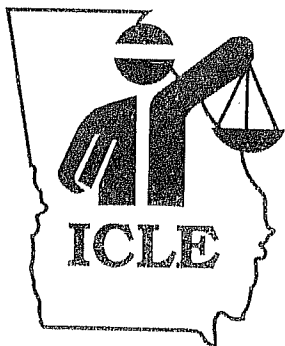


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PEREMPTORY CHALLENGES AFTER *BATSON*

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PEREMPTORY CHALLENGES AFTER *BATSON*

I. The *Batson* Rule

In establishing the *Batson* rule, the Supreme Court held that the prosecution's use of peremptory strikes to remove potential jurors on account of their race violates the Equal Protection Clause. *Batson v. Kentucky*, 476 U.S. 79 (1986). This principle was extended to the defendant's peremptory strikes in *Georgia v. McCollum*, 505 U.S. 42 (1992). In *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Court extended *Batson* to civil actions, and later to civil state court actions in *Chavous v. Brown*, 501 U.S. 1202 (1991). Cf. *United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994)(holding the equal protection right established by *Batson* applies to all criminal and civil cases in federal court through the Due Process Clause of the Fifth Amendment).'

II. Scope of *Batson*

A. *Batson* Extended

Federal courts have extended the *Batson* rule to include the following:

1. Gender

The Supreme Court subsequently extended *Batson* to gender-based peremptory strikes. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

2. Race Which Differs From Movant's

In order to challenge a discriminatory strike under *Batson*, it is not necessary that the movant share the racial identity of the excluded minority. *Powers v. Ohio*, 499 U.S. 400 (1991); *United States v. Rodrigues*, 935 F.2d 194 (11th Cir. 1991).

3. Caucasians

Federal courts have recognized white persons as a cognizable group for purposes of the rule in *Batson*. *E.g.*, *United States v. McFerron*, 163 F.2d 952 (6th Cir. 1998)(implicitly holding that defendants could challenge exclusion of whites from jury in holding that trial court erred in rejecting black defendant's defense of strikes of white jurors); *Government of Virgin Islands v. Forte*, 865 F.2d 59 (3d Cir. 1989)(holding that *Batson* rule applied to both whites and blacks); *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987)(holding white persons constitute a cognizable group for Sixth Amendment purposes under the fair cross-section analysis;

4. American Indians

Federal courts have similarly held that American Indians are a cognizable group covered by the *Batson* rule. *See United States v. Roan Eagle*, 867 F.2d 436 (8th Cir. 1989)(holding that American Indians are a recognized minority group for purposes of a *Batson* inquiry where prosecution struck only potential American Indian juror); *accord United States v. Iron Moccasin*, 878 F.2d 226 (8th Cir. 1989); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987).

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5. Hispanic Persons

In *Hernandez v. New York*, 500 U.S. 352 (1991), the Supreme Court held that Hispanic or Latino persons are a cognizable group for purposes of applying the *Batson* rule, although the Court accepted Spanish-English bilingualism as a race-neutral reason to strike the potential juror in a case involving translators. This decision followed several federal court rulings reaching the same conclusion. *E.g.*, *United States v. Rudas*, 905 F.2d 38 (2d Cir. 1990); *United States v. Ruiz*, 894 F.2d 501 (2d Cir. 1990); *United States v. De La Rosa*, 911 F.2d 985 (5th Cir. 1990); *United States v. Moreno*, 878 F.2d 817 (5th Cir. 1989); *United States v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989). Although peremptory challenges based on Hispanic ethnicity are subject to a *Batson* challenge, it is sufficient to rebut a *prima facie* case that the challenged party claim the strikes were based on an alleged inability to listen to the English translations of Spanish testimony. *Hernandez v. New York*, 500 U.S. 352 (1991).

6. Asian-Americans

In *United States v. Sneed*, 34 F.3d 1570 (10th Cir. 1994), the court implicitly held that Asian-Americans were a cognizable group under *Batson* in holding that the prosecution demonstrated a race-neutral reason for peremptory challenge against Chinese-American prospective juror.

7. Italian-Americans

Some litigants have succeeded in establishing that Italian-Americans are a cognizable racial group protected from discrimination under *Batson*. *E.g.*, *United*

States v. Biaggi, 909 F.2d 662 (2d Cir. 1990)(requiring government to demonstrate neutral explanations for peremptory challenges excluding Italian-Americans after government challenged five of six jurors in that ethnic group). In many cases, however, federal courts have held that litigants failed to carry their burden of showing that Italian-Americans are a cognizable racial group for purposes of their *Batson* challenges. *E.g.*, *United States v. Campione*, 942 F.2d 429 (7th Cir. 1991)(holding conclusory statement by defense counsel at side-bar conference that Italian-Americans meet the *Batson* test for a cognizable group fails to satisfy preliminary showing); *United States v. Di Pasquale*, 864 F.2d 271 (3d Cir. 1988)(holding defendants failed to carry burden of demonstrating that Italian-Americans are a cognizable group under *Batson*); *United States v. Bucci*, 839 F.2d 825 (1st Cir. 1988)(defendants made no effort to show that Italian-Americans are cognizable group that have been or are currently subjected to discrimination); *United States v. Sgro*, 816 F.2d 30 (1st Cir. 1987)(holding that general statements about distinctive ethnicity of Italian-Americans failed to satisfy minimal burden of showing cognizability).

8. Jewish Persons As a Race

In *United States v. Somerstein*, 959 F. Supp. 592 (E.D.N.Y. 1997), the district court held that the *Batson* rule applied to the government's use of peremptory challenges against Jewish venirepersons, regardless of whether Jewish persons were considered members of a race, religion, or both.

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B. Limitations on *Batson* Coverage

The majority of federal courts have not extended the coverage of *Batson* to include the following:

1. Age

The Eighth Circuit recently held that *Batson* does not apply to age-based peremptory challenges to potential jurors. In *Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999), the plaintiff sued his former employer for employment discrimination including age discrimination. During jury selection, the employer used all three of its peremptory challenges to remove jurors over the age of 50. The plaintiff objected that this practice violated his right to a representative jury under *Batson*. The district court rejected the plaintiff's *Batson* challenge and the Eighth Circuit affirmed, holding that age, unlike race or gender, is not a suspect classification subject to strict, or even heightened, scrutiny under the Equal Protection Clause. Even if age was the proper basis for a *Batson* challenge, the court continued, the employer's age-neutral explanations for the three strikes were not pretextual. The court based this finding on the fact that all three stricken jurors gave answers during voir dire that arguably provided support for the employer's counsel's view that they were predisposed against the employer, and the brother-in-law of one of the stricken jurors had made age discrimination claims against a former employer. Other courts have also held that discrimination against venirepersons based on age does not violate *Batson*. *E.g.*, *United States v. Jackson*, 983 F.2d 757 (7th Cir. 1993)(holding exclusion of young adults from jury did not

violate *Batson*); *United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991)(holding “[a]ge and appearance have been recognized as legitimate reasons for peremptorily striking potential jurors.”)

2. Religion

The constitutional status of peremptory challenges based on religion is unsettled. *United States v. Stafford*, 136 F.3d 1109, 1114 (7th Cir. 1998). Although the Supreme Court has not resolved this issue, at least two justices have argued that precedent requires an extension of *Batson* principles to religion. See *Davis v. Minnesota*, 511 U.S. 1115 (1994)(Scalia and Thomas, JJ., dissenting from denial of certiorari from decision that *Batson* does not extend to peremptory strikes based on religion). State courts appear to be split on the issue. Compare *Joseph v. State*, 636 So. 2d 777 (Fla. Ct. App. 1994)(disallowing strikes against Jewish jurors as a violation of the state constitution) with *Casarez v. State*, 913 S.W.2d 468 (Tex. Crim. App. 1995)(on rehearing en banc)(holding religion-based peremptory strikes did not violate the Equal Protection Clause).

3. Persons with Disabilities

In the most recent federal appellate court ruling on this issue, the Seventh Circuit held that venirepersons with disabilities are not members of a suspect or quasi-suspect class for the purposes of a *Batson* challenge, applying a rationality review rather than heightened scrutiny to claims of discrimination regarding the government's peremptory challenges. *United States v. Harris*, ___ F.3d ___, No. 99-1994, 1999 WL 1076347 (7th Cir. Nov. 30, 1999). Inability to see or hear evidence

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a legitimate basis for a peremptory strike. *United States v.*
F.2d 934 (7th Cir. 1990).

Morgan v. City of Albuquerque, 25 F.3d 918 (10th Cir. 1994), the Tenth
Circuit held that it was permissible to use peremptory strikes against venire
members based on their association with persons with disabilities.

4. Sexual Orientation

Homosexuals may not be covered by *Batson* as a matter of fact rather than as
a matter of law, because sexual orientation is not a readily observable
characteristic; therefore, making a *Batson* challenge would necessarily involve
inquiring into a prospective juror's sexual orientation. At least one federal court
was unwilling to conduct this inquiry under *Batson*. See, e.g., *Johnson v. Campbell*,
92 F.3d 951 (9th Cir. 1996)(assuming without deciding that sexual orientation could
be a *Batson* qualification, absence of record evidence that sexual orientation of
parties was in issue shows district court did not err in refusing to question
challenged juror about his sexual orientation or hold a *Batson* hearing on the issue).

5. Marital Status

Peremptory challenges on the basis of marital status generally do not violate
Batson. E.g., *United States v. Omoruyi*, 7 F.3d 880 (9th Cir. 1993); *United States v.*
Nichols, 937 F.2d 1257 (7th Cir. 1991).

6. Wealth or Socioeconomic Status

Most courts have held that strikes for wealth or socioeconomic status cannot
support a *Batson* challenge. E.g., *United States v. Brown*, 34 F.3d 569 (7th Cir.

1994)(holding venireperson's lack of a job as well as her family's unemployment was a permissible basis for a peremptory strike); *United States v. Miller*, 939 F.2d 605 (8th Cir. 1991)(holding venireperson's occupation was legitimate, non-discriminatory reason for peremptory challenge).

7. Unilateral Dismissals of Venire Members by District Court

Arguments have been made to extend the *Batson* rule to actions of the district court itself in dismissing veniremen. In *United States v. Martinez-Nava*, 838 F.2d 411 (10th Cir. 1988), the Tenth Circuit dismissed a Hispanic defendant's *Batson* challenge that the district court's dismissal of two American Indian venirepersons resulted in a racial imbalance. The court indicated that it was reluctant to extend *Batson* to actions of the district court, but even if it did, the district court's neutral explanations regarding travel distance and the likelihood of inclement weather was sufficient to defeat the defendant's *Batson* challenge.

III. *Batson* Procedural Requirements

Batson spelled out a three-part test to challenging a peremptory strike for bias: (1) the challenging party must make out a prima facie case of discrimination; (2) the challenged party must offer a "clear and reasonably specific" neutral explanation for the peremptory strikes; and (3) the trial court must evaluate the credibility of the proffered explanation. *Batson*, 476 U.S. at 98 n.20.

A. Prima Facie Case

Batson does not require that the movant establish a "pattern" of discrimination in order to establish a prima facie case, although such a pattern can

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be considered by the trial court. Rather, the challenging party must establish an inference of racial discrimination through any means. *United States v. Blackman*, 66 F.3d 1572 (11th Cir. 1995). "The trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the [party's] questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 96-97.

Thus, while the ultimate composition of the jury does not nullify the possibility of discrimination, it is a significant factor in the highly deferential review the appellate court affords to the district court's conclusions. *United States v. Tokars*, 95 F.3d 1520 (11th Cir. 1996). A statistical showing is not the sole basis for establishing a prima facie case of discrimination. *Cochran v. Herring*, 43 F.3d 1404 (11th Cir. 1995); *United States v. David*, 803 F.2d 1567 (11th Cir. 1986)(holding number of black jurors struck is not dispositive of whether a prima facie case has been established).

B. The Opponent's Articulated Reason

If the challenging party demonstrates a prima facie case of racial discrimination regarding the strike, the opponent must articulate a legitimate, nondiscriminatory explanation for the peremptory strike. In order to satisfy this burden, the striking party's legitimate reason need not be "persuasive, or even plausible" in order to survive step two of a *Batson* challenge, as long as the reason

does not deny equal protection. *Purkett v. Elem.* 514 U.S. 765, 767 (1995); accord *United States v. Tokars*, 95 F.3d 1520 (11th Cir. 1996). Even a reason based on an outright mistake is sufficient to rebut the challenger's prima facie case at stage two. See *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540 (10th Cir. 1997). Again, however, even the exercise of one peremptory challenge for a discriminatory reason violates *Batson*; there is no requirement that the movant establish a pattern. *United States v. Horsley*, 864 F.2d 1542 (11th Cir. 1989).

Since the burden on the challenged party is exceedingly light at this stage, most prima facie cases will survive to stage three, where the trial court's decision is reversible only if it is clearly erroneous.

C. The Trial Court's Determination

Once the *Batson* challenger demonstrates a prima facie case of discrimination, and the opposing party offers an explanation for the challenged strikes, the trial judge then considers all the facts and circumstances and determines whether the *Batson* movant has established the existence of purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352 (1991); *United States v. Stewart*, 65 F.3d 918 (11th Cir. 1995). The movant may seek an adversarial hearing at which counsel may cross-examine opposing counsel as to the reason for the strikes, although not all courts will allow this type of *Batson* hearing. Compare *United States v. Tucker*, 836 F.2d 334 (7th Cir. 1988) (“[W]e believe that adversarial hearings are the appropriate method for handling most *Batson* type disputes.”), with *United States v. Davis*, 809 F.2d 1194 (6th Cir. 1987) (affirming trial court's

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decision to conduct *Batson* rebuttal hearing *in camera* without movant and movant's counsel present). In *United States v. Jiminez*, 983 F.2d 1020 (11th Cir. 1993), the Eleventh Circuit reserved ruling on the question of whether one counsel may question opposing counsel about his exercise of peremptory strikes.

After hearing the arguments and rebuttals, the trial court decides the persuasiveness of the justification. *Purkett v. Elem.* 514 U.S. 765 (1995). The movant has the burden of persuading the trial court by a preponderance of the evidence that the allegations of intentional discrimination in jury selection are true. *Id.*

In making its pretext determination, the trial court may, for example, consider a comparison of stricken whites with stricken blacks, or a comparison of stricken blacks to seated whites. *Hollingsworth v. Burton*, 30 F.3d 109 (11th Cir. 1994); *United States v. Bennett*, 928 F.2d 1548 (11th Cir. 1991); *United States v. Alston*, 895 F.2d 1362 (11th Cir. 1990). Failing to strike a white juror who shares certain traits with a struck black juror does not in and of itself automatically prove the existence of discrimination, because the characteristic may be more or less present in different jurors. *United States v. Bennett*, 928 F.2d 1548 (11th Cir. 1991). Nevertheless, if the district court considers that factor in disallowing a strike, the appellate court will defer to the lower court's findings. *United States v. Stewart*, 65 F.3d 918 (11th Cir. 1991). On the other hand, the presence of several blacks on the jury may undercut any inference of impermissible discrimination that might arise

simply by the striking of other blacks. *United States v. Allison*, 908 F.2d 1531 (11th Cir. 1990).

In *Wallace v. Morrison*, 87 F.3d 1271 (11th Cir. 1996), the Eleventh Circuit adopted a "dual motivation" analysis in evaluating *Batson* challenges, recognizing that a person may act for more than one reason. This "dual motivation" analysis provides that an acknowledgement that race was part of the striking party's motivation, or even a finding to that effect unaided by such acknowledgement, is not inconsistent with the existence of some other race-neutral explanation for the strike. If the striking party demonstrates some race-neutral reason that would have prompted striking the juror, the movant's *Batson* challenge will fail. *United States v. Tokars*, 95 F.3d 1520 (11th Cir. 1996).

Examples of satisfactory discrimination-neutral reasons for exercising a peremptory strike can include the juror's lack of attentiveness during voir dire, or the juror's rolling and rubbing her eyes. *United States v. Diaz*, 26 F.3d 1533 (11th Cir. 1994); *United States v. Hendrieth*, 922 F.2d 748 (11th Cir. 1991); *United States v. Cure*, 996 F.2d 1136 (11th Cir. 1993). Because this factual allegation is subject to abuse and is not readily apparent from the record, the trial court must develop the record regarding the specific behavior by the potential juror that resulted in the peremptory strike, and verify that the stricken venire-person's conduct was conspicuously different from that of the other members of the venire. *United States v. Diaz*, 26 F.3d 1533 (11th Cir. 1994). Although a strike purportedly based on a prospective juror's address, or his proximity to the location of prior criminal

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activity appears to be discrimination-neutral, trial courts must scrutinize such explanations to ensure that they do not mask a discriminatory motive. *United States v. Williams*, 936 F.2d 1243 (11th Cir. 1991).

The Seventh Circuit held that dismissal of some jurors for lack of education or business experience was not a mere pretext for discrimination in *United States v. Tucker*, 836 F.2d 334 (7th Cir. 1988). On the other hand, strikes of jurors with knowledge of computing, bookkeeping, and electronics in the belief they would have trouble applying the reasonable doubt standard was held to be pretextual in *Roman v. Abrams*, 822 F.2d. 214 (2d Cir. 1987).

Strikes of jurors for being social workers, or having children the same age as the defendant, were upheld by the Second Circuit where the striking party stated that these factors would make the jurors too sympathetic to the defendant. See *United States v. Alvarado*, 951 F.2d 22 (2d Cir. 1991). Similarly, striking a juror who lived in a particular low income housing area with an allegedly higher likelihood of direct exposure to drug trafficking was upheld in *United States v. Uwaezhoke*, 995 F.2d 388 (3d Cir. 1993). Where jurors from a low-income, high-crime neighborhood were struck on the belief that they might be skeptical of the police, however, the Ninth Circuit upheld the *Batson* challenge and disallowed the strikes in *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992).

Intuitive strikes, based on lack of eye contact or hostile body language, present a difficult factual question for trial courts. Some federal courts have held that such intuitive strikes were non-pretextual. See *Polk v. Dixie Ins. Co.*, 972 F.2d

83 (5th Cir. 1992) (lack of eye contact permissible as grounds for strike); *United States v. De La Rosa*, 911 F.2d 985 (5th Cir. 1990) (intuitive strikes are permissible); *Barfield v. Orange County*, 911 F.2d 644 (11th Cir. 1990) (hostile facial expressions and language permissible); *United States v. Terrazas-Carrasco*, 861 F.2d 93 (5th Cir. 1988) (strikes based on "intuitive assumptions" permissible); *United States v. Forbes*, 816 F.2d 1006 (5th Cir. 1987) (hostile posture and demeanor permissible). Other courts have disallowed intuitive strikes under *Batson* review. See *Splunge v. Clark*, 960 F.2d 705 (7th Cir. 1992) (prosecutor "felt [struck venire member] would not be a good juror"); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987) (holding juror's "unsatisfactory" background and answers to questionnaire were insufficient grounds for peremptory strike).

In some cases, strikes have been upheld where the stated discrimination-neutral reasons also applied to non-stricken non-minority jurors. *E.g.*, *United States v. Valley*, 928 F.2d 130 (5th Cir. 1991); *United States v. Bennett*, 928 F.2d 1548 (11th Cir. 1991); *United States v. Clemons*, 843 F.2d 741 (3d Cir. 1988). Other cases reached the opposite conclusion that such reasons were pretextual. *E.g.*, *Splunge v. Clark*, 960 F.2d 705 (7th Cir. 1992); *United States v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989); *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987).

Some courts have cited the fact that other members of the same minority group were left on the jury as militating against a finding of discriminatory intent. *E.g.*, *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990); *United States v. Terrazas-Carrasco*, 861 F.2d 93 (5th Cir. 1988). Other courts have given little or no

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weight to the fact that members of the same minority group as the stricken juror were left on the jury by the striking party. *E.g.*, *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992); *United States v. Ferguson*, 935 F.2d 862 (7th Cir. 1991); *United States v. Clemons*, 843 F.2d 741 (3d Cir. 1988).

D. Timing and Waiver

The party making a *Batson* challenge must do so in a timely manner during voir dire. *See, e.g.*, *Garcia v. Excel Corp.*, 102 F.3d 758 (5th Cir. 1997)(holding *Batson* challenge after jury venire was dismissed was untimely); *United States v. Cashwell*, 950 F.2d 699 (11th Cir. 1992)(defendant waived *Batson* argument where reconstructed record established that defendant's trial lawyer failed to make objections of any kind during voir dire).

In a matter of first impression for the Fourth Circuit, the court held that the plaintiff in an employment discrimination action waived his *Batson* challenge by failing to pursue his objection once the defendant offered a legitimate, nondiscriminatory explanation for its use of preemptory jury strikes to eliminate the only two African-American jurors from the jury pool, even where the district court failed to make a ruling on the record. *Davis v. Baltimore Gas and Elec. Co.*, 160 F.3d 1023 (4th Cir. 1998); *accord Hopson v. Fredericksen*, 961 F.2d 1374 (8th Cir. 1992); *United States v. Rudas*, 905 F.2d 38 (2d Cir. 1990).

In addition to making a timely objection, a litigant must raise all grounds for the *Batson* challenge in order to avoid waiving the argument. *See United States v. Lampkins*, 47 F.3d 175 (7th Cir. 1995)(holding defendant waived a challenge to

gender-based strikes when he raised only racial discrimination before the trial court). Finally, the litigant must get the demographics of the jurors, counsel and clients, the reasons for the strikes, and the counter-arguments on the record in order to avoid waiver of the *Batson* challenge. See *United States v. Williams*, 936 F.2d 1243 (11th Cir. 1991)(requiring record evidence of opposing party's reasons for strikes and counter-arguments by movant for pretext determination); *Shaw v. State*, 201 Ga. App. 438, 411 S.E.2d 534 (1991)(holding that *Batson* movant has burden of insuring that record reflects racial composition of panel, racial breakdown of both parties' strikes, and racial composition of the resulting jury).

E. Appellate Review

In reviewing a *Batson* challenge, the appellate court gives great deference to the district court's determination of the existence of a prima facie case. Once past this prima facie threshold, the district court's determination concerning the actual motivation behind each challenged strike amounts to pure fact-finding. Thus, the appellate court will reverse the district court's determination only if it is clearly erroneous. *United States v. Stewart*, 65 F.3d 918 (11th Cir. 1995); *United States v. Bennett*, 928 F.2d 1548 (11th Cir. 1991).

The trial court's prima facie case determination does not become moot when the trial court makes subsequent findings which are subject to review, including the trial court's credibility determination regarding the striker's explanation. *United States v. Stewart*, 65 F.3d 918 (11th Cir. 1995).