

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.