

BATSON and BEYOND

By

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“It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.”

. . .

The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected.

Miller-El v. Dretke, 545 U.S. 231, 237-238, 125 S. Ct. 2317, 2323-2324

(2005)(*internal citation omitted*).

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), proscribes a three-step process for evaluating whether a party’s use of peremptory strikes is a constitutional violation:

Step 1: the opponent of a peremptory challenge(s) must establish a prima facie case of purposeful discrimination in the selection of the petit jury;

Step 2: once the opponent makes a prima facie showing, the burden of production shifts to the proponent of the strike to come forward with a race-neutral reason;

Step 3: the trial judge must make a determination in light of the parties' submissions whether the [opponent of the strike] has shown purposeful discrimination.

Batson at 96-98, 106 S. Ct. at 1723.

(I) Establishing a Prima Facie Case.

The Supreme Court in *Batson* enumerated two examples of circumstances that may support an inference of impermissible discrimination: (a) if a party engages in a "pattern" of strikes against venire members of a particular race, or (b) if a party makes statements or asks questions during voir dire or in exercising challenges suggesting that its strikes have a discriminatory purpose. *Batson*, 476 U.S. at 97; *Central Ala. Fair Housing Ctr. Inc. v. Lowder Realty Co.*, 236 F.3d 629, 636 (11th Cir. 2000).

a) A Pattern of Strikes. In cases where the challenge alleges an impermissible pattern of strikes against venire members of a particular race, a challenge rate significantly greater than the minority percentage of the venire strongly supports a prima facie *Batson* claim. *Central Ala. Fair Housing Ctr.*, 236 F.3d at 637 (citing *United States v. Alvarado*, 923 F.2d 253, 255 (2d Cir. 1991), where a challenge rate 172% greater than the minority percentage of the venire established a prima facie case of discrimination). A pattern of exclusion of minority venire persons provides support for an inference of discrimination. *Batson*, 476 U.S. at 97.

To prove a *Batson* violation, the party challenging the use of the strikes must "must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Johnson v. California*, 125 S. Ct. 2410, 2416 (2008)(internal quotation marks omitted). The objector's burden in establishing a prima facie case is one of production, not of persuasion. *Id.* at 2417-18 & n.7. Although the burden of production requires the objector to produce facts supporting an inference of discrimination, that inference need not be the most likely one possible, or even one that is more likely than not correct, but instead need only be one conceivable inference among many:

We did not intend [*Batson's*] first step to be so onerous that a defendant would have to persuade the judge -- on the basis of all the facts, some of which are impossible for the defendant to know with certainty -- that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Johnson, 125 S. Ct. at 2417 (internal quotation marks omitted).

b) A Prosecutor's Statements or Comments. This area is often overlooked by attorneys in making out their prima facie case. Pay attention to the reasons articulated during a prosecutor's challenges for cause. Obviously, also take note

of the race and gender or the persons the prosecutor is attempting to strike for cause.

(“Education level” or “intelligence problems” ?) Keep your ears open during challenges for cause, and during a prosecutor’s explanation of peremptory strikes¹, for claims of concerns about a juror’s lack of education or intelligence. Such general assertions about an “lack of education” have been recognized as a pretext or disguise for racial discrimination:

A startlingly common reason given by prosecutors for striking black prospective jurors is a juror’s alleged “low intelligence” or “lack of education.”

See *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, by The Equal Justice Initiative, at p. 17².

<http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf>.

In *McGahee v. Allen*, the Eleventh circuit noted as follows:

The State's proffer of the same unsupported reason to explain several of its strikes against African-American jurors is certainly a

¹Admittedly, the providing of explanations should only take place after the judge has found the challenging party to have made out a prima facie case. However, in practice, these steps are often co-mingled and prosecutors frequently provide explanations prior to a ruling on the prima facie case step.

²(Citing *McGahee v. Allen*, 560 F.3d 1252, 1265 (11th Cir. 2009); *Jackson v. State*, 5 So. 3d 1144, 1147 (Miss. Ct. App. 2008); *State v. Hill*, No. M2005-02347-CCA-R3-CD, 2007 WL 1774275, at *6 (Tenn. Crim. App. June 20, 2007); *Taylor v. State*, 620 S.E.2d 363, 366-67 (Ga. 2005); *State v. Crawford*, 03-1494 (La. App. 5 Cir. 4/27/04); 873 So. 2d 768, 784; *Ford v. Norris*, 67 F.3d 162, 168 (8th Cir. 1995); *Givens v. State*, 619 So. 2d 500, 501-02 (Fla. Dist. Ct. App. 1993); *Conerly v. State*, 544 So. 2d 1370, 1371-72 (Miss. 1989); *State v. Tomlin*, 384 S.E.2d 707, 708 (S.C. 1989)).

relevant fact that should have been considered by the Alabama court. Furthermore, **the State's claim that several African-Americans were 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. Allen, 560 F.3d 1252, 1265 (11th Cir. 2009)(Emph. added).

c) The striking of 100% of the cognizable class from the jury is not the test for a prima facie case, (although it may feel like it.)

In *Fleming v. Kemp*, the Eleventh Circuit found the defendant did make out a prima facie case when, “[T]he prosecutor used eight of ten peremptory challenges to strike blacks from the jury, where the venire (after challenges for cause) consisted of only ten blacks and some 45 whites.”

The district court held that *Batson* is not relevant to Fleming's situation for two reasons. First, the court found that because **all black jurors were not excluded from Fleming's jury** as they were in *Batson*, the latter case did not apply. But **nothing in *Batson* compels the district court's conclusion that constitutional guarantees are never abridged if all black jurors but one or two are struck because of their race.** On the contrary, *Batson* restates the principle that “[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.’” *Batson, supra*, 106 S. Ct. at 1722, quoting *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 n. 14, 97 S. Ct. 555, 564 n. 14, 50 L. Ed. 2d 450 (1977). We cannot agree that *Batson* may be rendered a priori inapplicable by a prosecutorial game of numbers.

Fleming v. Kemp, 794 F.2d 1478, 1483 (11th Cir. 1986). (Emph. added).

To establish a prima facie case, a defendant need not show the removal of

100% of the black jurors by the government. The key question is whether the defendant establishes facts and circumstances to “raise an inference” of exclusion on the basis of race so as to require inquiry into the prosecutor's motives. *Batson*, 476 U.S. at 96.

Batson rests on a rationale that blacks are entitled not to be struck for racial reasons, and black defendants are entitled to be tried in a system free of racially exclusionary practices. This represents more than a group entitlement not to be entirely excluded from participation. Rather, under *Batson*, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown. Accord *Fleming v. Kemp*, 794 F.2d 1478 (11th Cir. 1986).

United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986).

The seating of some blacks on the jury may be a notable fact, however it does not bar a finding of racial discrimination. Furthermore, it does not preclude the finding of a prima facie case. *United States v. Allison*, 908 F.2d 1531, 1537 (11th Cir. 1990).

d) The statistical importance of alternates ? The Eleventh Circuit suggests that alternates are statistically equal to seated jurors for *Batson* analysis. Thus, the government can clean up bad *Batson* numbers, that is - a pattern of strikes which gives rise to an inference of discrimination, by picking an alternate panel with a high percentage of the people it impermissibly struck. This can have a huge effect

if the trial is large or long, and several alternates are selected. However, a defendant can use the same tactic.

[T]he law of this circuit is that in determining whether a prima facie case has been established the peremptory strikes used to select alternates are to be considered together with those used to select the initial 12 jurors. *Ochoa-Vasquez*, 428 F.3d at 1045 n.41. (“In determining whether a statistical pattern of discrimination exists, our precedent looks to the total number of peremptory strikes available to the striker, including the peremptory strikes against alternates.”)

United States v. Hill, 643 F.3d 807, 838 (11th Cir. 2011)(*cert. denied April 23, 2012*).

If your prosecutor relies on the alternate panel to clean up his or her numbers, argue that this use of alternates is only dicta, not the law of your circuit. In *Ochoa-Vasquez*, the Eleventh Circuit found no prima facie case when the government used 5 of 9 strikes, 56%, to strike Hispanics from a venire that was 84% Hispanic. *Ochoa-Vasquez*, 428 F.3d at 1045-46. In footnote 41, the *Ochoa* Court said “our precedent looks to,” it did not say “considers together with” or “treats equally.” *Id.* *Ochoa* relied upon *United States v. Allison*, 908 F.2d 1531, 1538 (11th Cir. 1990). In *Allison*, the counting of alternates was only hypothetical dicta: “If we define the juror pool to be the impaneled jury (including alternates) plus the jurors who were peremptorily struck, the percent of blacks in the pool was

twenty-one percent.” *Id.* at Note 8. (Emphasis added). The issue was never squarely before the *Allison* Court.

The distinction between an alternate and a seated juror is no mere administrative label. Most alternates never deliberate on the real jury. Furthermore, the number of alternates selected can disproportionately distort the statistics. The larger the number of alternates selected, the less likely they are to actually serve. A party should not be excused from using 100% of its strikes against a minority group, simply by creating an alternate panel made up entirely of the group of people it impermissibly struck. An all-white jury with an all-black alternate panel does not satisfy *Batson*, much less preclude an inference of discrimination. The government should not be allowed to water down *Batson* simply by picking a large number of alternates. *Batson* should not be rendered meaningless by “a prosecutorial game of numbers.” *Fleming v. Kemp*, 794 F.2d 1478, 1483 (11th Cir. 1986).

(II) Once a prima facie case is made by the challenger, the other party must articulate race-neutral reasons for each strike. The trial court must determine whether the prosecutor’s proffered explanations for exercising each of his or her strikes were comprehensible and race neutral. See *Rice v. Collins*, 546 U.S. 333, 338, 126 S. Ct. 969, 973–74 (2006) (“Although the prosecutor must

present a comprehensible reason, “[t]he second step of this process does not demand an explanation that is persuasive, or even plausible”; so long as the reason is not inherently discriminatory, it suffices.”) (quoting *Purkett v. Elem*, 514 U.S. 765, 767–68, 115 S. Ct. 1769, 1771 (1995) (alteration in original)). Explanations will be upheld if not based upon characteristics “peculiar to any race.” See *Purkett*, 514 U.S. at 769, 115 S. Ct. at 1771.

(III) If race-neutral reasons are provided, step-3 requires the trial court to determine whether the Defendant has carried his burden of proving purposeful discrimination. *Rice*, 546 U.S. at 338, 126 S. Ct. at 974. Be prepared to rebut the prosecutor’s explanations. Point out the inconsistencies or contradictions where the prosecutor struck a black juror for stated reason, but seated a white juror who had the same characteristics. In making the Step-3 determination, the courts must evaluate the “the persuasiveness of the justification” proffered by the prosecutor, while keeping in mind that “the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.” *Id.* (quotation marks omitted). “Although the presence of African-American jurors does not dispose of an allegation of race-based peremptory challenges, it is a significant factor tending to prove the paucity of the claim.” *Puentes*, 50 F.3d at 1578.

“The issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. A plurality of this Court has concluded in the direct review context that a state court's finding of the absence of discriminatory intent is ‘a pure issue of fact, that is accorded significant deference and will not be overturned unless clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 364-365, 114 L. Ed. 2d 395, 111 S. Ct. 1859.’” *Miller-El v. Cockrell*, 537 U.S. 322, 339; 123 S. Ct. 1029, 1040 (2003).

“[T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness [*339] of the prosecutor's justification for his peremptory strike. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Ibid.* In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.” *Id.*

STANDARD OF REVIEW.

Normally, review of a *Batson* claim turns “largely on an evaluation of credibility,” and “the trial court’s determination is entitled to great deference and must be sustained unless it is clearly erroneous. ” “(Whether a prima facie showing has been made is ‘treated as a question of fact to be decided by the trial judge’); *United States v. Stewart*, 65 F.3d 918, 923 (11th Cir. 1995).” *United States v. Hill*, 643 F.3d at 837. The District Court’s “ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.” *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1207 (2008).

However, depending on your record, consider arguing that the prima facie case determination involves constitutional error and should be reviewed *de novo*. Usually, the second and third steps of *Batson* are reviewed under a highly deferential standard shown to a finder of fact - clearly erroneous. However, the if trial court never completed the first step, or failed to properly apply the law in analyzing the prima facie case issue, there is a decent argument that the *Batson* issue should be reviewed *de novo*.

In *United States v. Ochoa-Vasquez*, Judge Barkett wrote the following in dissent:

Despite the "great deference" we give to the district

court's finding as to the existence of a prima facie Batson case, "the application of the equal protection principles enunciated in Batson to the exclusion of [a particular racial or ethnic group] from a jury is an issue of constitutional law that is subject to plenary review." *United States v. Allen-Brown*, 243 F.3d 1293, 1296 (11th Cir. 2001). Indeed, as the Supreme Court has now [**91] twice reminded us, "deference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 162 L. Ed. 2d 196, 125 S. Ct. 2317, 2325, (2005) (quoting [*1054] *Miller-El v. Cockrell*, 537 U.S. 322, 340, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003)) (internal marks omitted).

Ochoa-Vasquez, 428 F.3d at 1053-54, J. Barkett, *dissenting*.

In *United States v. Dorvilus*, 357 Fed. Appx. 239, 242 (11th Cir. 2009), the Eleventh Circuit ruled, "We review *de novo* the constitutional issues presented by a *Batson* challenge, though we accord "great deference" to a district court's ruling on whether the objecting party established a prima facie case of discrimination.

United States v. Brown, 299 F.3d 1252, 1255 (11th Cir. 2002)."

ONCE THE TRIAL COURT HAS A PARTY PROVIDE REASONS FOR ITS PEREMPTORY STRIKES, FUTURE ANALYSIS OF WHETHER A PRIMA FACIE CASE EXISTS BECOMES MOOT (or does it ?)

Once the trial court directs the government to provide race neutral reasons for its peremptory strikes, future analysis of whether or not a *prima facie* case was made, becomes moot. *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859

(1991)(plurality opinion). *See also United States v. Campa*, 529 F.3d 980 (11th Cir. 2008), *United States v. Smith*, 272 Fed. Appx. 811, 813, n.3 (11th Cir 2008), *United States v. Williams*, 214 Fed. Appx. 935, 936 (11th Cir. 2007), and *United States v. Gamory*, 635 F.3d 480, 495 (11th Cir. 2011)(“Initially, the question of whether Gamory made out a prima facie case is moot because the District Court never explicitly determined whether he had done so. *See United States v. Edourad*, 485 F.3d 1324, 1342–43 (11th Cir. 2007)”).

But the judge in this case elicited non-discriminatory reasons for the exercise of the prosecution's peremptory strikes and ruled on the ultimate issue of intentional discrimination. The Supreme Court instructs that once a trial judge rules on this question, the burden to establish a prima facie case is mooted. *See Hernandez v. New York*, 500 U.S. 352, 358, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395 (1991) (plurality opinion). And, the Government does not contend that Houston's appeal should fail because he did not establish a prima facie case.

United States v. Houston, 456 F.3d 1328, 1336 (11th Cir. 2006).

So, if you are appealing a case where the district court directed the government to explain its use of peremptory strikes, be sure to argue there is no need to revisit the prima facie case determination, as it is now moot. However, do be warned that *Hernandez v. New York* is a plurality opinion which is not binding

on the lower courts³.

REVERSE-BATSON STRATEGIES:

Generally speaking, simply reverse the process and use all the bad precedent against the government:

- 1) Argue the government failed to make out a prima facie case.
- 2) Do not volunteer explanations for your strikes unless directly ordered to do so.
- 3) Point out the presence of the challenged group on your seated jury. Point out that you did not strike all the white / male jurors that you could have.
- 4) Count your alternates for statistical purposes. Furthermore, when possible, use your alternate strikes to improve your numbers.
- 5) Note the lack of comments from you indicating any bias.
- 6) Point out, if arguable, that some of the people you struck were not of the race or gender which the prosecutor counted them as.
- 7) Know your percentages (%'s) before you strike. If you cross over the percentage, be all the more prepared to explain your strikes.
- 8) Have your explanations ready. Make sure they are consistent with your other strikes.
 - Her Dad's a cop. I don't like teachers.
 - Hair was too short. Too law and order.

³*United States v. Stewart*, 65 F.3d 918, 924 (11th Cir. 1995).

- He had been a crime victim, and still seemed angry.

WARNING !

Be warned - as in life, codefendants can get you into trouble if they violate Batson. One defendant's discriminatory intent belongs to all. *United States v. Thompson*, 528 F.3d 110 (2d Cir. 2008). If you lose a reverse-Batson challenge and the district court re-seats a juror whom you struck, you have very little remedy on appeal. Denial of a defendant's peremptory challenge does not constitute a structural error requiring automatic reversal **because peremptory challenges are not constitutionally mandated and are not necessary for a fair trial**. When a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge is not a matter of federal constitutional concern. *Rivera v. Illinois*, 129 S. Ct. 1446 (2009). Yikes !