent information about these threats by Mr. Arthurs to trial counsel on multiple occasions over the course of many months before the start of trial in 2003.

In addition to what the defense team learned from Ms. Williams in the lead up to trial, the prosecution also disclosed information to Mr. Duke's lawyers that was consistent with what Ms. Williams had been sharing. Near the start of jury selection, Mr. Duke's defense team received discovery from the Gaston County District Attorney's Office that included a note that read: *Ralph said (to Robin) "I won't let him hurt you again."* Mr. Duke's defense team subsequently confirmed that Ms. Williams had shared that information – that Mr. Arthurs said to her that he "won't let [Duke] hurt you again" – with the prosecution. Ms. Barefoot will testify how she then served a trial subpoena on Ms. Wiliams.

Assuming her continued unavailability as a witness, the testimony of Robin Williams, Mr. Duke's former girlfriend, will be introduced through her videotaped deposition that was conducted on February 22, 2024, by the parties. During her deposition, Ms. Williams confirmed that Mr. Arthurs made threats about Mr. Duke on more than one occasion [Williams Deposition, Tr. 9:1-3]; that Ms. Williams told Mr. Arthurs not to act on those threats [Williams Deposition, Tr. 9:4-13]; that Ms. Williams shared that information with Mr. Duke's defense team [Williams Deposition, Tr. 10:2-17, 14:6-12]; and that Ms. Williams was prepared to testify about those threats if called as a witness [Williams Deposition, Tr. 14:13-16, 18:4-10].[1]

Evidence presented will also establish that while Ms. Williams consistently shared information about the prior threats, she also consistently told Mr. Duke's trial counsel that she had not been present when the fight between Mr. Duke, Mr. Arthurs, and Mr. Grant started. [Williams Deposition, Tr. 1-7, 35:14-20]

---

[1] The State's examination of Ms. Williams merely confirmed this information:

> **Mr. Dunn:** And according to your testimony, Ralph [Arthurs] wanted to harm Mr. Duke because Mr. Duke had harmed you, correct, so he was – he was worried about your safety?
>
> **Ms. Williams**: Yeah, him and Harold. Harold was – he was wanting to get Jeff as much as Ralph was, you know, and I told him no.
>
> **Mr. Dunn**: And both of them wanted to, using your words, get Jeff because he had beat you?
>
> **Ms. Williams:** Yeah. They wanted to whoop his butt.

[Williams Deposition, Tr. 27:8-16]

2. *Mr. Duke's Defense Team Aggressively Staked Out a Theory of Defense Based on What Robin Williams Had Shared*

During openings on September 9, 2003, Mr. VonKallist gave the jury a detailed forecast of the information they would hear about what led up to the deaths of Mr. Arthurs and Mr. Grant. That information was grounded in evidence about Mr. Arthurs's prior threats:

> *Mr. Arthurs was driving. He had been drinking a lot, just like Mr. Duke was. And on his way back, he threatened Mr. Duke to Robin Williams for the earlier assault that had occurred, and he said he would take care of her, and if couldn't do it he would do it with a friend. [Tr. 1681]*
>
> * * * * *
>
> *Mr. Grant stood there. They talked, but the discussion changed. The discussion moved towards a more dangerous topic: Robin Williams. And the testimony and evidence will show that as it did so Mr. Duke was confronted with two men who were challenging him about Robin Williams and the prior assault over and over again. And they put him in a situation acting as her protector, a protector that she never wanted to have, that she didn't feel she needed. They tried to intimidate Mr. Duke at that point. Alcohol was everywhere in their veins. And as Mr. Duke stood there hearing about this, he tried to respond, look, you don't know; look, you don't know. It's over. He tried to explain it over and over. [Tr. 1685]*
>
> * * * * *
>
> *And during that fight he fought for his own defense. He did not know prior to that day that he was walking in a situation where two men wanted to harm him because of something he had done to a woman he had been with. No one ever told him that that was going on in their minds. No one ever explained to them. And as he sat there drunk, looking at them, he did not anticipate it. [Tr. 1686]*

3. *Mr. Duke's Defense Team Unreasonably Threw Away Mr. Duke's Defense That Had Been Promised to the Jury*

Evidence will show that on the day before the prosecution was finishing its case-in-chief, the defense team again met with Robin Williams. Ms. Williams confirmed, again, that she would not testify that she was present when the fight started between Mr. Duke, Mr. Arthurs, and Mr. Grant. In response to that information, the defense decided to not call Ms. Williams for any purpose, and also present no evidence at all.

Evidence will show that Ms. Williams's position about being present or not had never changed prior to that moment (*i.e.*, that Ms. Williams saying, again, that she was not there was neither new nor different information). Further, evidence will show that Ms. Williams's information about the prior threats made by Mr. Arthurs had never changed. Nonetheless, the defense decided to abandon Mr. Duke's *entire* defense – apparently because Ms. Williams, again, confirmed that she would not testify to being present when the fight started.

Evidence will show that Mr. Bender and Mr. VonKallist's interactions around this issue devolved so precipitously that they no longer were communicating with one another about anything, much less strategy. Their communication and relationship were so broken that Ms. Barefoot called Ms. Lawson, who was no longer part of the defense team, to come to Gaston County in an effort to mediate a discussion between the lawyers – which was to no avail.

4. Mr. Duke's Defense Team Was Left to Meekly Apologize to the Jury

The parties subsequently held a charge conference and moved to closing arguments. During its closing, the prosecution hammered on the fact that there had been no evidence presented about any ill will or motive on behalf of Mr. Arthurs:

> *And the ill will between the parties: And there wasn't then.* ***There certainly wasn't any on behalf of Ralph Arthurs****. As you remember, Ralph Arthurs invites Jeff Duke into his home. Ralph Arthurs is trying to get Jeff Duke an apartment. [Tr. 2621]*
>
> * * * * *
>
> *And the reputation, if any, of the victim for danger and violence:* ***As I said, Ralph Arthurs was nothing but a friend of Jeff Duke, trying to get him an apartment, inviting him into his home.*** *Harold Grant, what have you heard about him? Well, Mr. Crowthers told you one time he fancied himself a pretty serious boxer, and he wanted to take on Harold Grant one time and hit him. What did Harold Grant do? Put him down, held him to the floor 'till he calmed down. That's the kind of people you're dealing with here. [Tr. 2625]*

The State also stressed that defense counsel made promises that they did not keep:

> *In Mr. VonKallist's opening he sat in that chair right there, and seated in that chair stated that's not what happened.* ***Well, Mr. VonKallist must have been thinking of some trial other than the one that you folks listened to.*** *[Tr. 2634]*

* * * * *

That Ralph Arthurs and Harold Grant tried to intimidate him and it backfired. Nonsense. Nonsense. Harold Grant or one of the two men grabbed the knife and then came at him. Do you recall that? That was part of the opening? And he acted in self-defense. This was a fight. Folks, what occurred in that apartment may have been many things. It certainly was not a fight. [Tr. 2636]

During his closing, Mr. VonKallist acknowledged that the defense had promised the jury certain evidence during opening statements but failed to deliver:

I was listening to Mr. Red Arrow – let me put some of these papers away – and I listened real hard about what he said. ***He said that we said some things in the opening, and indeed we did, and at least one of them was in error, indeed it was. And in that opening we said some other things that we would show you, but indeed, we didn't. And if you were to feel cheated, and if you were to feel wronged, and if you were to feel upset that you didn't get to see what we told you we would show you, it's okay, as a person. It's okay to feel that way toward us. It's okay to feel that we misled you. It's all okay.*** *[Tr. 2664]*

5. Expert Testimony

Lisa Dubs will be tendered as an expert and will provide her opinion as to the requirements of prevailing professional norms for capital defense counsel at the time of Mr. Duke's trial (2002-2003). Ms. Dubs will also offer her opinion as to whether these prevailing professional norms were met by trial counsel in this particular matter. Ms. Dubs's report was previously disclosed to the State pursuant to the Court's prehearing scheduling order.

B. Legal Issues

1. Ineffective Assistance of Counsel Where Trial Counsel Failed To Produce Evidence Promised in Opening Statement

"[A] cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." *State v. Moorman*, 320 N.C. 387, 400, 358 S.E.2d 502 (1987).

In *State v. Moorman* (a rape trial), the defendant's attorney promised in his opening statement to prove that defendant was "physically and psychologically incapable of rape." *Id.* at 393. The defendant in that case testified at a postconviction hearing that he "never told [the attorney] that it was physically or psychologically impossible for him to commit rape. Defendant said he had no idea what [the attorney] meant when he promised to prove defendant was incapable of rape." *Id.* No evidence of such incapability was presented in the trial. *Id*.

The trial judge in *Moorman* testified at the evidentiary hearing on the defendant's MAR. Judge James H. Pou Bailey testified that "it was unusual to make a prediction of evidence that is not produced because to do so seriously undermines your credibility and ultimately your client's credibility with the jury." *Id*. at 393.

As was the case here, the *Moorman* Court found that the impact of the unfulfilled promises in the opening statement was aggravated by the prosecutor's closing argument, which highlighted this failure. For example, the prosecutor said in closing, "I would ask you to think about all the different things that Mr. Paul said in his opening statement that he was going to show you ... that were never shown through the evidence[.]" *Id*. at 401.

Following an evidentiary hearing, the Court found that that attorney's "opening statement and wide ranging defense theories unsupported by the evidence as well as his forecasted evidence which did not materialize were practices that were deficient and failed to fall within the range of competence expected of attorneys in criminal cases." *Id*. at 395. The North Carolina Supreme Court agreed, and in its prejudice analysis, emphasized that "[t]his promised defense severely undercut the credibility of the actual evidence offered at trial[.]" *Id.* at 401. The North Carolina Supreme Court found that the attorney's acts were "sufficient to undermine confidence in the trial's reliability" and remanded for a new trial. *Id*. at 399.

2. The Evidence Promised in Opening Would Have Been Admissible

There would have been multiple avenues for introducing evidence regarding the prior threats by Ralph Arthurs through the testimony of Robin Williams.

First, North Carolina Rule of Evidence 803(3) allows the admission of hearsay testimony into evidence if it tends to show the "declarant's then existing state of mind … (such as intent, plan, motive, design, [or] mental feeling)." N.C.G.S. § 8C-1, Rule 803(3). The availability of the declarant under Rule 803(3) is immaterial.

In interpreting Rule 803(3), the Supreme Court of North Carolina Supreme Court has held that the rule allows the admission of a hearsay statement of a then-existing intent to engage in a future act. *See State v. McElrath*, 322 N.C. 1, 17-18, 366 S.E.2d 442, 451 (1988). The Court

has made clear that statements of a victim's state of mind are admissible if the victim's state of mind is relevant to the case. *See State v. Ransome*, 342 N.C. 847, 467 S.E.2d 404 (1996) (trial court erred in excluding evidence of statements by the victims that they intended to "get" the defendant which were not communicated to the defendant). *See also State v. Alston*, 341 N.C. 198, 230, 461 S.E.2d 687, 704 (1995) ("It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant.") (citations omitted).

The hearsay statements in question here "constitute statements of [Mr. Arthurs'] then-existing states of mind as expressions of their intentions to be aggressors in a confrontation with defendant." *Ransome*, 342 N.C. at 852, 467 S.E.2d at 408. With this evidence, the jury could reasonably infer that it was likely that Mr. Arthurs would do something to provoke Mr. Duke. *See State v. Faucette*, 326 N.C. 676, 683, 392 S.E.2d 71, 74 (1990) (affirming the admission of evidence under Rule 803(3) because "[t]he evidence of [the victim's] state of mind was also relevant to rebut defendant's self-defense inferences that he did not start shooting until he saw her reach 'for her gun.' The jury could infer from the evidence regarding her state of mind that it was unlikely that [the victim] would do anything to provoke defendant, including reach for a weapon").

The evidence of Mr. Arthur's repeatedly telling Robin that he planned to "get" Mr. Duke in retaliation would have also been admissible under Rule 404(b). Although Rule 404(b) is most often used against a defendant in a criminal case, it can also be introduced as evidence that constitutes Rule 404(b) involving a witness or victim in a case. Rule 404(b) is a "rule of inclusion," *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012), and is regularly introduced to establish the victim's state of mind. *See, e.g., State v. Foust*, 724 S.E.2d 154, 159-60 (2012) (prior bad acts of the defendant admitted to explain why the rape victim was afraid of the defendant and did not report the rape and that the incident was nonconsensual); *State v. Bynum*, 111 N.C.App. 845, 433 S.E.2d 778 (1993) (evidence of defendant threatening to kill victim was admissible to explain why victim failed to come forward earlier with allegations of sexual abuse). For example, in *State v. Thibodeaux*, 352 N.C. 570, 579, 532 S.E.2d 797, 804 (2000), the Supreme Court of North Carolina affirmed the trial court's admission of hearsay statements into evidence under Rule 404(b) to prove intent and malice because the probative value of the evidence – transcript and audio tape of the victim's testimony at a 50-B hearing about the defendant's misconduct – substantially outweighed any danger of unfair prejudice, confusion of the issues, or misleading the jury.

3. It Does Not Matter if One or Both of the Trial Lawyers Were Ineffective

The overall representation received by Mr. Duke was constitutionally deficient regardless of whether one or both of his attorneys were constitutionally ineffective. *See State v. Matthews,* 358 N.C. 102 (2004) (reversible error for one of capital defendant's attorneys to admit defendant's guilt to lesser offense without defendant's consent).

IV. JURY MISCONDUCT

Mr. Duke asserts that he was denied his rights to confrontation and a fair and impartial jury under the United States and North Carolina Constitutions because during the trial, a juror contacted a pastor for advice about imposing the death penalty, shared those materials she received from her pastor with other jurors, and she – and perhaps other jurors – considered and used those materials during deliberations.

A. Forecast of the Evidence

As detailed in previous filings, during penalty phase deliberations, juror Melissa Gantt reached out to a pastor for advice and/or guidance about imposing the death penalty. Ms. Gantt received materials from the pastor, which she considered while deliberating. Ms. Gantt also shared the information with other jurors. Subsequent to receiving materials Ms. Gantt ultimately voted in favor of the death penalty. Witnesses will include Ms. Gantt, other juror(s), and former law student interns (now attorneys) who first discovered and memorialized this issue.

B. Legal Issues

The law does not allow the use of extrajudicial materials in jury deliberations. A juror's use of extrinsic materials during deliberations violates a defendant's rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, Article I, §§ 19, 23, 24, and 27 of the North Carolina Constitution. *See Remmer v. United States*, 347 U.S. 227 (1954); *Parker v. Gladden*, 385 U.S. 363 (1966); *Gardner v. Florida,* 430 U.S. 349 (1977).

"It is clearly established under Supreme Court precedent that an external influence affecting a jury's deliberations violates a criminal defendant's right to an impartial jury." *Barnes v. Joyner*, 751 F3d 229, 240 (4th Cir. 2014) (*citing Parker*, 385 U.S. at 364-66; *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965); *Remmer*, 347 U.S. at 229).

Any contact between a juror and a third party, regarding a matter pending before the jury, creates a rebuttable presumption of prejudice, which if unrebutted, requires a new trial. *Id*. at 241; *Remmer*, 347 U.S. at 229. The defendant must satisfy only a minimal standard to be entitled

to the *Remmer* presumption. *See Barnes*, 751 F.3d at 245. Specifically, the defendant must introduce "competent evidence that the extrajudicial communications or contacts were more than innocuous interventions." *United States v. Cheek,* 94 F .3d 13 6, 141 (4th Cir. 1996) (internal quotation marks and citation omitted). That is to say, the defendant must present "a genuine allegation of communication or contact between a third party and a juror concerning the matter pending before the jury." *Barnes*, 751 F.3d at 246.

Once the defendant has created the *Remmer* presumption, due process requires that the court hold a hearing on the issue. *Id*. at 243. Although the *Remmer* presumption is not conclusive, the government has the heavy burden of establishing that the juror's improper contact was harmless to the defendant. *Id*. at 241. In other words, the government must show that there exists "no reasonable possibility that the jury's verdict was influenced by an improper communication." *Cheek*, 94 F.3d at 141 (internal quotation marks and citations omitted). In meeting this burden, the government may not rely on evidence that is inadmissible under Rule 606(b) of the North Carolina Rules of Evidence regarding among other topics, the mental processes of the jurors in connection with the verdict. *See Cheek*, 94 F.3d at 143-44. Courts have considered a variety of factors in determining the 'no reasonable possibility' question including "the extent of the improper communication, the extent to which the communication was discussed and considered by the jury, the type of information communicated, the timing of the exposure, and the strength of the Government's case." *United States v. Basham*, 561 F.3d 302, 320 (4th Cir. 2009).

Here, Mr. Duke is entitled to the *Remmer* presumption. The evidence will establish that at least one juror, if not more, specifically considered extrinsic materials during the sentencing phase, provided by Juror Gantt's pastor, which offered a Biblical view of the death penalty.

V. CONCLUSION

The foregoing is a summary of some of the points that counsel for Mr. Duke anticipates are likely to arise during the hearing. Should any legal issues arise that are not covered in this hearing brief, undersigned counsel respectfully requests leave to submit further memoranda as necessary to assist the Court.

Date: August 30, 2024

Jacob H. Sussman
Tin Fulton Walker & Owen
301 East Park Avenue
Charlotte, NC 28203
T: 704-277-3962
E: jakesussmanlaw@gmail.com

/s/ Joseph L. Anderson

Joseph L. Anderson
Anderson Pangia & Associates
2615 Sparkling Place
Winston-Salem, NC 27103
T: 800-735-4062
E: janderson@pangialaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing pleading upon opposing counsel via U.S. mail and email to the following:

Marissa Jensen
Zachary Dunn
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

Date: August 30, 2024

Jacob H. Sussman