
25.5 Peremptory Challenges

A. In General

In her concurrence in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), Justice Sandra Day O'Connor described peremptory challenges as follows:

> The peremptory challenge is "a practice of ancient origin" and is "part of our common law heritage." The principal value of the peremptory is that it helps produce fair and impartial juries. "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury." The peremptory's importance is confirmed by its persistence: It was well established at the time of Blackstone and continues to endure in all the States.

Id. at 147 (citations omitted).

Peremptory challenges allow the parties to excuse jurors on the basis of the party's own criteria, generally without inquiry or required explanation. *State v. Jenkins*, 311 N.C. 194 (1984) (any reason except race is an acceptable reason for peremptory challenge) (case decided before *Batson v. Kentucky*, 476 U.S. 79 (1986)); *accord State v. Smith*, 291 N.C. 505 (1977); *see also Swain v. Alabama*, 380 U.S. 202, 220 (1965) (*"*The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."(citation omitted)); *State v. Wooten*, 344 N.C. 316 (1996) (permissible for prosecutor to strike juror because of juror's hesitancy about death penalty). The only limit on the exercise of peremptories is that neither side may exercise a peremptory challenge because of the juror's race, gender, or other constitutionally protected characteristic. These limitations are discussed in detail *infra* in § 25.5C, Equal Protection Limitation on Peremptory Challenges: *Batson* and Its Progeny.

B. Statutory Right to Peremptory Challenges

The right to peremptory challenges is statutory. *See* G.S. 15A-1217 (entitling both State and defendant to peremptory challenges in criminal case). There is no constitutional right

to peremptory challenges. *See Rivera v. Illinois*, 556 U.S. 148, 157 (2009) (peremptory challenges are "creature[s] of statute" and states "may decline to offer them at all"); *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (peremptory challenges reinforce a defendant's right to trial by an impartial jury but the challenges are "auxiliary," not constitutional); *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("peremptory challenges are not of constitutional dimension").

Number of peremptory challenges. Peremptory challenges are allotted to the parties based on the number of defendants, not on the number of charges lodged against any one defendant. *State v. Boyd*, 287 N.C. 131 (1975). The State and each defendant in a noncapital case are entitled to six peremptory challenges. If there are co-defendants, the State gets six additional peremptory challenges per co-defendant. G.S. 15A-1217(b). In a capital case, each party is entitled to fourteen peremptories. If there are co-defendants, the State gets fourteen additional peremptory challenges per co-defendant. G.S. 15A-1217(a). Parties are entitled to one additional peremptory challenge for every alternate selected in capital or noncapital cases. G.S. 15A-1217(c).

The N.C. Supreme Court has said that the trial judge has no 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); *see also State v. Banks*, 125 N.C. App. 681 (1997) (as sanction for failure to preserve evidence, trial judge stripped State of two peremptory challenges), *aff'd per curiam*, 347 N.C. 390 (1997).

C. Equal Protection Limitation on Peremptory Challenges: *Batson* and Its Progeny

Generally. The U.S. Supreme Court has held that racial discrimination in the exercise of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986). Discrimination in jury selection also violates article I, section 26 of the N.C. Constitution, which states 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 constitution).

Three-prong *Batson* test. *Batson v. Kentucky*, 476 U.S. 79 (1986), established the following three-part test for demonstrating an equal protection violation in the exercise of peremptory challenges.

***First*,** a defendant making a *Batson* challenge must establish a prima facie case of discrimination. *E.g.*, *State v. Golphin*, 352 N.C. 364 (2000) (citing *Hernandez v. New York*, 500 U.S. 352, 358–59 (1991)). The trial judge must consider all relevant circumstances, including the defendant's race, the victim's race, the race of key witnesses, discriminatory questions or statements made by the prosecutor, a pattern of strikes against minority jurors, or the relative acceptance rate of whites and blacks. *See Golphin*, 352 N.C. at 426; *State v. White*, 349 N.C. 535, 548 (1998); *see also State v.*

Smith, 328 N.C. 99, 121 (1991) (one of the most important considerations for whether a prima facie case is established is whether prosecutor uses a disproportionate number of peremptory challenges to strike African-American jurors); *State v. Wiggins*, 159 N.C. App. 252, 263 (2003) (setting out a list of five nonexclusive factors that appellate courts look to in analyzing *Batson* claims).

"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* found that the trial judge erred in failing to find that the defendant had made out a prima facie case where the defendant was black, the victim white, and the prosecutor had filled eleven seats with white jurors and struck the three black prospective jurors 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. Green*, 324 N.C. 238 (1989) (remanding for *Batson* hearing after trial judge erroneously failed to find prima facie case); *accord State v. McCord*, 140 N.C. App. 634 (2000). For a further discussion of this first step, see *infra* "U.S. Supreme Court decisions after *Batson*" in this subsection C. (discussing *Johnson v. California*).

***Second*,** if the defendant is successful in establishing a prima facie showing of discrimination, the burden shifts to the State to proffer a race-neutral reason for the strike. *Purkett v. Elem*, 514 U.S. 765 (1995); *Hernandez v. New York*, 500 U.S. 352 (1991). "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) (citations 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 nondiscriminatory. *Purkett*, 514 U.S. at 768 (but recognizing that implausible reason probably will fail step three); *see also State v. Fletcher*, 348 N.C. 292 (1998) (following *Purkett*); *Bonnett*, 348 N.C. at 433 ("[U]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (citation omitted)). The State must offer a race-neutral explanation as to each peremptorily challenged jurors at issue. *State v. Wright*, 189 N.C. App. 346 (2008) (granting defendant a new trial where trial judge's finding that the State had offered valid and nondiscriminatory explanations for excusing black jurors was not supported by the record; State had only offered specific explanations for five of the seven challenged jurors).

When the State proffers explanations for its challenges, the defendant is entitled to an opportunity to rebut the proffered reason for excusing the juror. *E.g.*, *State v. Gaines*, 345 N.C. 647, 668 (1997); *State v. Peterson*, 344 N.C. 172 (1996). The defendant does not have the right to call as a witness and examine the prosecutor in the effort to show that his or her proffered explanations are a pretext. *State v. Porter*, 326 N.C. 489, 497 (1990); *State v. Jackson*, 322 N.C. 251 (1988).

***Third*,** the trial judge assesses the State's proffered reason and determines whether the defendant has proved purposeful discrimination. If the judge finds that the prosecutor's proffered reasons are disingenuous, or "pretextual," and the real reason for the strike is

discriminatory, then he or she must find a violation of the Equal Protection Clause. *Hernandez v. New York*, 500 U.S. 352, 359 (1991); *State v. Gaines*, 345 N.C. 647, 668 (1997). "At [this] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *Garrett v. Morris*, 815 F.2d 509, 511 (8th Cir. 1987) (trial court "has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination"). Factors the judge should consider in determining whether a proffered explanation is pretextual include:

- The susceptibility of the particular case to racial discrimination. The race of the defendant, the victims, and the key witnesses is relevant to this determination.
- The prosecutor's demeanor.
- The credibility of the explanation itself. The evaluation of the explanation involves objective and subjective criteria, such as whether similarly situated white venirepersons were passed by the State and whether the State's justification is relevant to this case. The prosecutor's explanation also should be evaluated "'in light of the explanations offered for the prosecutor's other peremptory strikes' and 'the strength of the prima facie case.'"

State v. Porter, 326 N.C. 489, 498–99 (1990) (citation omitted).

***Practice note*:** Because it is relatively easy for the State to proffer a race-neutral reason for a strike and meet the second prong of the *Batson* test, defense counsel needs to focus on the third step—convincing the trial judge that the State's proffered explanations for strikes are not credible. Implausible reasons unrelated to the juror's fitness to serve, such as hairstyle, gum chewing, or a remote connection to a minor State witness, may well be pretextual. Try to identify and bring to the judge's attention white jurors with characteristics similar to the characteristic identified by the State as its reason for striking a juror. For example, if the prosecutor claims he struck a black juror because he or she was young, list for the judge the young white jurors passed by the prosecutor. If the reason proffered is simply false—if, for example, the prosecutor asserts that a perfectly forthright juror was "hesitant," or "seemed defiant"—inform the trial judge that you noticed no hesitation or defiance.

For a further discussion of this step, see *infra* "U.S. Supreme Court decisions after *Batson*" (discussing *Miller-El v. Dretke*, 545 U.S. 231 (2005)) and "Suspect reasons for strikes" (discussing reasons found unacceptable by some courts) in this subsection C.

Importance of getting 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 (1991) (defendant failed to carry his burden of establishing an adequate record for appellate review because he did not elicit the race of the jurors by means of questioning or other

proper evidence); *State v. Payne*, 327 N.C. 194 (1990) (affidavit submitted by defense counsel containing counsel's perceptions concerning the races of the excused potential jurors was not adequate to support defendant's claim of improper use of peremptory challenges under *Batson*); *State v. Mitchell*, 321 N.C. 650, 654 (1988) (statements of counsel, standing alone, are not sufficient to support a finding that peremptory challenges were used discriminatorily); *State v. Shelman*, 159 N.C. App. 300, 310 (2003) ("[w]ithout a transcript or some other document setting out pertinent aspects of jury selection," appellate court did not have enough information to assess defendant's *Batson* claim).

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 State v. Brogden*, 329 N.C. 534 (1991) (notations by the court reporter of defense counsel's subjective impressions concerning race were not acceptable); *State v. Payne*, 327 N.C. 194 (1990) (no error in trial judge's denial of the defendant's motion for the clerk to record the race of the prospective jurors made after they had been excused and the jury had been selected; clerk's perception of a particular person's race is inappropriate); *State v. Mitchell*, 321 N.C. 650, 656 (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").

U.S. Supreme Court decisions after *Batson*. In 2005, the U.S. Supreme Court issued two opinions applying *Batson v. Kentucky*. The first, *Miller-El v. Dretke*, 545 U.S. 231 (2005), addressed the issue of what sort of evidence a defendant can rely on to show intentional discrimination in the exercise of a peremptory strike. The opinion is most useful with respect to step three, explained above, where the defendant is trying to rebut proffered "race neutral" reasons for a strike articulated by a prosecutor.

One important kind of rebuttal evidence is side-by-side comparisons between black and white panelists, i.e., "comparative juror analysis." 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 stated that he struck a black venireman who expressed the opinion that he would vote against the death penalty if he believed the defendant could be rehabilitated. That was not a race neutral reason, the Court found, where the prosecutor accepted white jurors with comparable views. *Miller-El* also found an explanation for a strike to be pretextual where the prosecutor did not fully inquire into the issue. Where a black juror was struck ostensibly because his brother had prior convictions, but the prosecutor did not ask about the juror's relationship with his brother, the Court found the prosecutor's reason unconvincing. Further discussion of comparative juror analysis by the U.S. Supreme Court can be found in *Foster v. Chatman*, ___ U.S. ___, 136 S. Ct. 1737 (2016), set out later in this subsection.

Practice note: It is improper for the reviewing judge to substitute a better reason than the prosecutor offers. If you find that the trial judge is doing this—"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 accepted by the judge.

In another part of the opinion, *Miller-El* holds that intentional discrimination can be shown by patterns of questioning or other conduct. If a prosecutor starts asking questions of black jurors that he or she is not asking of white jurors, such as whether they think the criminal justice system is fair, then discrimination is more likely to be present. In *Miller-El*, the Court found discrimination where the prosecutor described the death penalty vividly and explicitly to black jurors but very blandly to white jurors.

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 often to move those jurors back in line. A North Carolina equivalent might occur where jurors are divided into panels. If at the end of a panel there are two black venirepersons left and no whites, and the prosecutor chooses that moment to suggest merging the remaining members of the panel with the next panel, this would tend to show discrimination. *See supra* § 25.1C, Random Selection Requirement.

A final part of the decision emphasizes patterns of discrimination shown by the district attorney's office over time. This part of the decision reinforces the need for the defense bar to keep track of patterns in particular offices or with respect to particular prosecutors.

In *Johnson v. California*, 545 U.S. 162 (2005), the Court addressed the standard of proof needed to meet step one in *Batson*—establishing a prima facie case of discrimination. *Johnson* makes clear that at step one, the party alleging discrimination does not carry a burden of proof but merely a burden of production. To establish a prima facie case of discrimination and require the State to proceed to step two, a defendant need only produce sufficient evidence to permit the trial judge to draw an inference of discrimination. The defendant does not have to show a "strong likelihood" of discrimination or even that it is more likely than not that the prosecutor is acting in a racially discriminatory manner. The defendant does carry the burden of proof at step three. *Johnson* can be cited both at the trial court level to encourage the judge to ask the prosecutor to place his or her reasons for strikes on the record, and on appeal to request a *Batson* remand, where a trial judge erroneously failed to find a prima facie case of discrimination.

In 2008, the U.S. Supreme Court decided *Snyder v. Louisiana*, 552 U.S. 472 (2008), in which it reiterated that it is unconstitutional to strike even a single prospective juror based on a discriminatory purpose. In *Snyder*, the Court found that the trial judge committed clear error 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 declined to rule based on the first proffered explanation since the record did not show that the trial judge actually made a determination regarding the juror's demeanor. The Court noted in dicta, however, that great deference is due a trial judge's ruling on demeanor since "determinations of credibility and demeanor lie 'peculiarly within a trial judge's province.'" *Id.* at 477 (citation 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 be rejected if the judge did not observe or cannot recall the juror's demeanor).

The Court then 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. at 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 nevertheless failed to 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.

In 2016, the U.S. Supreme Court decided *Foster v. Chatman*, ___ U.S. ___, 136 S. Ct. 1737 (2016). In *Foster*, the defendant had made a *Batson* claim at trial and the denial of that claim had been affirmed on direct appeal in 1988. The defendant renewed the claim in a later habeas corpus proceeding and presented evidence he had obtained after gaining access to the prosecution's trial file pursuant to an open-records law. The claim was again denied. After determining that it had jurisdiction, the U.S. Supreme Court reviewed the merits of the *Batson* claim based on the newly discovered information. The Court's review was focused on the third step in *Batson*, i.e., whether, under the totality of the circumstances, the State's proffered explanations for the strikes were credible. Using "comparative juror analysis," the Court found that evidence of purposeful discrimination against two black potential jurors was "compelling." *Id.* at ___, 136 S. Ct. at 1754. The results of its comparative juror analysis, along with the prosecution's "shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file," convinced the Court that the strikes of the potential jurors were "motivated in substantial part by discriminatory intent." *Id.* (citation omitted). For further discussion of the *Foster* decision and its implication on jury selection challenges in North Carolina, see Emily Coward, *U.S. Supreme Court Strikes Down Racial Discrimination in Jury Selection*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 2, 2016).

Other groups cognizable under *Batson.* In addition to prohibiting racial discrimination in the exercise of peremptory strikes, the Equal Protection Clause of the Fourteenth Amendment prohibits gender discrimination in the exercise of peremptories. *See J.E.B. v. Alabama ex rel. T.B*., 511 U.S. 127, 129 (1994) (holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality"); *accord State v. Gaines*, 345 N.C. 647 (1997); *State v. Bates*, 343 N.C. 564 (1996). The N.C. Constitution likewise prohibits discrimination in jury selection based on gender. *See State v. Maness*, 363 N.C. 261 (2009) (gender discrimination prohibited by article I, section 26 of N.C. Constitution). The procedure for establishing gender discrimination, and the factors the court should consider in evaluating a defendant's prima facie showing and deciding the ultimate question of whether there is intentional discrimination, are the same as under *Batson. See Gaines*, 345 N.C. 647; *Bates*, 343 N.C. 564.

Article I, section 26 of the N.C. Constitution explicitly prohibits discrimination against jurors on the basis of religion (as well as prohibiting race and gender discrimination). In *State v. Eason*, 336 N.C. 730 (1994), the defendant contended that the prosecutor had violated article I, section 26 by striking a juror because the juror was a Jehovah's Witness. While recognizing the potential legitimacy of the claim, the court held that the particular juror was struck because of her beliefs about the death penalty. The legitimacy of a federal constitutional claim of discrimination based on religion has not been determined by the U.S. Supreme Court. In *Davis v. Minnesota*, 511 U.S. 1115 (1994), the U.S. Supreme Court refused to grant certiorari to review the propriety of the use of peremptory challenges to exclude a Jehovah's Witness from jury service on the ground that the members of that religion are reluctant to exercise authority over other human beings. Justice Thomas dissented from the denial of certiorari, stating that after the Court's decision in *J.E.B.* extending *Batson* to cover gender-based discrimination, "no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause." *Id.* at 1115.

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).

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 being passed 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 reach it.

Suspect reasons for strikes. North Carolina appellate courts have been extraordinarily deferential to the State in reviewing *Batson* issues. Other states have regularly found certain types of reasons for strikes unacceptable. These reasons include:

- 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 by trial judge in allowing the prosecutor to peremptorily challenge a black juror based on the 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 nonverbal behaviors. *Bernard v. State*, 659 So. 2d 1346 (Fla. Dist. Ct. App. 1995) (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 inappropriately struck juror who prosecutor thought had muttered under his breath, showing disrespect for judge, and who was member of NAACP); *Avery v. State*, 545 So. 2d 123 (Ala. Crim. App. 1988) (reasons such as looks, body language, and negative attitude are susceptible to abuse and must be closely scrutinized by courts).
- 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*, 206 A.D.2d 382, 383 (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'").

Challenges by white defendant of strikes against African-Americans. 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 the 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).

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 Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("'[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.'"(citation omitted)).

Review of failure to find prima facie case of discrimination. Generally, when a trial judge rules that the defendant failed to show a prima facie case of discrimination, an appellate court's review is limited to a determination of whether the trial judge erred in so finding. *See State v. Bell*, 359 N.C. 1, 12 (2004). However, if the prosecutor is required to or voluntarily chooses to put his or her reasons for strikes against minority jurors on the

record before the judge rules on the question of a prima facie showing, and the trial judge then rules "on the ultimate question of discrimination," the issue of whether there is a prima facie case of discrimination becomes moot. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991); *see also Bell*, 359 N.C. 1, 12; *State v. Headen*, 206 N.C. App. 109, 115 (2010). The only issue before either the trial judge or the reviewing court in that instance is whether the prosecutor intentionally discriminated. *See Hernandez*, 500 U.S. 352, 363; *see also State v. Thomas*, 329 N.C. 423, 430–31 (1991). If the prosecutor puts a race-neutral justification on the record after the trial judge has already rejected the defendant's prima facie case, the issue of whether the defendant made out a prima facie case of discrimination is not moot for appellate purposes. *See State v. Williams*, 343 N.C. 345 (1996) (rule that whether defendant has made a prima facie showing becomes moot if prosecutor articulates reasons for the challenges did not apply here where prosecutor offered his reasons after the trial judge had already ruled that defendant had failed to make a prima facie case and judge only asked the prosecutor to do so after defendant requested that the reasons be stated for the record).

Remedy for *Batson* violation. *Batson* itself does not specify the proper trial remedy for a violation. *See Batson v. Kentucky*, 476 U.S. 79, 99 n.24 (1986) (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 *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 (footnotes 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.").

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 venire should be dismissed and jury selection should begin again. However, the court has not been absolutely consistent on this approach. 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 passed

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.

For an in-depth discussion of remedies for *Batson* violations, including practice suggestions, see ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 7.3F (Selection of the Trial Jury: Remedy for *Batson* Violations at Trial) (2014).

Application of *Batson* to defendants. 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); *State v. Hurd*, 246 N.C. App. 281 (2016); *State v. Cofield*, 129 N.C. App. 268 (1998).

A "reverse *Batson* claim" is established just like 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 is pretextual and determines whether the State has met its burden of proving purposeful discrimination.

Practice note: In defending against a prima facie case of discrimination, be sure to note for the record how many African-American or other minority jurors are being passed to you for questioning. It may be that you are exercising 90% of your strikes against white jurors, but that 95% of the jurors being passed to the defense are white because most of the black or other minority jurors have 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 find structural error and grant the defendant a new trial. *See* Jeff Welty, *Rivera v. Illinois and "Reverse Batson,"* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 7, 2009); *see, e.g., State v. Scott*, 749 S.E.2d 160, 165 (S.C. Ct. App. 2013) (vacating conviction and remanding for new trial where the State's *Batson* claim was erroneously granted). However, two decisions by the N.C. Court of Appeals have upheld the State's *Batson* challenges against the defendant on the ground that the defendant had engaged in purposeful discrimination against white people. *See Hurd*, 246 N.C. App. 281; *Cofield*, 129 N.C. App. 268. While N.C. appellate courts have reviewed over 100 cases in which the defendant alleged a *Batson* claim against the prosecution, the courts have never reversed a case on the ground that the third step of *Batson,* purposeful discrimination, had been violated. *See* Alyson Grine, *Reverse Batson Challenge Sustained*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 19, 2016); *see also* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957, 1957 (2016) ("In the 114 cases decided on the merits by North Carolina appellate courts, the courts

have never found a substantive *Batson* violation where a prosecutor has articulated a reason for the peremptory challenge of a minority juror.").

Although the question of the remedy available 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 (citations 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.

No North Carolina decision has addressed the issue.

Additional resources. For further discussion of the federal and state constitutional limits on the use of peremptory challenges, see ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES Ch. 7 (Selection of the Trial Jury: Peremptory Challenges) (2014). A collection of materials on dealing with race in jury voir dire can also be found on the Office of Indigent Defense Services website in the Race Materials Bank. The NC PDCORE website, created by a committee of the North Carolina Public Defender Association, also contains a helpful collection of litigation materials, data, publications, reports, books, links, and other tools regarding racial disparities in the criminal justice system. *See* NC PDCORE (select Resources). For an in-depth review of thirty years of North Carolina appellate *Batson* jurisprudence, see Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957 (2016).