Chapter 7
Selection of the Trial Jury: Peremptory Challenges

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7.1 Scope of Chapter

In criminal cases, parties may challenge jurors for cause during jury selection (for example, when a juror expresses an inability to be fair and impartial) or may use a certain number of peremptory challenges to remove jurors without cause. Peremptory challenges, or strikes, influenced by race violate the constitutional rights of both defendants and improperly struck jurors, and impair the reputation and democratic function of the justice system as a whole. *See infra* § 7.2A, Consequences of Discrimination in Jury Selection.

This chapter reviews the federal and state constitutional limits on the use of peremptory challenges. Most significantly, in the landmark U.S. Supreme Court decision *Batson v.*

Kentucky, 476 U.S. 79 (1986), the U.S. Supreme Court established a three-step approach for assessing whether a party used a peremptory challenge for a discriminatory reason. Under this approach, an attorney may establish a violation by showing that the prosecutor failed to offer a sufficient race-neutral reason for exercising a peremptory challenge. Statistical evidence is not required to establish a violation; however, such data may be used to support an alleged violation. This chapter therefore reviews studies that have been conducted in North Carolina (and can be replicated) about disparities in the use of peremptory challenges. The chapter describes the procedures for raising a *Batson* claim, including raising the issue properly during jury selection, conducting a hearing on the issue, remedies, and preserving the record for appeal.

7.2 Overview

A. Consequences of Discrimination in Jury Selection

Recent publications have raised concerns about the potential influence of race on peremptory challenges, both nationally and in North Carolina. *See, e.g.,* Catherine M. Grosso & Barbara O'Brien*, A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012) (concluding that in the cases of inmates on North Carolina's death row as of July 1, 2010, the strike rate of eligible Black jurors was about 2.5 times that of eligible non-Black jurors); EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14 (2010) (reporting that "[f]rom 2005 to 2009, in cases where the death penalty has been imposed, prosecutors in Houston County, Alabama, have used peremptory strikes to remove 80% of the African Americans qualified for jury service").

The consequences of discrimination in jury selection extend beyond the violation of an individual defendant's constitutional rights. Courts have recognized that racial minorities suffer harm from discrimination in jury selection, "for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (1995) (internal quotations omitted); *see also State v. Saintcalle*, 309 P.3d 326, 337 (Wash. 2013) (observing that when the judicial system "allow[s] the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict"). The U.S. Supreme Court has observed: "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. 79, 87. When the jury selection procedure is "tainted with racial bias, that overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication." *Miller-El*, 545 U.S. 231, 238 (internal citations and quotations omitted).

B. Development of Law

Racial discrimination in the selection of trial jurors has long been recognized as unconstitutional. *See Strauder v. West Virginia*, 100 U.S. 303 (1880). "For more than a century, [the U.S. Supreme] Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia v. McCollum*, 505 U.S. 42, 44 (1992); *see also Batson*, 476 U.S. 79, 85 (describing the Court's "unceasing efforts to eradicate racial discrimination" in jury selection).

In the era before Reconstruction, jury service was generally restricted to White men. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 9 (2010). The Civil Rights Act of 1875 outlawed racial discrimination in jury service and, in 1880, the U.S. Supreme Court overturned a West Virginia statute restricting jury service to Whites. *Strauder*, 100 U.S. 303, 308 (holding that racial discrimination in jury selection compromises the right of trial by jury and violates the Equal Protection Clause); *see also Batson*, 476 U.S. 79, 89 ("The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court."). In practice, however, the Civil Rights Act of 1875 was rarely enforced, and the *Strauder* holding was circumvented by the replacement of statutes restricting jury service to Whites with statutes that, while race-neutral on their face, had the effect of excluding African Americans from jury service. For example, laws restricting jury service to eligible voters resulted in all-white juries when voting was restricted to those who could pass a literacy test and pay a poll tax. *See Williams v. Mississippi*, 170 U.S. 213 (1898). In addition, local officials excluded African Americans from jury service based on vague jury service requirements such as intelligence or good character. *See, e.g.*, *State v. Speller*, 229 N.C. 67, 69 (1948) ("The Chairman of the Board of [Bertie] County Commissioners testified that there had been 'no discrimination at all' in the selection of persons to serve on juries; that he had never 'known a Negro's name to be on the list of persons chosen for [service] on a grand or petit jury', but that all rejections were for want of good moral character and sufficient intelligence."); *see also* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 10–11 (2010).

In the 1960's, there was an increase in the number of minorities on jury venires as a result of the civil rights movement and the U.S. Supreme Court's fair cross-section jurisprudence. However, some scholars have concluded that these gains were undercut by the advent of racial discrimination in the exercise of peremptory challenges. *See, e.g.*, EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 12 (2010); Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2072–76, 2106–2110 (2010).

In *Swain v. Alabama*, 380 U.S. 202 (1965), the U.S. Supreme Court held that the use of race in the exercise of peremptory strikes violates the Equal Protection Clause, but

required defendants raising challenges to show a pattern or practice of discrimination over a number of cases; evidence of discrimination from the defendant's individual case was not sufficient to establish an equal protection violation. The Court later recognized that the *Swain* standard was difficult to meet: it imposed a "crippling burden of proof [leaving] prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Batson*, 476 U.S. 79, 92–93; JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 134 (1994) (noting that the *Swain* standard was not satisfied in federal court over a twenty year period).

In 1986, the U.S. Supreme Court altered the evidentiary burden for proving discrimination in the exercise of peremptory challenges by holding that Equal Protection Clause violations could be demonstrated with evidence from a defendant's case alone; historical evidence of discriminatory patterns was no longer required. *Batson*, 476 U.S. 79, 95–96; *see also infra* § 7.3, Legal Restrictions on Peremptory Challenges. The *Batson* framework continues to govern challenges to discrimination in jury selection, but subsequent U.S. Supreme Court cases, including *Miller El v. Dretke* and *Snyder v. Louisiana*, have refined the standards necessary to sustain a *Batson* challenge.

Despite the Court's condemnation of racial discrimination in jury selection, "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature." *Miller El v. Dretke*, 545 U.S. 231, 238 (2005). Just as the *Batson* Court concluded that *Swain* had not succeeded in ending the practice of race-based peremptory challenges, in recent years the Supreme Court has recognized that *Batson's* three-step test for detecting racial motivations behind peremptory strikes has also had a "weakness of its own owing to its very emphasis on the particular [race-neutral] reasons [for a strike that] a prosecutor might give." *Miller-El*, 545 U.S. 231, 239–40; *see also Miller-El*, 545 U.S. 231, 270 (Breyer, J., concurring) ("the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before").

In 1970, North Carolina amended its state constitution to explicitly prohibit discrimination in jury selection. Article I, section 26 of the North Carolina Constitution provides that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." Additionally, North Carolina courts have held that the *Batson* framework is applicable under North Carolina constitutional law. *See State v. Maness*, 363 N.C. 261, 271–72 (2009). Nonetheless, a number of researchers, attorneys, and other observers have noted that legal prohibitions have not succeeded in eliminating race discrimination from jury selection in our state. *See infra* § 7.2D, Studies of Peremptory Challenges in North Carolina.

In recent years, legislators, judges, and researchers have examined the role that race may play in peremptory challenges in North Carolina capital cases. In 2009, the North Carolina General Assembly enacted the Racial Justice Act (RJA), which prohibited the sentencing or execution of any person "pursuant to any judgment that was sought or obtained on the basis of race." S.L. 2009-464. The law provided relief for defendants who could demonstrate that race "was a significant factor in decisions to exercise peremptory

challenges during jury selection" in "the county, the prosecutorial district, the judicial division, or the State" at the time the defendant's death sentence was sought or imposed. *Id*. The law was amended in 2012 and repealed in 2013. Before its repeal, statistical information concerning racial disparities in jury selection in North Carolina capital cases was compiled in connection with RJA claims. *See infra* § 7.2D, Studies of Peremptory Challenges in North Carolina.

Four defendants' RJA claims advanced to trial court hearings. *See State v. Marcus Reymond Robinson*, Order Granting Motion for Appropriate Relief, ACLU.ORG (last visited Aug. 12, 2014) [Robinson Order]; *State v. Tilmon Golphin, Christina Walters, and Quintel Augustine*, Order Granting Motions for Appropriate Relief, ACLU.ORG (last visited Aug. 12, 2014) [Golphin Order]. In all four cases, the trial court found violations of the RJA relating to patterns of discrimination in peremptory strikes, among other things. These cases are now under review by the North Carolina Supreme Court. Regardless of the ultimate outcome in those cases, the evidence collected by the trial court, and the lengthy, detailed analysis of jury selection issues in North Carolina contained within the Golphin and Robinson Orders may serve as useful information for attorneys raising challenges to peremptory strikes. *See* Cassandra Stubbs, *Strengthening* Batson *Challenges with the MSU Study* in the Race Materials Bank at www.ncids.org (select "Training and Resources").

C. How Race May Influence the Exercise of Peremptory Challenges

Discretion. Because of the broad discretion afforded their exercise, the U.S. Supreme Court has recognized that "peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (internal quotations omitted); *see also Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) (it has been difficult to harmonize, "on the one hand, what Blackstone called an inherently 'arbitrary and capricious' peremptory challenge system, and, on the other hand, the Constitution's nondiscrimination command" (internal quotations and citations omitted)). In his concurring opinion in *State v. Saintcalle,* 309 P.3d 326, 347–71 (2013) (Gonzalez, J., concurring), Washington State Supreme Court Justice Gonzalez identified several ways in which race may unlawfully influence the exercise of peremptory challenges:

- A peremptory challenge may be based on an overt racial stereotype. *Id.* at 355–56; *see also Howard v. Senkowski*, 986 F.2d 24, 25 (2d Cir. 1993) (prosecutor believed Black jurors were more likely to sympathize with the defendant).
- A peremptory challenge may be based on a juror profile that treats race as an indicator of how a juror may view a given type of case. *Saintcalle*, 309 P.3d 326, 356 (Gonzalez, J., concurring) (discussing TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION: STRATEGY AND SCIENCE 6–23 (3d ed. 2007)).
- A peremptory challenge may be part of an effort to achieve some particular racial balance on the jury as a whole. *Saintcalle*, 309 P.3d 326, 356 (Gonzalez, J., concurring); *see also Miesner v. State*, 665 So. 2d 978, 980–81 (Ala. Crim. App.

1995) (prosecutor stated that he was looking for White jurors in order to achieve a racially balanced jury).

- A peremptory challenge may be based on unconscious bias. *Saintcalle*, 309 P.3d 326, 356 (Gonzalez, J., concurring); *see also* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2007) (studying influence of implicit bias in simulated peremptory challenges and finding "clear empirical evidence that a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence"); *infra* "Implicit bias" in this subsection C.

Time pressure. Researchers have concluded that time pressure may exacerbate the influence of biases on decision-making:

> [S]ituations that involve time pressure [or] that force a decision maker to form complex judgments relatively quickly . . . limit the ability to fully process case information. Decision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes—recalling facts in ways biased by stereotypes and making more stereotypic judgments—than decision makers whose cognitive abilities are not similarly constrained.

NATIONAL CENTER FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 4. Evaluating this phenomenon in the *Golphin* case, the trial court observed: "When prosecutors evaluate potential jurors, they must quickly decide—often on the basis of the prosecutor's gut feel—whether a particular venire member will be a 'good' juror for the State. This is precisely the type of decision and environment likely to be most susceptible to implicit bias." Golphin Order at 92.

Implicit bias. Even before contemporary implicit bias studies improved our understanding of unconscious stereotypes, Justice Marshall recognized the difficulty of uncovering the role that both conscious and unconscious bias may play in the exercise of peremptory strikes:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice Rehnquist concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that

> mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.

Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring).

Researchers have concluded that race influences peremptory strikes and that, as a result of implicit biases, "good people often discriminate, and they often discriminate without being aware of it." Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 160–61 (2005). By requiring prosecutors to provide a race-neutral explanation for challenged peremptory strikes, the *Batson* framework presumes that individuals generally are aware of the factors motivating their own behavior. However, "[e]ven presuming that lawyers are always entirely honest and open about their motivations for striking jurors, there are powerful reasons to believe that much discrimination occurs at the subconscious level." Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. LAW. REV. 279, 326 (2012) (noting that a lawyer facing a *Batson* challenge may "even lie to herself and identify some other nominally neutral trait or character on which to pin her unease"). In the *Golphin* case, the trial court found "unrebutted, credible expert testimony . . . indicating that individuals are not reliable reporters of the extent to which their decisions are influenced by race." Golphin Order at 28; *see also* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010).

Ease of identifying race-neutral reasons for peremptory strikes. Many have observed that even if a prosecutor's peremptory strike has been consciously or unconsciously influenced by race, it is easy to justify the strike on race-neutral grounds. *See* Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J. L. REFORM 229, 236 (1993) (concluding that "in almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race"). The ease of identifying a race-neutral strike justification raises concerns, since "people will act on unconscious bias far more often if reasons exist giving plausible deniability (e.g. an opportunity to present a race-neutral reason)." *State v. Saintcalle*, 309 P.3d 326, 336 (Wash. 2013).

Researchers have found that individuals "are remarkably facile at recruiting race-neutral characteristics to justify jury selection judgments." Samuel R. Sommers & Michael I. Norton*, Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007). Some prosecutors' trainings have included "cheat sheets" listing race-neutral strike justifications, such as crossed arms. *See Top Gun II Batson Training: Articulating Juror Negatives* in the Race Materials Bank at www.ncids.org (select "Training and Resources"); *see also* Robinson Order at 156–57 (reviewing the training materials from the *Top Gun II* CLE and finding that the "training [was not] intended to teach prosecutors how to avoid discrimination in jury selection, but that the training was focused on how to avoid a finding of a *Batson* violation in case of an objection by opposing counsel").

Unless defense counsel effectively raises concerns about the reasons offered for a peremptory strike, a judge may have difficulty discerning the prosecutor's motivations and therefore may accept the race-neutral reason for the strike at face value.

D. Studies of Peremptory Challenges in North Carolina

North Carolina appellate courts have been deferential to trial court rejections of *Batson* claims. Only one reported decision has reversed a trial court's rejection of a defendant's *Batson* claim, and in that case the prosecutor did not offer any race-neutral justifications for striking at least one, and possibly two, Black venire members. *State v. Wright*, 189 N.C. App. 346 (2008). It is difficult to quantify the extent to which race may influence the exercise of peremptory strikes in North Carolina, however. The affirmance of trial court decisions overruling *Batson* objections does not necessarily resolve the question. Appellate decisions may not reflect whether defendants are prevailing on *Batson* claims at trial, which generally would not be the subject of appellate review. To the extent the appellate decisions show a pattern, some may argue that they show that prosecutors generally exercise peremptory strikes in a race-neutral fashion, while others may view them as evidence of the need for closer scrutiny of peremptory challenges to effectuate the rights sought to be guaranteed. *See* Amanda S. Hitchcock, Recent Development, *"Deference Does Not By Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *Review in North Carolina Capital* Appeals, 84 N.C. L. REV. 1328 (2006) (reviewing North Carolina capital cases involving *Batson* claims between 1986 and 2005, arguing that the process has been unduly deferential to race-neutral justifications, and suggesting that, following the U.S. Supreme Court's opinion in *Miller-El v. Dretke*, 545 U.S. 231 (2005), North Carolina appellate courts reviewing *Batson* claims should grant greater weight to statistical evidence, complaints regarding disparate questioning, and comparative juror analysis); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (studying jury selection in Durham, North Carolina felony trials and concluding that race appeared to play a role in peremptory strikes by both prosecutors and defense attorneys); Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. LAW REV. 1533, 1577 (1991) (reviewing North Carolina decisions in the five years following *Batson* and finding no decisions in the appellate courts finding a *Batson* error on merits).

Most recently, two Michigan State University (MSU) researchers found that, in the trials of the 173 prisoners on death row in North Carolina at the time of the study, prosecutors used peremptory challenges to strike 52.6% of Black strike-eligible jurors and 25.7% of all other strike-eligible venire members. *See* Catherine M. Grosso & Barbara O'Brien*, A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1548 (2012). The strike rate of Black venire members was higher in cases involving Black defendants: in those cases, prosecutors struck 60% of Black venire members and 23.1% of other venire members. *Id.* at 1549; *see also* Golphin Order at 138 (finding MSU study "highly reliable"). Where relevant, this chapter describes how this study's findings may support challenges to discriminatory peremptory strikes in noncapital cases, and how defense

attorneys may conduct their own studies of peremptory strike patterns. *See infra* § 7.4A, Pretrial Preparation for a *Batson* Challenge; *see also* Cassandra Stubbs, *Strengthening* Batson *Challenges with the MSU Study* in the Race Materials Bank at www.ncids.org (select "Training and Resources").

E. Potential Benefits of Raising *Batson* Challenges

There are a number of reasons why defenders should raise *Batson* challenges to peremptory strikes that appear motivated by race or ethnicity. These include:

- Raising meritorious *Batson* challenges may result in more racially diverse juries. Diverse juries are consistent with the guarantee of a jury of one's peers; and empirical studies have concluded that diverse juries may be more likely to deliberate longer and conduct a more rigorous analysis of the issues presented. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. PERSONALITY AND SOC. PSYCHOL. 597, 608 (2006) ("By every deliberation measure . . . heterogeneous groups outperformed homogeneous groups.").
- You must raise a *Batson* challenge to a potentially discriminatory peremptory strike to preserve the issue for appellate review.
- Making the issue of race salient in this manner may reduce the influence of implicit bias on prosecutors, defenders, jurors, and judges. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).
- The ABA Guidelines counsel that attorneys should raise "appropriate issues" regarding jury panel selection and the exercise of challenges for cause and peremptory challenges. ABA Defense Standard 4-7.2.
- Raising such a challenge may strengthen your relationship with your client by demonstrating that you are willing to tackle difficult issues.
- By raising meritorious *Batson* challenges to questionable strikes, you help develop a record of prosecutorial *Batson* justifications for use in future *Batson* challenges. *See supra* § 7.4A, Pretrial Preparation for a *Batson* Challenge.

7.3 Legal Restrictions on Peremptory Challenges

A. Statutory Right to Peremptory Challenges in North Carolina

There is no constitutional right to peremptory challenges; they are a statutory creation. *See Rivera v. Illinois*, 556 U.S. 148, 157 (2009). In North Carolina, the State and each defendant in a non-capital case are entitled to six peremptory challenges. *See* G.S. 15A-1217. If there are co-defendants, the State gets six additional peremptory challenges per co-defendant. G.S. 15A-1217(b). Generally, trial judges do not have authority to grant

additional peremptory challenges. *State v. Hunt*, 325 N.C. 187, 198 (1989). The court has found no error, however, where the trial judge granted each defendant an additional peremptory challenge because one juror who had been accepted by all parties was dismissed because of a family emergency. *State v. Barnes*, 345 N.C. 184, 208 (1997). Trial judges may take away peremptory challenges as a sanction. *State v. Banks*, 125 N.C. App. 681 (trial judge stripped State of two peremptory challenges for failure to preserve evidence), *aff'd per curiam*, 347 N.C. 390 (1997).

For further discussion of the laws governing peremptory challenges in North Carolina, see 2 NORTH CAROLINA DEFENDER MANUAL § 25.5B (Statutory Right to Peremptory Challenges) (2d ed. 2012).

B. Overview of *Batson* Challenges

Generally. The U.S. Supreme Court has held that racial and ethnic discrimination in the exercise of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Hernandez v. New York*, 500 U.S. 352 (1991). Discrimination in jury selection also violates article I, section 26 of the N.C. Constitution, which provides that no person may be "excluded from jury service on account of sex, race, color, religion, or national origin." *See State v. White*, 349 N.C. 535 (1998) (racial discrimination in jury selection violates both state and federal constitutions). The North Carolina Supreme Court has held that the test for proving a violation of article I, section 26 of the N.C. Constitution is identical to the three-part test in *Batson*. *State v. Augustine*, 359 N.C. 709, 715 (2005).

Standing. There is no standing requirement for *Batson* claims. In *Powers v. Ohio*, 499 U.S. 400 (1991), the U.S. Supreme Court held that the defendant does not have to be of the same race as improperly excluded jurors to raise a *Batson* challenge. Any defendant has standing to assert the equal protection rights of jurors. *See also State v. Locklear*, 349 N.C. 118 (1998) (explaining *Powers*); *State v. Williams*, 343 N.C. 345 (1996) (same).

All racial groups protected under *Batson*. *Batson* challenges can be raised in response to the use of discriminatory peremptory strikes against venire members of all races. For example, Native Americans are recognized as "a racial group cognizable for *Batson* purposes." *State v. Locklear*, 349 N.C. 118, 136 (1998) (quoting *State v. Porter*, 326 N.C. 489, 499 (1990)); *see also United States v. Iron Moccasin*, 878 F.2d 226 (8th Cir. 1989); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987).

Strikes based on gender prohibited. The Equal Protection Clause also prohibits peremptory strikes based on gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *see also State v. Maness*, 363 N.C. 261, 272, (2009) ("A party alleging either a race-based or gender-based discriminatory peremptory challenge of a prospective juror must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike." (quotations omitted)).

Subgroups. The U.S. Supreme Court has not decided whether subgroups, such as African American women, are a cognizable group under *Batson.* If the only African

Americans accepted without peremptory challenge by the State are men, arguably there is a *Batson/J.E.B.* violation. In *State v. Best*, 342 N.C. 502 (1996), the defendant argued that the prosecutor had discriminated against African American women, but the court found the claim had not been preserved and did not address it.

C. *Batson* Step One: The Prima Facie Case

Batson v. Kentucky, 476 U.S. 79 (1986), held that the party raising an equal protection challenge to a peremptory strike must first establish a prima facie case of discrimination. *See, e.g.*, *State v. Golphin*, 352 N.C. 364 (2000) (citing *Hernandez v. New York*, 500 U.S. 352, 358–59 (1991)). In considering whether the party has established a prima facie case, the trial judge must consider all circumstances relevant to a claim of discrimination. *See Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (prima facie claim will be evaluated based on "the totality of the relevant facts" (quotations omitted)); *Snyder v. Louisiana*, 552 U.S. 472 (2008) ("[I]n considering a *Batson* objection . . . all of the circumstances that bear upon the issue of racial animosity must be consulted."); *Golphin*, 352 N.C. 364, 426; *State v. White*, 349 N.C. 535, 548. Some of the circumstances relevant to establishing a prima facie case include the percentage of minorities challenged peremptorily; disparate questioning of minority and non-minority potential jurors; the race of the defendant, victim, and witnesses; and historical data, such as sustained *Batson* challenges against the prosecutor in prior cases. For an illustrative list of evidence, see *infra* "Evidence supporting defendant's prima facie case at step one" in § 7.4B, Presenting an Effective *Batson* Challenge.

"Step one of the *Batson* analysis, a prima facie showing of racial discrimination, is not intended to be a high hurdle for defendants to cross." *State v. Hoffman*, 348 N.C. 548, 553 (1998). *Hoffman* ruled that the trial judge erred in failing to find that the defendant had made out a prima facie case with respect to the prosecutor's peremptory challenge of certain Black jurors where the defendant was Black, the victim was White, and the prosecutor had filled eleven seats with White jurors and struck every other Black prospective juror not excused for cause. The case was remanded so that the prosecutor could place his or her reasons for the strikes on the record. *See also State v. McCord*, 140 N.C. App. 634 (2000) (remanding for *Batson* hearing after trial judge erroneously failed to find prima facie case).

Improper strike of one juror sufficient. If even one juror is struck for racial reasons, there is constitutional error in the jury selection. *State v. Robbins*, 319 N.C. 465, 491 (1987) ("Even a single act of invidious discrimination may form the basis for an equal protection violation."); *see also United States v. Vasquez–Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) ("the Constitution forbids striking even a single prospective juror for a discriminatory purpose"; quoted with approval in *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)); *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (striking a single black prospective juror for a discriminatory reason violates equal protection guarantees, even where prosecutor accepts other black jurors). *See also infra* "Comparative juror analysis at step one" in § 7.4B, Presenting an Effective *Batson* Challenge.

Significance of minority acceptance rate. North Carolina appellate courts have often considered the "minority acceptance rate" or "Black juror acceptance rate" when evaluating the defendant's prima facie *Batson* claim on appeal. *See, e.g.*, *State v. Smith*, 328 N.C. 99, 121 (1991) (observing that an important consideration bearing on whether a prima facie case is established is whether the prosecutor uses a disproportionate number of peremptory challenges to strike Black jurors). This number reflects the percentage of eligible minorities accepted, rather than peremptorily stricken, by the prosecutor. For example, if a prosecutor used peremptory strikes to remove three of five Black venire members, the acceptance rate of Black jurors would be 40%. *See, e.g.*, Excerpt from Motion for Appropriate Relief - *Batson* Claim in the Race Materials Bank at 6 in the Race Materials Bank at www.ncids.org (select "Training and Resources") (calculating acceptance rate of Black potential jurors). The N.C. Supreme Court has found that the defendant failed to establish a prima facie case at step one where the minority acceptance rate was 66%, *State v. Ross*, 338 N.C. 280 (1994); 50%, *State v. Nicholson*, 355 N.C. 1, 24 (2002); 40%, *State v. Fletcher*, 348 N.C. 292, 320 (1998), and 37.5%, *State v. Gregory*, 340 N.C. 365, 398 (1995). The N.C. Supreme Court reversed a finding that a defendant failed to make out a prima facie case of discrimination when the prosecutor's acceptance rate of Black jurors was 28.6%, and the overall minority acceptance rate was even lower. *State v. Barden*, 356 N.C. 316, 344–45 (2002). In that case, the court stressed that "numerical analysis of the type employed here is not necessarily dispositive." *Id*. at 344.

In order to make arguments regarding strike rates during voir dire, the defense team will need to take careful notes of strikes and continually calculate acceptance rates as voir dire progresses. *See* Scott Holmes's Spreadsheet for Calculating Juror Strike Ratios and Cassandra Stubbs's Strike Data Spreadsheet in the Race Materials Bank at www.ncids.org (select "Training and Resources"). Where a prosecutor's "acceptance rate" of minority jurors is low, defense attorneys should make note of this fact in support of a *Batson* challenge.

However, defense attorneys should not refrain from challenging strikes that appear to be race-based simply because the minority acceptance rate is not one that North Carolina appellate courts have found to be evidence supporting a prima facie claim of discrimination. The U.S. Supreme Court has observed that disparate strike rates are not a necessary element of a defendant's prima facie *Batson* claim: "More powerful than … bare statistics . . . are side-by-side comparisons of some Black venire panelists who were struck and white panelists who were allowed to serve." *Miller-El*, 545 U.S. 231, 241. Additionally, defense attorneys should carefully consider the circumstances surrounding the prosecutor's strikes. For example, a minority acceptance rate of 60% reflecting the acceptance of three of five Black jurors may mask the fact that, when the three Black jurors were accepted by the prosecutor, he or she was running low on peremptory strikes. Under these circumstances, the prosecutor's acceptance of three Black jurors does not necessarily constitute evidence supporting a race-neutral justification for striking the other two Black jurors. *See Miller El*, 545 U.S. 231, 249 (fact that the State grew more "sparing with peremptory challenges as the jury selection wore on . . . weaken[s] any suggestions that the State's acceptance of . . . the one Black juror [towards the end of the

jury selection] shows that race was not in play"). As the Supreme Court has recognized, strike rates in a given case may not accurately represent the degree to which race played a role in peremptory challenges.

D. *Batson* Step Two: The Prosecutor's Race-Neutral Justification

If the defendant establishes a prima facie showing of discrimination, the burden of production shifts to the State to provide a race-neutral reason for the strike. *Purkett v. Elem*, 514 U.S. 765 (1995); *Hernandez v. New York*, 500 U.S. 352 (1991). A bare denial of discrimination will not suffice. "The [State's] explanation must be clear and reasonably specific, but need not rise to the level justifying exercise of a challenge for cause." *State v. Bonnett*, 348 N.C. 417, 433 (1998) (quotation omitted). In *Purkett*, the U.S. Supreme Court held that, at step two, the proffered race-neutral explanation does not have to be persuasive or even plausible as long as it is facially non-discriminatory; however, the Court recognized that an implausible reason will probably fail at step three, when the court determines whether the reason offered is pretextual. 514 U.S. 765, 768; *see also State v. Fletcher*, 348 N.C. 292 (1998) (following *Purkett*); *Bonnett*, 348 N.C. 417, 433 ("unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral" (quotation omitted)). For a discussion of identifying and challenging justifications that are not race-neutral, see *infra* "Challenging justifications that are not race-neutral at step two" in § 7.4B, Presenting an Effective *Batson* Challenge.

E. *Batson* Step Three: The Pretext Determination

In the third step of a *Batson* challenge, the trial judge assesses the State's proffered reason and determines whether the defendant has met the burden of proving purposeful discrimination. Before the trial judge makes this determination, the defendant is entitled to an opportunity to rebut the proffered race-neutral reasons for excusing the juror. *See, e.g.*, *State v. Gaines*, 345 N.C. 647, 668 (1997); *State v. Peterson*, 344 N.C. 172 (1996). If the judge finds that the prosecutor's proffered reasons are pretextual and the real reason for the strike is discriminatory, the judge must find an equal protection violation. *Hernandez*, 500 U.S. 352, 359; *Gaines*, 345 N.C. 647, 668. "At [this] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U.S. 765, 768 (1995).

Because it is relatively easy for the State to proffer a race-neutral reason for a strike, defense counsel should be prepared to show that the State's proffered explanations for strikes are not credible. Implausible reasons unrelated to the juror's fitness to serve, such as demeanor or a remote connection to a relatively minor State witness, may be pretextual. Also, if a prosecutor accepts a White juror with certain characteristics, and then challenges a Black juror based on those same characteristics, defense counsel has grounds to argue that the stated reasons for the challenge are pretextual. For example, if the prosecutor claims he struck a Black juror because she was young, list for the judge the young White jurors accepted by the prosecutor. For an illustrative list of evidence that

may support a finding of pretext, see *infra* "Evidence supporting a determination of pretext at step three" in § 7.4B, Presenting an Effective *Batson* Challenge.

Practice note: At step three, you must renew your objection to the challenged strikes. The North Carolina Supreme Court has held that a defendant's failure to attempt to demonstrate that the prosecutor's strike justifications were pretextual amounts to an expression of satisfaction with the explanations offered. *State v. Porter*, 326 N.C. 489, 501 (1990). Thus, silence following a prosecutor's proffer of race-neutral reasons supporting a challenged peremptory strike can be fatal to your *Batson* claim.

Suspect strike justifications. North Carolina appellate courts have been deferential to trial court decisions on *Batson* challenges. Some appellate decisions have remanded the defendant's *Batson* claims for further hearing (*see, e.g.*, *State v. Barden*, 356 N.C. 316, 344–45 (2002) (remanded for *Batson* hearing when judge improperly rejected the defendant's prima facie case); *State v. Barden*, 362 N.C. 277 (2008) (remanded for additional *Batson* hearing in light of U.S. Supreme Court cases clarifying *Batson* standards)), but only one North Carolina appellate decision has found a *Batson* violation. In that case, the prosecutor did not offer any race-neutral reason for striking at least one, and possibly two, Black jurors. *State v. Wright*, 189 N.C. App. 346 (2008).

Courts from other jurisdictions have more often found certain types of reasons for strikes insufficient. Reasons that have been viewed as indicative of pretextual discrimination include juror age, neighborhood, hairstyle, membership in predominantly African American organizations, demeanor, intelligence, and clothing. These decisions provide guidance in assessing the reasons offered by the State for peremptory challenges. *See infra* "Challenging justifications that are not race-neutral at step two" in § 7.4B, Presenting an Effective *Batson* Challenge.

Practice note: If the prosecutor explains that a challenged strike of a panelist was motivated by an objectionable demeanor that you did not observe, you should ask the court to require the prosecutor to describe the demeanor with particularity, contest the prosecutor's allegations when appropriate, and offer your own characterization of the juror's demeanor for both the trial judge and the record for possible appellate review. *See, e.g.*, *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 518 (Tex. 2008) ("Peremptory strikes may legitimately be based on nonverbal conduct, but permitting strikes based on an assertion that nefarious conduct 'happened,' without identifying its nature and without any additional record support, would strip *Batson* of meaning.").

For example, if the prosecutor states that a potential juror appeared nervous, and the panelist appeared calm and comfortable to you, you should make the judge aware of your disagreement with the prosecutor's characterization. You may do so by, when possible, presenting testimonial evidence of a courtroom witness such as an investigator or paralegal. Otherwise, you may note your disagreement and ask the judge to make findings based on the judge's observations. Unless you have created a record, deference will be given on appeal to a trial judge's rulings on demeanor. *Snyder*, 552 U.S. 472, 477 ("determinations of credibility and demeanor lie peculiarly within a trial judge's

province" (quotation omitted)); *see also Thaler v. Haynes*, 559 U.S. 43 (2010) (per curiam) (holding that although a judge must take into account, among other things, his or her observations of a juror's demeanor when a challenge is based thereon, neither *Batson* nor *Snyder* require that a "demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor"). Additionally, if the allegedly objectionable demeanor was exhibited by an accepted panelist of a different race, be sure to note this on the record.

No right to cross-examine prosecutor on race-neutral explanation. The North Carolina Supreme Court has held that a defendant does not have the right to call the prosecutor as a witness to show that his or her proffered explanations are pretextual. *State v. Porter*, 326 N.C. 489, 497 (1990); *State v. Jackson*, 322 N.C. 251 (1988). Courts in other jurisdictions have allowed defendants to cross-examine prosecutors regarding their reasons for peremptory strikes (*see, e.g.*, *Keeton v. State*, 749 S.W.2d 861 (Tex. Crim. App. 1988); *Ex Parte Lynne*, 543 So. 2d 709, 712 (Ala. 1988)); and divergent judicial approaches to this question were recently the subject of a petition for certiorari to the U.S. Supreme Court. Petition for Writ of Certiorari, *Drake v. Louisiana*, No. 09-998, 2010 WL 638483 (Feb. 18, 2010). Although the petition was denied (560 U.S. 925 (2010)), the issue is potentially subject to reconsideration, particularly in light of U.S. Supreme Court holdings stressing that *Batson* claims turn on prosecutorial credibility. *See, e.g.*, *Purkett*, 514 U.S. 765, 769 (court's determination of racial motivation "turn[s] primarily on an assessment of [the prosecutor's] credibility").

Defendant does not have to show race was the "sole factor" motivating the peremptory strike. At times, a peremptory strike may be motivated by both constitutional race-neutral factors and unconstitutional race-based factors. A *Batson* challenge will succeed when, during the third step, the court determines that "race was *significant* in determining who was challenged and who was not." *State v. Waring*, 364 N.C. 443, 480 (2010) (quoting *Miller-El*, 545 U.S. 231, 252 (emphasis added in *Waring*)). The defendant does not have "to establish that race was the sole reason" for the prosecutor's use of a peremptory strike. *Waring*, 364 N.C. 443, 480–81 (holding that "sole basis" is not the correct standard and observing that the significant or motivating factor standard is "less stringent" than the "sole basis" standard; remanded for further hearing).

The U.S. Supreme Court has not determined whether the "significant factor" standard permits a peremptory strike when the "party defending the action [can] show that [the unconstitutional] factor was not determinative." *Snyder v. United States*, 552 U.S. 472, 485 (2008) (declining to reach the question). The N.C. Supreme Court's treatment of the question in *Waring* indicates that, in North Carolina, the party raising the *Batson* challenge must demonstrate only that race was a significant factor, and not a determinative one, behind the peremptory strike. The N.C. Supreme Court has not adopted a "but for" test, which would require a showing that, but for the venire person's race, the State would not have used a peremptory strike. Justice Marshall has explained that such a test "is inappropriate in the *Batson* inquiry . . . because of the special

difficulties of proof that a court applying that standard to a prosecutor's peremptory-challenge decisions necessarily would encounter." *Wilkerson v. Texas*, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting from denial of cert.); *see also Cook v. Lamargue*, 593 F.3d 810, 815 (9th Cir. 2010) (summarizing circuit split on treatment of strikes in which race plays some role but is not necessarily a determinative factor and holding that a *Batson* challenge should succeed whenever race was a substantial motivating factor).

There is some support for arguing that a standard less stringent than the "substantial motivating factor" one should apply in cases of mixed prosecutorial motives for peremptory strikes. *Batson* announced an "unqualified requirement that the State offer a *neutral* explanation for its peremptory challenge. To be neutral, the explanation must be based *wholly* on nonracial criteria." *Wilkerson v. Texas*, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting from denial of cert.) (emphasis in original) (internal citation omitted); Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. LAW. REV. 279, 311 (2012) (observing that mixed-motive explanations are not neutral). Defense attorneys can argue that the "significant factor" standard should be interpreted to mean that a strike motivated in part by race is unconstitutional. "A judicial inquiry designed to safeguard a criminal defendant's basic constitutional rights should not rest on the unverifiable assertions of a prosecutor who, having admitted to racial bias, subsequently attempts to reconstruct what his thought process would have been had he not entertained such bias." *Wilkerson*, 493 U.S. 924, 927–28 (Marshall, J., dissenting from denial of cert.). This reasoning also would apply to instances in which racial motivations were not admitted but were detected by the judge at step three of the *Batson* test. Such a standard would be consistent with research recognizing the difficulty of assigning different weights to multiple motivations. *See, e.g.*, Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. LAW. REV. 279 (2012).

Comparative juror analysis at step three. *Miller-El v. Dretke*, 545 U.S. 231, 241–46 (2005), identified side-by-side comparisons between Black and White panelists as an important type of evidence at step three of the *Batson* test. If a prosecutor accepts a White juror with certain characteristics, and then uses those characteristics to strike a Black juror, discrimination can be inferred. For example, in *Miller-El*, the prosecutor claimed that he struck a Black venireman because the venireman purportedly expressed the opinion that he would vote against the death penalty if he believed the defendant could be rehabilitated. This was not a race-neutral reason, the Court found, where the prosecutor accepted White jurors with comparable views. Further, the Court noted that the prosecutor's justification for the strike was a mischaracterization of the venireman's stated position regarding rehabilitation and the death penalty. Defense counsel's challenge to this mischaracterization at voir dire prompted the prosecutor to offer the additional explanation that the strike was based on the venireman's indication that his brother had prior criminal convictions. The Court found this explanation for the strike to be pretextual based on its timing and lack of inquiry by the prosecutor into the venireman's relationship with his brother or whether the prior convictions had any influence on the venireman.

In 2008, the U.S. Supreme Court reemphasized the importance of comparative juror analysis in *Snyder v. Louisiana*, 552 U.S. 472 (2008). In *Snyder*, the Court found that the trial judge erred in overruling the defendant's *Batson* objection to the State's use of a peremptory challenge to remove a prospective Black juror. The State had offered two race-neutral explanations for striking the juror: (1) the juror looked very nervous during the questioning; and (2) the juror was a student teacher and was concerned about missing class. As a result of the juror's concerns, the prosecutor asserted that he felt that the juror might agree to a lesser verdict in order to bypass the penalty phase and finish quickly. The Court did not rule on the first proffered explanation because the record did not show that the trial judge made a determination about the juror's demeanor. However, the Court found the prosecutor's second explanation implausible and highly speculative because the prospective juror had not seemed overly concerned about the student-teaching situation once his dean was contacted and gave assurances that the class time could be made up. The Court compared the testimony of the juror who was struck with that of two White jurors who also were concerned about conflicting obligations. Although one of those jurors had asked to be excused based on a hardship and related obligations that seemed "substantially more pressing" than the struck juror's concerns, the prosecutor did not strike him. *Snyder*, 552 U.S. 472, 484. A second White prospective juror also expressed concern about serving, stating that he would "'have to cancel too many things,' including an urgent appointment at which his presence was essential." *Id.* Despite these concerns, the prosecutor did not strike this juror. Based on these circumstances, the Court held that discriminatory intent was a substantial or motivating factor in the actions taken by the prosecutor and reversed the lower court's decision upholding the validity of the peremptory strike. *Miller-El* and *Snyder* both stand for the principle that side-by-side comparisons of jurors can be powerful evidence of discriminatory intent. *See also infra* "Comparative juror analysis at step one" in § 7.4B, Presenting an Effective *Batson* Challenge.

Practice note: It is improper for the judge to substitute a better reason than the prosecutor offers. *See, e.g.*, *Galarza v. Keane*, 252 F.3d 630, 639 (2d Cir. 2001) (where trial court judge did not evaluate prosecutor's race neutral justifications for three challenged peremptory strikes and stated that "either side could have struck [one of the stricken jurors] for cause," failure to consider prosecutor's own justifications constituted reversible error). If you find that the trial judge is "saving" the prosecutor's explanations, you should object and make a record of the difference between the reason advanced by the prosecutor and the reason found by the judge.

Disparate questioning. In *Miller-El*, the Court held that intentional discrimination can be shown by patterns of questioning or other conduct—for example, if a prosecutor asks questions of Black jurors that he or she does not ask of White jurors, such as whether they think the criminal justice system is fair. In *Miller-El*, the Court found discrimination where the prosecutor described the death penalty vividly and explicitly to Black jurors but blandly to White jurors. The following types of disparate questioning practices may constitute evidence of discrimination:

- Asking repetitive, scrutinizing questions only of Black jurors. *See, e.g.*, Golphin Order at 114 (describing this practice); *Miller-El v. Dretke*, 545 U.S. 231, 249 (2005) (prosecutor "repeatedly questioned [a Black juror] on his capacity and willingness to impose a sentence of death" while failing to do so of a White juror who expressed concern that the death penalty was too easy on a convict).
- Asking follow-up questions only of Black jurors when White jurors make the same or similar statements. *See, e.g.*, *Miller-El*, 545 U.S. 231, 245 (observing that "nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror's belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to [the law]").
- Providing prefatory information before asking questions of Black jurors that differs from the prefatory information provided before asking questions of other jurors, which may reflect an attempt to elicit different answers from Black jurors to support challenges for cause or peremptory strikes. *See, e.g.*, *Miller-El*, 545 U.S. 231, 256 (6% of White potential jurors, but 53% of Black potential jurors, were provided a graphic description of capital punishment before questioning on their views concerning the death penalty).
- Asking race-related questions of Black jurors that are not asked of non-Black jurors. *See, e.g.*, Golphin Order at 114 (describing case in which a prosecutor asked a black juror if her "black friends" would criticize her if she voted to convict the defendants).

Practice note: Texas, where *Miller-El* originates, allowed any party to "shuffle" the venire cards during jury selection. The U.S. Supreme Court criticized the prosecutor's practice of shuffling the cards when there were several Black jurors in the next group of jurors to be called into the box. The effect of the shuffling was to move those jurors back in line. A North Carolina equivalent might occur where jurors are divided into panels—for example, if at the end of a panel there are two Black venire members left and no Whites, and the prosecutor asks to merge the remaining members of the panel with the next panel. *See* 2 NORTH CAROLINA DEFENDER MANUAL § 25.1C (Random Selection Requirement) (2d ed. 2012).

F. Remedy for *Batson* Violations at Trial

Batson does not specify the proper remedy for a violation that is found at trial. *Batson,* 476 U.S. 79, 99 n.24 (declining to determine whether it is "more appropriate in a particular case . . . to discharge the venire . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire"). In *State v. McCollum*, 334 N.C. 208 (1993), the N.C. Supreme Court held that if the trial judge finds that the State has violated *Batson*, the better practice is to dismiss the venire and begin jury selection again. The *McCollum* court did not preclude the court from exercising its discretion to seat improperly struck jurors, but noted that reseating a juror improperly struck by the State may not be appropriate where the juror knows that he or she was struck and may have difficulty being impartial.

Practice note: Concerns regarding the impartiality of an improperly struck juror might be addressed two different ways, both of which may increase confidence that an improperly struck juror could be seated and remain impartial. The favored method is to conduct all peremptory strikes at the bench, out of hearing of the jurors. If this approach is taken, counsel should make sure that the bench hearing is on the record. Alternately, if the peremptory strikes are made within earshot of the potential jurors, judicial questioning of an improperly struck juror may be able to resolve questions about the juror's impartiality.

North Carolina trial courts have not always dismissed the venire in response to a *Batson* claim. In *State v. Fletcher*, 348 N.C. 292 (1998), the prosecutor initially struck a juror because the juror was a member of the NAACP. When the trial judge found the prosecutor's reason to be discriminatory, the prosecutor withdrew his strike and accepted the juror. The trial judge then found no *Batson* violation, and the N.C. Supreme Court affirmed. Chief Justice Mitchell, dissenting in *Fletcher*, would have ordered a new trial, emphasizing that dismissing the venire is the better practice where the prosecutor makes an invalid strike. In *State v. Parker*, a capital trial reviewed by a superior court judge ruling on an RJA claim, the trial court judge seated the improperly struck juror after sustaining the defendant's *Batson* challenge. Golphin Order at 71.

Trial courts in other jurisdictions have fashioned different remedies for *Batson* violations. In *Foster v. State*, 111 P.3d 1083 (Nev. 2005), the Nevada Supreme Court observed:

> In implementing *Batson*, the states have generally followed one of three different approaches. Some jurisdictions require the trial courts to disallow a peremptory strike made in violation of *Batson* or to reseat the improperly stricken juror. Other jurisdictions require the trial courts to discharge the venire and commence jury selection anew from an entirely new venire. The majority of courts, however, have delegated to the discretion of the trial judge the determination of the appropriate remedy for a *Batson* violation.

Id. at 1089 (internal quotation omitted); *see also McCrory v. Henderson*, 82 F.3d 1243, 1247 (2d Cir. 1996) ("If the objection is raised during jury selection, the error is remediable in any one of a number of ways. Challenges found to be abusive might be disallowed; if this is not feasible because the challenged jurors have already been released, additional jurors might be called to the venire and additional challenges granted to the defendant; or in cases where those remedies are insufficient, the jury selection might begin anew with a fresh panel.")

Practice note: Judges may ask the parties for suggestions regarding the proper remedy. *See, e.g.*, *State v. McCollum*, 334 N.C. 208, 235 (1993) (after sustaining defendant's *Batson* objection, "[t]he trial court then inquired as to how the defendant and the State desired to proceed to correct the *Batson* violation"). Defense attorneys should consider one or more of the following remedies depending on the circumstances of the case:

- reseating of the improperly struck juror, especially if the strike and *Batson* challenge were conducted out of the hearing of the struck juror; *see* Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1110–12 (2011) (explaining that the benefits of this remedial procedure include the voiding of the unconstitutional act, vindication of improperly struck juror's right to equal protection, the procedure's express contemplation by the *Batson* Court, and relative administrative efficiency);
- mistrial;
- discharging the entire venire and reseating a new venire from which juror panels are drawn;
- discharging the jury panel and assembling a new panel;
- denying the prosecutor peremptory strikes;
- returning individuals struck by the prosecutor to the panel.

Discharging an entire venire may not be a desirable outcome because it essentially upholds the improper strike, wastes judicial time and resources, does not vindicate the improperly struck juror's equal protection rights, and may not deter racially motivated peremptory strikes. *See generally Powers v. Ohio*, 499 U.S. 400 (1991) (prospective juror's right not to be excluded from jury service because of race is protected by the Equal Protection Clause).

The N.C. Superior Court Judges' Benchbook, an online compilation from the School of Government, states that if a judge finds a discriminatory use of a peremptory challenge, the judge "must get rid of the whole jury panel and start over" and may not reseat the wrongly excused juror. *Jury Selection (Criminal)* at 2–3 ("*Batson* challenges in a nutshell"), *in* N.C. SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith ed.). The discussion does not address the authorities or alternatives discussed in this section.

G. *Batson* Challenges to a Defendant's Strikes

The *Batson* rule applies to defendants as well as to the State. The Equal Protection Clause prohibits criminal defendants from exercising peremptory strikes in a manner that discriminates on the basis of race, gender, or other suspect characteristic. *Georgia v. McCollum*, 505 U.S. 42 (1992); *accord State v. Locklear*, 349 N.C. 118 (1998) (citing *McCollum*); *State v. Cofield*, 129 N.C. App. 268 (1998) (same).

A challenge to a defendant's exercise of peremptory challenges, referred to as a "reverse *Batson* claim," is made in the same way as a *Batson* claim. First, the State must show a prima facie case of discrimination. The burden then shifts to the defendant to explain his or her strikes in a race-neutral manner. The judge then assesses whether the reason offered by the defense attorney is pretextual, and determines whether the State has met its burden of proving purposeful discrimination.

Practice note: In defending against a *Batson* challenge, note for the record how many African American or other minority jurors were passed to you for questioning. It may be that you exercised 90% of your strikes against White jurors, but that 95% of the jurors passed to you were White, either because the panel was not racially diverse, or because Black or other minority jurors had already been excused for cause or struck by the State.

Reverse *Batson* claims have rarely been made in North Carolina, possibly as a result of a fear by prosecutors that if the trial judge is deemed to have erred in disallowing a defendant's peremptory challenge, the appellate court will grant the defendant a new trial. *See, e.g.*, *State v. Scott*, 749 S.E.2d 160, 165 (S.C. Ct. App. 2013) (where the State's *Batson* claim was erroneously granted, the court vacated the defendant's conviction and remanded for a new trial); *see also* Jeff Welty, *Rivera v. Illinois* and "Reverse Batson," N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 7, 2009).

Although the question of the remedy for improperly denied challenges has not been directly answered, the U.S. Supreme Court discussed it in *Rivera v. Illinois*, 556 U.S. 148 (2009). In *Rivera*, the judge, based on his own concerns about discrimination, required the defendant to explain his peremptory challenge of a Black female juror. After hearing the explanation, the judge denied the defendant's peremptory challenge and required that the juror be seated on the jury. That juror later became the jury foreperson. On appeal, the defendant argued that the trial judge's error in denying his peremptory challenge violated his rights under the Due Process Clause and amounted to structural error—that is, the defendant was entitled to a new trial without having to show prejudice. The Illinois Supreme Court found that the defendant was deprived of his state right to exercise his peremptory challenges but determined that the error was harmless beyond a reasonable doubt in light of the overwhelming evidence against him. The U.S. Supreme Court affirmed the decision of the lower court, holding that "the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws." *Id.* at 157. The Court noted that structural errors requiring automatic reversal are typically reserved for the type of error that "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 160 (quotation omitted). The Court held that "the mistaken denial of a state-provided peremptory challenge," under the circumstances presented in *Rivera*, did not constitute an error of that magnitude. *Id*. at 161.

No North Carolina decision has addressed the remedy available on appeal where the trial court improperly denies the defendant's peremptory challenge.

H. Implicit Bias and the *Batson* Framework

In *State v. Saintcalle*, 309 P.3d 326 (Wash. 2013), the Washington Supreme Court considered the place of implicit bias in the *Batson* framework. Justice Wiggins' lead opinion in the case called for explicit recognition of implicit bias in the analysis. He reasoned that the prevalence of implicit biases "upends the *Batson* framework," and he called for the replacement of the state's *Batson* test with a more robust one that

"necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion." *Id.* at 336, 339. Justice Wiggins noted that "trial courts may often interpret [the requirement of purposeful discrimination] to require conscious discrimination." *Id.* at 338. If the "purposeful discrimination" standard excludes acts motivated by implicit bias, sustaining a *Batson* challenge requires a trial judge to "look a member of the bar in the eye and level an accusation of deceit or racism. And if the judge chooses not to do so despite misgivings about possible race bias, the problem is compounded by the fact that we defer heavily to the judge's findings on appeal." *Id.* Explicit recognition of implicit bias in the *Batson* framework, according to Justice Wiggins, "would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a Batson challenge . . . [and thus] simplify the task of reducing racial bias in our criminal justice system, both conscious and unconscious." *Id.* at 339.

The recognition of implicit bias by judges and attorneys involved in litigation of *Batson* challenges may engender a more accurate and complete consideration of the possible role of race in the exercise of peremptory strikes. Additionally, if court actors accept that a prosecutor's race-neutral justification for a strike may be sincerely held but the strike nevertheless may be motivated by unconscious racial motivations, the defense attorney challenging an apparently discriminatory strike does not have to level a charge of overt racism and intentional discrimination; the prosecutor defending the strike does not face the potential stigma attached to a finding of a violation; and the judge ruling on the strike does not have to conclude that the prosecutor lied to conceal an intentional violation of the constitution. Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson*'s *Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1121–23 (2011). In light of the fact that defense attorneys, prosecutors, and judges are repeat actors who interact with each other both in and out of the courtroom on a regular basis, the alleviation of these disincentives to raising and sustaining *Batson* claims could improve the effectiveness of the *Batson* framework.

Some argue that under current equal protection jurisprudence, race-based peremptory strikes motivated by implicit biases are already captured within the *Batson* framework. *See State v. Saintcalle*, 309 P.3d 326, 338 n.8 (Wash. 2013) (observing that the argument that strikes motivated by implicit bias violate *Batson* under existing jurisprudence "makes sense," but declining to consider it as it was not raised by the parties). Professors Ralph Richard Banks and Richard Thompson Ford argue that the line of cases requiring proof of "discriminatory purpose" to sustain an equal protection claim does not distinguish between conscious and unconscious bias. Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L. J. 1053 (2009). In their view, peremptory challenges based on race violate the Equal Protection Clause whether the reliance was conscious or unconscious: "[t]here is no exemption for strikes that are discriminatory, but not intentionally so." *Id.* at 1099 (but cautioning about the evidentiary difficulty in succeeding on a claim of covert bias); *see also* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1094–97 (1998) (explaining why peremptory challenges motivated by race may be successfully challenged without proof of conscious intent to discriminate).

Practice note: In recent years, judicial recognition of the influence of implicit bias on decision-making has increased. *See* Equal Justice Society, *Packet on Scholarship and Jurisprudence Related to Implicit Bias and the Intent Doctrine*, EQUALJUSTICESOCIETY.ORG (last visited Aug. 13, 2014). In cases without evidence of overt racial discrimination on the part of the prosecutor, incorporating implicit bias research into your *Batson* challenge may strengthen your claim. Consider arguing that whether motivated by unconscious or conscious bias, a strike influenced by race contravenes the guarantee of equal protection. Raising this issue may lead to the adoption of a broader understanding of the "purposeful discrimination" standard in *Batson* claims, and allow court actors to move away from allegations of overt discrimination.

7.4 Litigating a *Batson* Challenge

A. Pretrial Preparation for a *Batson* Challenge

Come prepared. Before trial, it is impossible to know whether peremptory strikes will be exercised in a discriminatory manner. For this reason, defense attorneys should prepare in advance by gathering data and preparing potential motions and a note-taking system.

Assemble historical data. You should make a habit of arriving at every trial with records that, under appropriate circumstances, may be submitted as evidence in support of a *Batson* claim. While *Batson* challenges to peremptory strikes can be based solely on evidence of discrimination in the defendant's individual case, patterns suggestive of discrimination in jury selection also constitute evidence of discrimination at steps one and three of the *Batson* analysis. *See Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Batson* evidence includes "totality of the relevant facts" (quotation omitted)); *see also supra* § 7.3C, *Batson* Step One: The Prima Facie Case, § 7.3E, *Batson* Step Three: The Pretext Determination. Because evidence of past strikes may be relevant in meeting the defendant's burden of showing discrimination, defenders should keep track of patterns of strikes in particular prosecutor's offices and with respect to particular prosecutors, including:

- copies of voir dire from previous trials, including past *Batson* challenges and prosecutors' stated reasons for strikes;
- manuals or training materials regarding responding to *Batson* challenges, *see, e.g., Top Gun II Batson Training: Articulating Juror Negatives* in the Race Materials Bank at www.ncids.org (select "Training and Resources"); *see also Miller-El v. Dretke*, 545 U.S. 231 (2005) (discriminatory training manual on exclusion of Black people from juries constituted evidence supporting finding of Batson violation);
- any available strike rate data, including strike rates in capital cases in your county and judicial district from the MSU study, *see* Affidavit Regarding MSU Study in the Race Materials Bank at www.ncids.org (select "Training and Resources"); challenges by county and prosecutor in capital cases can also be found in the Golphin Order or

Robinson Order by referencing charts sorted by county and defendant on the IDS website;

- any other patterns, practices, or evidence relating to the influence of race on prosecutorial decision-making, *see, e.g.*, Affidavit Regarding Peremptory Strikes Exercised in Capital Cases in a Single North Carolina County in the Race Materials Bank at www.ncids.org (select "Training and Resources").

Defenders should be prepared to integrate any relevant information into upcoming trials. For example, if a particular prosecutor usually responds to *Batson* challenges by explaining that the struck African American venire person appears nervous, you should make the judge aware of this pattern when a prosecutor defends a peremptory strike on this basis. "A prosecutor who repeats the same race-neutral reasons at every trial loses credibility, but only when you point it out, and back it up." Susan Jackson Balliet and Bruce P. Hackett, *Litigating Race in Voir Dire*, THE ADVOCATE, May 2008, at 42, 46.

Practice note: Past *Batson* justifications by particular prosecutors can point to additional evidence to assemble before trial. For example, if the prosecutor in your client's case has previously justified challenged strikes by noting that the panelist lives in an objectionable neighborhood, you can pull census data about the demographic composition of neighborhoods identified in past strikes in preparation for a possible argument that such a justification serves as a proxy for race and is not race-neutral. Similarly, attorneys can pull data about the demographic composition of the neighborhoods of Black venire members in the present case. This information can be found on the website of the U.S. Census Bureau.

Calculating strike data. The methodology employed by the MSU researchers is described in a law review article about the study's procedure and findings, and can be replicated by defense attorneys for other types of cases (for example, all felony cases in a certain judicial district over an eight-month period; all felony cases handled by a particular prosecutor; or all cases involving a Black defendant and a White victim in a certain county during a certain year). *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012). A modified approach based on the study's methodology would involve creating a file for each type of proceeding examined that includes:

- The names of every "strike-eligible" venire member. This population includes venire members who were questioned on voir dire, not excluded for cause, and whom the prosecutor had the opportunity to strike.
- The race of every venire member included on the list. This may be obtained from juror questionnaires, the juror's statement of his or her race on the record in the voir dire transcript, or electronic databases such as the State Board of Elections website, or LexisNexis "Locate a Person (Nationwide) Search Non-regulated". *See* Examples of Juror Questionnaires in the Race Materials Bank at www.ncids.org (select "Training and Resources"). Summons lists with addresses may be available in court files. The

addresses listed on juror summons may be compared to the addresses found in web-based sources identifying racial information to confirm that the two sources refer to the same person. Because of the potential for error, attorney observation is a disfavored method of identifying the race of venire members.

- Other demographic characteristics of strike-eligible jurors, including gender, marital status, employment, and educational background, to the extent revealed in juror questionnaires or during voir dire.
- Prior experiences with the legal system of strike-eligible jurors.
- Expressed views by strike-eligible jurors concerning law enforcement officers, prosecutors, or the criminal justice system.
- The number of questions asked of each prospective juror.
- Whether the prospective juror was struck. This information can be obtained by reviewing clerk charts or transcripts.
- If a *Batson* challenge was raised, the prosecutor's explanation for the challenge and the judge's ruling on the challenge.

Once this information has been collected, attorneys should be able to calculate basic statistical data, such as the relative strike rates of Black venire members versus other venire members. Attorneys should also be able to compile data regarding the number of questions asked of venire members of various races, and the race-neutral justifications offered in response to *Batson* challenges by prosecutors. Additional analysis of strike patterns to control for personal characteristics of venire members may require assistance from a statistician or an attorney trained in statistical methods. *See* Catherine M. Grosso & Barbara O'Brien*, A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012).

Learn the trial judge's approach to *Batson*. Trial judges have discretion in conducting voir dire and establishing procedures for resolving *Batson* claims. Before trial, ascertain the *Batson* procedures followed by the judge and his or her past *Batson* rulings if available. In particular, you will want to learn:

- whether the judge allows *Batson* challenges to be raised and resolved out of hearing of the potential juror at issue;
- whether *Batson* hearings are routinely held;
- the procedures generally followed by the judge in *Batson* hearings;
- how often the judge has granted *Batson* challenges; and
- what remedy the judge has ordered in response to any violations.

Prepare note-taking method. To effectively identify and challenge equal protection violations, you should develop a thorough and efficient system for recording all aspects of the voir dire process. One effective practice is to use a spreadsheet to record each venire member's race, gender, physical appearance, and other notable attributes; the number of questions asked of the juror; the type of questions asked of the juror; and all

statements made by that juror. *See* Scott Holmes's Spreadsheet for Calculating Juror Strike Ratios and Cassandra Stubbs's Strike Data Spreadsheet, both in the Race Materials Bank at www.ncids.org (select "Training and Resources"). Ideally, these notes should be compiled by a separate member of the defense team who can focus on preparing them, such as an attorney, paralegal, administrative assistant, intern, or investigator who is familiar with the note-taking method. Precise, accurate records are essential for identifying similarities between venire members struck and accepted, discerning historical patterns, and calculating strike rates. Susan Jackson Balliet & Bruce P. Hackett, *Litigating Race in Voir Dire*, THE ADVOCATE, May 2008 at 42, 46.

B. Presenting an Effective *Batson* Challenge

Raising a *Batson* challenge. *Batson* claims are raised orally during voir dire. The attorney should state that the defendant objects to the State's peremptory challenge and would like to be heard at the bench. It is preferable to state the legal grounds for the challenge at the bench and out of earshot of the jurors, to prevent affecting the impartiality of potential jurors who are the subjects of *Batson* challenges. Counsel should make sure that the bench hearing is on the record.

***Batson* hearing.** A *Batson* challenge triggers an automatic right to a hearing. "[I]t is not the prima facie case that triggers the right to a hearing." Susan Jackson Balliet & Bruce P. Hackett, *Litigating Race in Voir Dire*, THE ADVOCATE, May 2008 at 49. As one court explained, "*Batson v. Kentucky* requires that upon *timely* objection to peremptory challenges for alleged discrimination, the court shall hold a hearing to determine if a prima facie case of discrimination can be made." *Simmons v. Com.*, 746 S.W.2d 393, 397 (Ky. 1988) (emphasis in original). If you are denied a hearing, be sure to make a proffer of the evidence that would support a prima facie *Batson* claim.

Practice note: It is important to raise a *Batson* claim whenever you suspect that race may have been a motivating factor in a prosecutor's exercise of a peremptory strike. At times, the basis for your challenge may grow stronger as voir dire progresses. If, for example, a Black juror is struck early in voir dire and your *Batson* challenge to the strike is denied, and later a White juror is questioned or treated differently, you should renew your objection based on the additional evidence. If you did not object when the juror was initially struck, your *Batson* claim may be deemed waived.

Ensure inclusion of jurors' race on record. To preserve a *Batson* challenge for appellate review, the record must be clear as to the race of the jurors peremptorily challenged by the State as well as the race of the other members of the jury panel (prospective and selected); otherwise, the appellate court will find insufficient evidence in the record to support the defendant's claim. *See State v. Brogden*, 329 N.C. 534, 546 (1991) (defendant "failed to carry his burden of establishing an adequate record for appellate review"; defense counsel's subjective impressions regarding race and notations by the court reporter of her subjective impressions regarding race were not sufficient); *State v. Payne*, 327 N.C. 194, 198–201 (1990) (affidavit containing defense counsel's perceptions of the race of potential jurors was not adequate to support defendant's claim

of improper use of peremptory challenges under *Batson* and defendant's request to have "courtroom clerk record the race and sex of the 'prospective' jurors who had already been seated or excused" was properly rejected; the trial court noted "that had the defendant made his motion prior to jury selection, the court would have had each prospective juror state his or her race during the court's initial questioning"); *State v. Mitchell*, 321 N.C. 650, 654–56 (1988) (inappropriate for court reporter to note the race of the jurors based on his or her perception; "if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence").

Practice note: Before jury selection begins, counsel should request that the trial judge have each prospective juror state his or her race for the record during the judge's initial questioning. *See* Motion for Court to Note the Race of all Potential Jurors Examined for Selection and Trial Brief and Pretrial Motions in the Race Materials Bank at www.ncids.org (select "Training and Resources").

Case study: In the following anecdote, Durham attorney Scott Holmes reflects on his experience raising *Batson* challenges in state and federal court:

Before jury selection begins, I think it is best practice to file a trial brief summarizing the most basic facts and raising the most routine pretrial motions in limine. See Trial Brief and Pretrial Motions in the Race Materials Bank at www.ncids.org (select "Training and Resources"). I think it is good to include in the trial brief/pretrial motions a request to record the race of the potential jurors. I think including it with the other pretrial motions takes some of the edge off. At the pretrial stage I ask the Court to include the self-identification of race with each juror's name and where they are from. It is easier for the court to ask for it than the parties. If the Court denies my request and refuses to ask about their race, I think it is best to ask for the Court's permission to get them to put their race on the record before they are stricken by either side. If that is denied, then I put it on the record myself based on my own observations, pointing out that I asked the Court to make the record and was refused. This is important because North Carolina courts have found observations by counsel or the court reporter about jurors' race insufficient to create a record. In state court, I've never had a prosecutor contest my motion or a judge deny it. The North Carolina Supreme Court has held that where there is any question about juror race, the trial court should resolve the question by questioning the juror or reviewing other proper evidence establishing juror race. *State v. Mitchell*, 321 N.C. 650, 654–56 (1988).

When I'm in trial, I use an excel spreadsheet to capture and synthesize data on the prosecutor's exercise of juror strikes. *See* Scott Holmes's Spreadsheet for Calculating Juror Strike Ratios in the Race Materials Bank at www.ncids.org (select "Training and Resources"). Every time the prosecutor accepts or peremptorily strikes a juror, I record the juror's race in the spreadsheet. The spreadsheet formula automatically calculates the prosecutor's strike ratio for White jurors, Black jurors, and other minority jurors, allowing me to see, in real time, any developing pattern.

One time, when using this tool during a trial in federal court, a very disparate strike ratio developed. The prosecutor struck 6 of 7 eligible Black jurors for a strike ratio of .857, and only 1 of 6 eligible White jurors for a strike ratio of .166. That case was unusual because, to my surprise, the federal judge denied my motion to record the race of all potential jurors. When I raised a *Batson* challenge objecting to the prosecutor's disparate pattern of striking Black jurors, the judge questioned how I

was able to determine the race of the struck jurors. It was a Catch-22: I had to rely on my own observations in determining juror race because the judge had denied my motion to record juror race, and the judge rejected my *Batson* claim at least in part based on a finding that my observations of juror race were unreliable.

While I did not prevail on my *Batson* claim in that case, simply raising it had an effect on the prosecutor. The prosecutor stopped using strikes to remove minority jurors, and we ended up with a very diverse jury. This case was an example of the powerful impact of raising *Batson* challenges, even when they do not succeed. I believe that I may have prevailed on the *Batson* challenge in state court and would encourage North Carolina defenders to raise the challenge even with less dramatic strike ratios. Although it may feel awkward to raise the issue because discussing race in general is hard, and specifically accusing a fellow attorney of racial bias is difficult, I believe that it is important to raise the issue. Even raising the issue sets a tone for everyone involved that I am planning on protecting all of my client's rights to the best of my ability. Litigating *Batson* challenges helps to safeguard a client's right to equal protection in the jury selection process and uphold the integrity of the jury system as a whole.

Consider filing a pretrial motion for *Batson*-related discovery. Before voir dire begins, consider seeking discovery on any *Batson*-related trainings or policies for prosecutors in your county. Such information may prove relevant in evaluating the totality of the circumstances surrounding an allegedly discriminatory strike. You also may be able to obtain the information by filing a public records request.

Ensure transcription of voir dire. In North Carolina, the party "alleg[ing] impropriety in the jury selection process must provide the reviewing court with the relevant portions of the transcript of the jury voir dire" or documents capable of reconstructing the relevant details of jury selection. *State v. Shelman*, 159 N.C. App. 300, 311 (2003) (quotation omitted) (rejecting defendant's *Batson* challenge where there was neither a transcript of voir dire nor any other document that could reconstruct the factual details of jury selection). The *Shelman* court held that relevant details of jury selection include:

- the number of jurors questioned by the prosecutor;
- the race and gender of jurors questioned by the prosecutor;
- the number and/or percentage of jurors accepted, by race and gender;
- whether similarly situated venire members received disparate treatment correlated with race and/or gender; and
- whether remarks to jurors made by prosecutors evinced racial bias.

Shelman, 159 N.C. App. 300, 310.

The best way to preserve this information is to ensure that voir dire is transcribed in accordance with G.S. 15A-1241. *See State v. Holloway*, __ N.C. App. __, 734 S.E.2d 139, *5 (2012) (unpublished) ("transcript of the trial court's discussion with defense counsel regarding defendant's *Batson* challenge is not an adequate substitute for these factual details"). Defense attorneys should file a pretrial motion to transcribe voir dire in every case. *See* Motion to Transcribe Voir Dire in the Race Materials Bank

at www.ncids.org (select "Training and Resources"). To ensure meaningful appellate review, the motion should ask the court to direct the court reporter to indicate in the transcript the name of the venire member each time he or she speaks. In addition, before the trial begins, counsel should file any jury questionnaires, jury lists, and strike sheets in the record for appellate purposes. Susan Jackson Balliet & Bruce P. Hackett, *Litigating Race in Voir Dire*, THE ADVOCATE, May 2008, at 42, 46; *see also* 2 NORTH CAROLINA DEFENDER MANUAL § 28.7C (Complete Recordation) (2d ed. 2012).

Evidence supporting defendant's prima facie case at step one. A wide range of evidence may be submitted in support of a prima facie *Batson* claim. Illustrative examples include:

- The race of the defendant, victim, and key witnesses. *See State v. Quick*, 341 N.C. 141, 146 (1995) (the fact that victims were White and defendant was Black arguably constituted a circumstance tending to establish discriminatory intent). *Cf. State v. Taylor*, 362 N.C. 514 (2008) (evidence that defendant was Black and victim was White "does not, standing alone, establish a prima facie case of discrimination"). To preserve your challenge for appellate review, be sure that all facts relevant to your *Batson* challenge—such as the race of the defendant, victim, and witnesses—are included in the record.
- Disparate questioning of minority and non-minority panelists. *See supra* "Disparate questioning" in § 7.3E, *Batson* Step Three: The Pretext Determination.
- Numerical use of strikes of minority panelists (for example, 3 of 4 African American panelists struck). As voir dire progresses, the defense team should tabulate the percentage of minorities and African Americans challenged peremptorily, the percentage of the prosecutor's peremptory strikes used on minorities and African Americans, and the minority and African American acceptance rates. *See supra* "Significance of minority acceptance rate" in § 7.3C, *Batson* Step One: The Prima Facie Case.
- Any pattern of seeking to strike minority panelists for cause, taking care to ensure that your voir dire notes include detailed information about challenges for cause.
- Any possible racial disparities in other aspects of the case (e.g., uncharged White co-defendants).
- Race issues present in the facts of the case, e.g., the case involves a cross-racial identification.
- Disparate treatment of minority and non-minority panelists. For example, does the prosecutor refer to non-minority panelists formally, but minority panelists by their first names?
- The prosecutor's record in other cases. How many *Batson* claims have been raised against strikes by that prosecutor? What are his or her acceptance rates in other cases?
- Race-neutral justifications in training materials regarding defending against *Batson* claims that match those offered by prosecutor. *See Top Gun II Batson Training: Articulating Juror Negatives* in the Race Materials Bank at www.ncids.org (select "Training and Resources"); *see also Miller-El v. Dretke*, 545 U.S. 231 (2005)

(discriminatory training manual on exclusion of Black people from juries constituted evidence supporting finding of *Batson* violation).

- Historical data demonstrating a pattern of discrimination. *See supra* § 7.4A, Pretrial Preparation for a *Batson* Challenge.
- Side-by-side comparisons of struck minority jurors and accepted non-minority jurors. *See infra* "Comparative juror analysis at step one," in this subsection B.
- The State's peremptory strike of one Black juror, which may constitute relevant evidence when considering the propriety of its strike of another Black juror. *See*. *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

Comparative juror analysis at step one. Recent U.S. Supreme Court opinions have stressed that comparisons of similarly situated jurors constitute perhaps the strongest evidence relevant to *Batson* claims, and a recent study of *Batson* claims in federal court revealed that comparative juror analysis "is the circumstance most likely to convince a court to grant a *Batson* challenge on appeal." Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV.1075, 1099 (2011). It is important to present these comparisons at trial when making your objections, as the "retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial." *Snyder*, 552 U.S. 472, 475 (holding that, since the similarity at issue was "thoroughly explored by the trial court when the relevant jurors asked to be excused for cause," the Court was able to rule on the basis of the comparative juror analysis). At step one, when you do not yet have the prosecutor's race-neutral justification to consider, comparative juror analysis consists of pointing out disparate treatment of similarly situated jurors. For example, you may compare the number of questions asked of a minority panelist regarding family members involved in the criminal justice system to the number of similar questions asked of a non-minority panelist.

The U.S. Supreme Court has held that the comparative juror analysis need not involve jurors who are "identical in all respects." *Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005) ("A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters"); *see also Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009) ("If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects.").

Importance of strong prima facie case at step one. Defense attorneys should present all relevant, available evidence and analysis when making a prima facie *Batson* claim. While step one is not meant to be a particularly high threshold, the strength of the prima facie cases will be relevant at step three, when the judge rules on the ultimate question of discrimination.

Challenging justifications that are not race-neutral at step two. At step two, you should object to the prosecutor's justification for the challenged strike if any of the asserted reasons do not constitute "permissible racially neutral selection criteria." *Batson*, 476 U.S. 79, 94 (quotation omitted); *see also Purkett v. Elem*, 514 U.S. 765, 769 (1995) (at step two, prosecutor is not required to identify a reason for the strike that makes sense, "but [must provide] a reason that does not deny equal protection"). Examples of *Batson* justifications that may be challenged as not being race-neutral include:

- An admission that the strike was based, in whole or in part, on race. In the *Golphin* litigation, the judge found that in a case from Davie County, a prosecutor explained a peremptory strike on the following basis: "The victim is a black female. That juror is a black female. I left one black person on the jury already." *See* Golphin Order at 113. *See also infra* "Defendant does not have to show race was the "sole factor" motivating the peremptory strike" in § 7.3E, *Batson* Step Three: The Pretext Determination.
- Residence in a predominantly minority neighborhood. "When potential jurors are excluded because they live in an all-black or nearly all-black community, 'neighborhood' as a justification for the strike cannot be disentangled from race." Golphin Order at 54. *See also infra* "Practice note" in § 7.4A, Pretrial Preparation for a *Batson* Challenge.
- Hairstyles and/or styles of dress associated with African Americans, such as cornrows or other hairstyles worn almost exclusively by African Americans.
- Association with African American institutions such as historically Black colleges and universities, Black churches, or the NAACP. *See* Golphin Order at 113 (citing four North Carolina cases in which prosecutors explained that jurors were struck because of their affiliation with African American institutions).
- Failure to present a race-neutral justification. *See State v. Wright*, 189 N.C. App. 346 (2008) (finding that prosecutor failed to offer any race-neutral justification for striking at least one, and possibly two, Black venire members); Golphin order at 119 (finding that, in ten North Carolina capital cases, prosecutors provided no race-neutral justification for striking a total of seventeen eligible African-American panelists).

If you are able to demonstrate that the prosecutor has not articulated a race-neutral justification for the challenged strike, you should prevail on your *Batson* challenge at step two without proceeding to step three.

Practice note: Be sure the prosecutor's race-neutral explanations for challenged peremptory strikes are on the record for potential appellate review. Once the prosecutor has provided a race-neutral explanation for the strike and "the trial court has ruled on the ultimate question of discrimination," the prima facie case becomes moot for purposes of appellate review. *Hernandez v. New York*, 500 U.S. 352, 359 (1991); *see also State v. Bell*, 359 N.C. 1 (2004); *State v. Headen*, 206 N.C. App. 109, 115 (2010). If the State offers an explanation of a challenged strike before the trial court rules on the defendant's prima facie case, the appellate court cannot dispose of the case by finding that the defendant failed to make out a prima facie case, but instead must analyze the prosecutor's

justifications and your response to those justifications, resulting in a fuller consideration of your *Batson* claim. *But cf. State v. Smith,* 347 N.C. 453, 463 (1998) (holding that prima facie case is not moot for purposes of appellate review in cases where the prosecutor puts a race-neutral justification on the record after the trial court has already rejected the defendant's prima facie case).

Justifications suggestive of pretext at step three. The following strike justifications may be suggestive of pretext, as illustrated by the cases cited:

- Age. *See, e.g., Richmond v. State*, 590 So. 2d 384, 385 (Ala. Crim. App. 1991) (age as reason for peremptory strikes is "'highly suspect because of its inherent susceptibility to abuse'" (citation omitted)); *Washington v. Commonwealth*, 34 S.W.3d 376, 379 (Ky. 2000) ("[c]ertainly age was not a sufficient reason to strike a 43-year-old man"). *But see State v. Caporasso*, 128 N.C. App. 236, 244 (1998) (no error where trial judge allowed prosecutor to peremptorily challenge a Black juror based on prosecutor's explanation that the juror was excused based on his "young age and lack of maturity"; the prosecution is allowed to "seek jurors who are stable and mature").
- Facial expressions or other non-verbal behavior. *Bernard v. State*, 659 So. 2d 1346 (Fla. Dist. Ct. App. 1995) (fact that juror made facial expression during another juror's comment insufficient reason for strike where expression not observed by trial judge and not confirmed by judge in record); *Somerville v. State*, 792 S.W.2d 265 (Tex. Ct. App. 1990) (reversing conviction where State improperly struck juror who prosecutor thought had muttered under his breath, purportedly showing disrespect for judge, and who was member of NAACP); *Avery v. State*, 545 So. 2d 123, 127 (Ala. Crim. App. 1988) (reasons such as looks, body language, and negative attitude are susceptible to abuse and must be "closely scrutinized" by courts); *Harris v. Hardy*, 680 F.3d 942, 965 (7th Cir. 2012) ("Demeanor-based explanations for a strike are particularly susceptible to serving as pretexts for discrimination.").
- Clothing or jewelry. *See Rector v. State*, 444 S.E.2d 862 (Ga. Ct. App. 1994) (case reversed where prosecutor struck juror because she had gold tooth); *People v. Bennett*, 614 N.Y.S.2d 430 (N.Y. App. Div. 1994) (prosecutor struck an African American juror who was wearing a headscarf because it showed "a certain disrespect for the proceedings"; pretextual basis found and conviction reversed); *Roundtree v. State*, 546 So. 2d 1042, 1044–45 (Fla. 1989) (prosecutor's reasons for striking two African American jurors were an "obvious pretext" where prosecutor asserted that he struck the jurors based on their clothing, "specifically commenting that the first juror was wearing maroon socks and 'pointy New York shoes'").
- Intelligence. *See* Golphin Order at 115–16 (noting that in several cases, prosecutors justified strikes of Black jurors by stating that they were not articulate, smart, or educated enough to serve as jurors, and concluding that "[t]hese explanations evoke the troubling stereotype of African-American inferiority").
- Lack of community connection. *See* Golphin Order at 117–18 (observing that this justification is "evocative of a time when African Americans were not citizens and full members of the communities in which they lived").

Evidence supporting a determination of pretext at step three. Several different factors may support a finding that the stated race-neutral justification was a pretext for discrimination. Once the prosecutor identifies the reason for the challenged strike, the defense attorney should renew the objection to the challenged strike, reemphasize the prima facie case, and present any evidence or arguments beyond the prima facie case at step one. For example, if a prosecutor states that he struck a juror because she looked nervous, the first opportunity the defense attorney will have to challenge this assertion is at step three. Evidence that may show that the proffered explanation is a pretext for discrimination may include:

- The race-neutral justification offered by the prosecutor is not true. For example, if a prosecutor argues that a struck juror fell asleep during voir dire, but you watched the juror carefully and did not see her fall asleep, you can challenge the justification as inaccurate and suggestive of a discriminatory motive. You may be able to offer the testimony of an investigator or paralegal to substantiate your challenge to the prosecutor's characterization of the juror's behavior.
- The facts identified by the prosecutor, while true, are not disadvantageous to the prosecution and therefore do not explain the strike. This type of showing can be made, for example, by demonstrating that the identified justification is not credible because it is a factor typically viewed favorably by prosecutors, such as a close connection to law enforcement. *See, e.g.*, *State v. Porter*, 326 N.C. 489, 498 (1990) (State may lawfully seek jurors who are government oriented and sympathetic to the pressures of law enforcement); Golphin Order at 123 (listing examples of cases in which Black jurors ostensibly were struck because of their connections to law enforcement officers).
- The reasons given for a challenged strike apply equally to an accepted juror of a different race. *See supra* "Comparative juror analysis at step three" in § 7.3E, *Batson* Step Three: The Pretext Determination.
- The State's justification is irrelevant to serving as a juror on the case (for example, the juror had a hyphenated last name, *see* Golphin Order at 124).
- The prosecutor has mischaracterized the struck juror's responses to voir dire questions.
- The strike rate of Black or minority panelists is higher than that of non-minority panelists.
- The prosecutor has used the same justifications, or vague justifications (such as demeanor or dress), when defending peremptory strikes against minorities in the present case or past cases. *See supra* § 7.4A, Pretrial Preparation for a *Batson* Challenge; *State v. Porter*, 326 N.C. 489, 498–99 (1990) (prosecutor's explanation should be evaluated "in light of the explanations offered for the prosecutor's other peremptory strikes" (quotation omitted)).
- There are similarities between the prosecutor's stated justifications and training materials designed to help prosecutors defeat *Batson* claims. *See Top Gun II Batson Training: Articulating Juror Negatives* in the Race Materials Bank at www.ncids.org (select "Training and Resources"); *Miller-El v. Dretke*, 545 U.S. 231 (2005)

(discriminatory training manual on exclusion of Black people from juries constituted evidence supporting finding of *Batson* violation).

- The prosecutor has expressed animus toward having one or more racial minority groups serving on juries. *See, e.g.,* Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1079 (2011) (describing a training video in which a prosecutor explained, "Let's face it . . . there's the blacks from the low-income areas . . . you don't want those people on your jury").
- The prosecutor engaged in disparate questioning of minority and non-minority jurors. *See supra* "Disparate questioning" in § 7.3E, *Batson* Step Three: The Pretext Determination.
- The prosecutor's office, or the particular prosecutor in the case, has engaged in a pattern of discrimination in jury selection. *See, e.g., Miller-El v. Cockrell*, 537 U.S. 322, 334 (2003) ("Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries"); *see supra* § 7.4A, Pretrial Preparation for a *Batson* Challenge.
- The reasons supporting defendant's prima facie case at step one have not been adequately explained or overcome by the State's explanation. At step three, counsel should reemphasize the reasons offered at step one as well as offer any additional evidence and arguments. *State v. Porter*, 326 N.C. 489, 498–99 (1990) (prosecutor's justification for the strikes will be evaluated in light of "the strength of the prima facie case") (quotation omitted).

Preserving your *Batson* challenges at the conclusion of the trial. Be sure that all relevant materials are made part of the record in the event your *Batson* claim is denied and the defendant is convicted, including jury questionnaires, information about denied discovery requests, and other pertinent materials.

Improving the success rate of *Batson* claims in North Carolina. Despite the limited success of *Batson* challenges in the North Carolina appellate courts, *Batson* claims are not unwinnable. The success of *Batson* challenges at trial in North Carolina is largely unknown. When the defendant is "initially successful in a *Batson* challenge, a judicial opinion will almost never reflect it" because regardless of the ultimate outcome of the trial, prosecutors ordinarily have no ability to appeal. Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092 (2011).

One possible explanation for the low success rate of *Batson* claims on appeal is that defense attorneys may not be raising challenges whenever there are grounds to do so. Also, *Batson* challenges may have sparse records on appeal; results may improve if attorneys build fuller records that include both historical and contemporaneous evidence of possible racial motivations for peremptory strikes. Further, recent years have seen significant developments in the law governing *Batson* challenges and potential data that may support *Batson* claims in North Carolina. *See, e.g.*, *State v. Barden*, 362 N.C. 277,

279 (2008) (remanding for additional *Batson* hearing in light of recent U.S. Supreme Court cases). Appellate rulings in North Carolina before 2008 did not reflect the holding in *Snyder v. Louisiana*, 552 U.S. 472 (2008), clarifying that a single unconstitutional strike constitutes a *Batson* violation; and, as the trial court recognized in the *Golphin* case, "none of the previous courts that denied *Batson* challenges had the opportunity to consider data from the MSU study" finding that Black jurors in North Carolina capital cases were over twice as likely as White jurors to be peremptorily struck by prosecutors. Golphin Order at 27.

7.5 Beyond Litigation

Criticism of the *Batson* framework has been widespread. *See, e.g.*, *Rice v. Collins*, 546 U.S. 333, 343 (Breyer, J., concurring); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 199 WIS. L. REV. 501 (1999); Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and The Peremptory Challenge*, 85 B.U. L. REV. 155, 161 (2005); Catherine M. Grosso & Barbara O'Brien*, A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012) (noting widespread disappointment).

Some jurists have expressed concern about detecting discrimination in jury selection because it commonly occurs at an unconscious level and is therefore difficult to identify. *See, e.g.*, *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (observing that "sometimes, no one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype," and wondering, under such circumstances, "[h]ow can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?"). For this reason, some have proposed eliminating peremptory strikes altogether. *See, e.g.*, *Batson v. Kentucky,* 476 U.S. 79 at 108 (Marshall, J., concurring) (proposing eliminating peremptory strikes altogether); *Rice v. Collins*, 546 U.S. 333 at 343–44 (Breyer, J., concurring) (joining in Justice Marshall's call to abolish the peremptory strike); *State v. Saintcalle*, 309 P.3d 326, 350 (Wash. 2013) (Gonzalez, J., concurring) (identifying several shortcomings of the *Batson* framework, including the difficulty facing trial judges in determining whether a strike is discriminatory, and calling for the elimination of the peremptory strike in Washington state). The proposal to eliminate peremptory challenges suffers from problems of its own, including the disadvantage to defendants of losing the opportunity to strike jurors who cannot be struck for cause but who may have difficulty accepting the defendant's theory of the case. Eliminating peremptory challenges also may have little support among prosecutors or defense attorneys, making it unlikely to occur.

In addition to vigorously enforcing the rights afforded by *Batson*, other measures have been suggested as ways to reduce the potential for racial bias in jury selection and to strengthen the judiciary's ability to respond to bias, including:

- Videotaping of voir dire, so that demeanor-based explanations for peremptory strikes can be assessed meaningfully.
- Trainings for court actors on the influence of implicit bias on decision-making.
- Explicit recognition that peremptory strikes motivated by implicit biases violate equal protection within the meaning of *Batson*.
- Disciplinary action by the State Bar or court against attorneys who engage in racial discrimination in jury selection. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 7 (2010).
- Engagement with civil attorneys who share concerns about racial discrimination in jury selection, as *Batson* challenges can be raised in civil as well as criminal cases.
- State legislation providing "remedies to people called for jury service who are illegally excluded on the basis of race." *Id*.
- Examination of the role implicit biases play in one's own decision-making. *See, e.g.,* Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 765 (2012) (because defense attorneys mostly represent non-White clients, there is a tendency to "falsely assume that we are less likely to have racial bias").
- Investigation of patterns of discrimination by the Justice Department under 18 U.S.C. § 243, which prohibits racial discrimination in jury selection and imposes civil penalties for violations.
- Supplemental state law procedures to strengthen *Batson*. For example, in Florida, prosecutors must provide a race-neutral justification for a challenged strike any time a defendant makes a timely challenge to the strike of a potential juror belonging to a distinct racial group; the defendant does not need to establish a prima facie case of discrimination at step one. *Melbourne v. State*, 679 So. 2d 759, 764 n.5 (Fla. 1996) (explaining that a prior case "eliminated the requirement that the opponent of the strike make a prima facie showing of racial discrimination"). Also, some Florida decisions have held that a prosecutor's race neutral justification will be accepted only where supported by the record. *See, e.g., State v. Slappy*, 522 So. 2d 18 (Fla. 1988) ("when the state engages in a pattern of excluding a minority without apparent reason, the state must be prepared to support its explanations with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself"); *Reeves v. State,* 632 So. 2d 702 (Fla. Dist. Ct. App. 1994) (where the State defended its peremptory strikes of two Black employees of the Department of Health and Rehabilitative Services by stating that the employees would be hostile to the prosecution, but the potential jurors were not questioned about their feelings toward the prosecutor's office, the strike justification was not supported by the record and the strikes were therefore impermissible); *see also* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 23 (2010) (citing *Cobb v. State*, 825 So. 2d 1080 (Fla. Dist. Ct. App. 2002)).