STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF XXXX FILE NO. XXXXXXXXXXXXXXX

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

)

STATE OF NORTH CAROLINA )

)

v. )

)

)

XXXXXXXXXXXXXX )

Defendant. )

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**request to Show pROspective jurors a video on UNDERSTANDING AND Countering BIAS**

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

NOW COMES Defendant, XXXXXXXXXXXX, by and through undersigned counsel, and respectfully moves this Court that prospective jurors be shown the video, “Understanding and Countering Bias,” from the UNC School of Government Judicial College (“the UNC Judicial College video”), as part of jury orientation, available at <https://www.sog.unc.edu/resources/microsites/north-carolina-judicial-college/understanding-and-countering-bias> (last checked May 8, 2022). Use of this video will help ensure that Defendant receives a fair and impartial jury whose decisions are not tainted by implicit bias. Further, use of this video will help protect Defendant’s right to due process and to be free from cruel and unusual punishment. This Court should require the showing of this educational video on implicit bias pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 19, 23, 24 and 27 of the North Carolina Constitution.

[*Where such information would provide relevant context:* Defendant is [describe defendant identity]. One [or more] of the victims in this case, XXXXXXXXX, is XXXX.] There is a long history of racial discrimination and racialized outcomes in the criminal justice system in this country and in this state. This problem persists today. *See* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010). It is a multifaceted problem that is exacerbated by the phenomenon of implicit bias.

Implicit biases are attitudes and stereotypes that people are not aware of, but that can influence their thoughts and behavior. These biases result from the brain’s natural tendency to categorize stimuli into various categories or “schemas.” All people rely on schemas to help sort the vast amount of information facing them each day, and schemas often involve stereotypes. As scholar john powell puts it, ‘[w]e cannot live without schemas. Having biases and stereotypes does not make us racist, it makes us human.’ Research suggests that people may not be aware of their own biases. In fact, an implicit bias may conflict with a consciously held belief.

Alyson A. Grine and Emily Coward, Recognizing and Addressing Issues of Race in Criminal Cases, University of North Carolina School of Government, Chapter One, page 1-6 (Sept. 2014) (“Recognizing Race Manual”).

Implicit bias poses a threat to the guarantee of fair and impartial juries and the promise of equal justice under law. *See generally* Reshma M. Saujani, *“The Implicit Association Test”: A Measure of Unconscious Racism in Legislative Decision-Making*, 8 Mich J. Race & L. 395, 419 (2003) (“[T]he unconscious nature of juror bias prevents the voir dire from impaneling fair and impartial jurors”). Social science research demonstrates what most of us in the criminal justice system realize: Implicit bias can influence jurors’ decisions. Recognizing Race Manual at 1-6-7. Numerous studies raise concerns about the potential impact of implicit biases on fair trials. *See, e.g.*, Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol Sci. 383 (2006); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539, 1542 (2004); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1195–96 (2009). While it is not possible to eliminate the impact of implicit bias, there are steps that can be taken to mitigate its influence on juror decision-making. Recognizing Race Manual at 1-7-8.

There has been a growing recognition of the importance of educating jurors about the phenomenon and consequences of implicit bias. In 2017, United States Supreme Court of the United States emphasized the importance of employing various strategies to safeguard against the influence of juror bias. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (addressing bias in the 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”); *see also* Hon. Kenneth V. Desmond, Jr., *The Road to Race and Implicit Bias Eradication*, Boston Bar Journal, Summer 2016, at 3 (“Throughout the past several decades, State and Federal appellate courts have candidly acknowledged the implicit biases of litigants and jurors.”). Legal experts have developed innovative approaches to educating jurors about the importance of guarding against the influence of implicit bias on decision-making.

Perhaps no innovation has been as broadly embraced as the juror orientation video produced by and for the US District Court for the Western District of Washington (“the WDWA video”), whose creators have shared the video with jurisdictions across the country. *See* [Unconscious Bias Video, USDC for the Western District of Washington](https://www.wawd.uscourts.gov/jury/unconscious-bias), available at <https://www.wawd.uscourts.gov/jury/unconscious-bias> (last checked May 8, 2022); *see also* *Memorandum from Jury Administrator Jeff Humenik to Judge John C. Coughenour*, Summary Report - Implicit Bias Questionnaire for Jurors, (Apr. 16, 2019), available at <https://civiljuryproject.law.nyu.edu/wp-content/uploads/2019/04/Implicit-Bias-Summary-Report-Judge-Coughenour.pdf> (last checked May 8, 2022) (survey results revealing that jurors overwhelmingly find WDWA video useful).

In North Carolina, Superior Court judges in several counties have granted motions to show the WDWA video to prospective jurors. In 2019, Buncombe County Senior Resident Superior Court Judge Alan Thornburg created a modified version of the WDWA video for use in Buncombe County jury orientation. In 2020, Durham County Senior Resident Superior Court Judge Orlando Hudson instructed that the modified WDWA video should be shown to all jurors oriented in Durham County Superior Court. The North Carolina Governor’s Task Force for Racial Equity in Criminal Justice, in its 2020 report, called for providing “implicit bias training to all jury system actors” and recommended “that jurors receive education and instructions on implicit bias by using jury videos, pattern jury instructions, and a juror pledge.”

The UNC Judicial College video identifies and addresses potential problems caused by implicit bias. It defines the concept of implicit bias and offers suggestions for noticing and countering the influence of such bias. Video content was “informed by [the WDWA video]” and created by a research and advisory group comprised of a wide array of court actors, including a current Senior Resident Superior Court Judge, retired Senior Resident Superior Court Judge, Chief District Court Judge, Trial Court Administrator, elected District Attorney, Indigent Defense Services Forensic Resource Counsel, Capital Defender Investigator, Law Professor, UNC School of Government Project Attorney, and a Court Management Specialist from the NC Administrative Office of the Courts. *See* North Carolina Judicial College: Understanding and Countering Bias, available at <https://www.sog.unc.edu/resources/microsites/north-carolina-judicial-college/understanding-and-countering-bias> (last checked May 8, 2022). The information in the video is delivered by experts in North Carolina law: retired North Carolina Court of Appeals Chief Judge Linda McGee, Wake Forest Law Professor Kami Chavis, and UNC School of Government Professor James Drennan. *See* id. The video is neutral, clear, and evidence based, and it has the potential to reduce the influence of implicit bias on the administration of justice. The showing of this video would not be prejudicial to either side in a criminal case.

After years of experimenting with the use of a video produced for the US District Court for the Western District of Washington featuring Seattle attorneys and judges, North Carolina now has its own jury orientation video on understanding and countering bias. The need to address implicit bias with jurors is clear, and this court should use all tools at its disposal to minimize the possibility that implicit bias will undermine the integrity of juror decision-making in North Carolina jury trials.

[In this case, *and/or,* *if seeking an administrative order*: and as a standing matter], this Court should direct that the UNC Judicial College video be shown to potential jurors during juror orientation.

Respectfully submitted, this the day of XXXXXXXX 20XX.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion** by first class mail or by hand delivery upon:

XXXXXXXXXXXX

Assistant District Attorney

Office of the District Attorney

XX Prosecutorial District

XXXXXXXXXXXX

XXXXXXXXXXXX

This the \_\_\_ day of XXXXXXX, 20XX.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

XXXXXXXXXXX