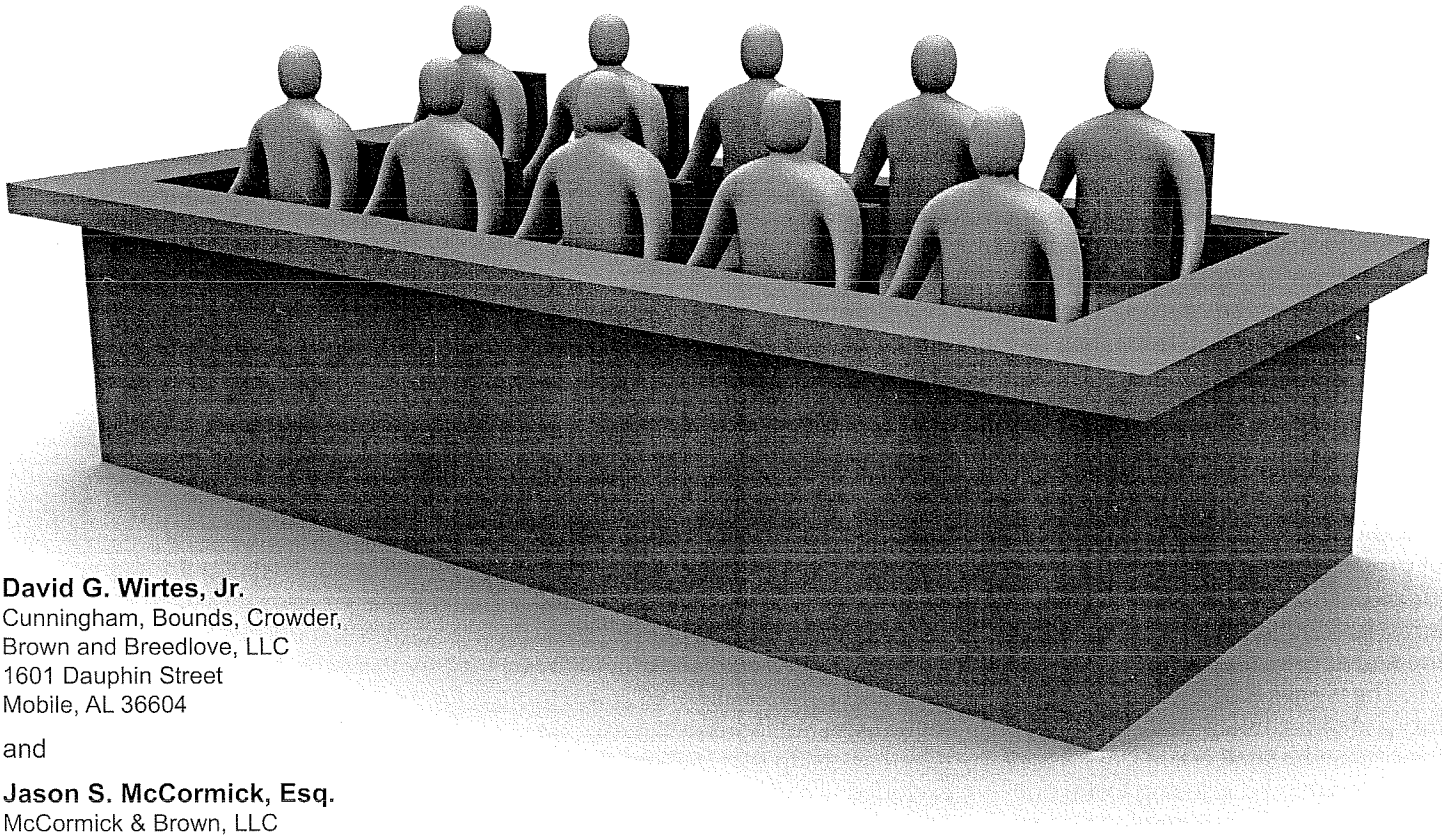
# Voir Dire, Jury Selection & Discrimination

"The concept of the jury system is as close as any society has ever come to true democracy. The ancient institution of a jury trial does not owe its existence to any positive law, but arose silently and gradually out of the usages of society. The jury trial is a privilege of the highest and most beneficial nature and our most important guardian both of the public and private liberty. The liberties we enjoy cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, . . . but also from all secret machinations, which may sand and undermine it."[1] >>



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## I. INTRODUCTION

The right to a fair and impartial jury is guaranteed by the Alabama and U.S. Constitutions.[2] Necessarily, then, jurors must be free from bias and prejudice.[3] In instances where this basic principle is violated, mistrials occur, and verdicts are vacated.[4] As lawyers, we are at the vanguard of protecting this fundamental right, and nowhere is this fundamental right more vulnerable than during the jury selection process.

This article outlines the critical points during the jury selection process where checks on discrimination occur, from the selection of the venire to the exercise of peremptory challenges. The article also outlines the judicial remedies available to curtail and cure such discrimination.

## II. THE MASTER JURY LIST

The process of seating a jury begins with Ala. Code § 12-16-70, as this statute governs the manner in which the Master Jury List for the Circuit Court is obtained:

"When jurors, grand or petit, are needed for court, the judge, or where there are more than one, then any one of the judges of the court, shall at a time within his or her discretion, but at least 20 days prior to the date on which the prospective jurors are to serve, draw or cause to be provided from the master jury list compiled pursuant to Rule 40, Alabama Rules of Judicial Administration, the names of prospective jurors in a number the judge deems sufficient to obtain the juries needed for the period for which the names are drawn . . .

The names so provided shall be forwarded forthwith to the clerk of the court who shall retain possession thereof without disclosing to anyone the names drawn nor any list thereof . . . ."

Id. In turn, Rule 40 of the Alabama Rules of Judicial Administration dictates to the circuit court the sources of potential jurors:

"Sources for Master Jury List. The presiding judge of the circuit court, after consulting with the other circuit court judges in his or her circuit, shall select a source or sources from which to compile a master list of all persons in the county or territorial subdivision who may be called for jury duty (a 'master jury list'). The master jury list shall include the addresses of the individuals on the list and any other necessary identifying information. The master jury list shall be compiled from one or both of the following sources:

(1) Records containing the names of all registered voters in the county or territorial subdivision; and

(2) Records containing the names of all persons in the county or territorial subdivision holding driver's licenses or nondriver identification cards . . .

The master jury list for each county or territorial subdivision shall be available to the public for inspection at all reasonable times."

Ala.R.Jud.Adm. 40(A)(B).

In 1978, the Alabama legislature adopted a comprehensive set of procedures governing the qualification and selection of jurors.[5] Since then, attacks upon the jury selection process have significantly decreased.[6] Present day challenges to the actual venire based on discrimination in the selection process are rare. Nonetheless, if a party suspects discrimination at this phase, the proper method to challenge the venire is a motion to quash.[7] In order to succeed on a Motion to Quash the Venire, the movant must show: (1) that that group that is alleged to be excluded is a distinctive group in the community; (2) that the representation of the group on the present venire is not fair and reasonable compared to the percentage of that group in the community; and (3) that the underrepresentation was caused by the systematic exclusion of the group in the selection process utilized to obtain the venire.[8]

Significantly, it is the source from which the venire is obtained that must fairly represent the community, not the individual panel.[9] As an example, the fact that there were only four African-Americans on a 36 person jury panel, without more, failed to establish a violation of the defendant's right to a jury representing a fair cross-section of the community.[10] Additionally, selecting the venire from a pool composed of persons in the county holding valid drivers' licenses is proper.[11]

## III. THE RIGHT TO VOIR DIRE POTENTIAL JURORS

Once the potential jurors arrive at the courthouse, Ala. Code § 12-16-6 imposes the duty on the trial court to oversee the voir dire examination of potential jurors:

"It is the duty of the court, before administering the oath prescribed by law to any grand, petit or tales jurors, to ascertain that such juror possess the qualifications required by law, and the duty required of the court by this section shall be considered imperative."

Id. Rule 47 of the Alabama Rules of Civil Procedure sets forth the procedural options available for examining potential jurors:

"The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorney to supplement the examination as may be proper."

Ala. R.Civ.P. 47(a).

In plain terms, it is recognized

that the parties have a right to have questions asked on voir dire answered truthfully, as truth is necessary for parties to exercise their discretion in making strikes.[12] Accordingly, it has long been the rule in Alabama that "... wide latitude should be accorded the parties in their voir dire examination of prospective jurors touching their qualifications, interest, or bias ...."[13] As the rules intended to prohibit discrimination in the jury selection process have evolved, so has the need for ever-increasing latitude during the voir dire examination process. It is, after all, the lawyer's role to ensure that he properly exercises his client's rights to assert statutory challenges for cause, common law challenges for cause, and peremptory challenges, all the while keeping an eye out for discriminatory challenges from the opposing side. Accordingly, while trial courts have wide discretion in conducting voir dire,[14] that discretion can be abused when a party's ability to determine whether a juror is free from bias or prejudice is impeded.[15]

IV. STATUTORY "FOR CAUSE" CHALLENGES

The statutory "Challenges of Jurors for Cause" are set forth in Ala. Code § 12-16-150:

"It is good ground for challenge of a juror by either party:

(1) That the person has not been a resident householder or freeholder of the county for the last preceding six months.[16]

(2) That he is not a citizen of Alabama.

(3) That he has been indicted within the last 12 months for felony or an offense of the same character as that with which the defendant is charged.

(4) That he is connected by consanguinity within the ninth degree, or by affinity within the fifth degree, computed according to the rules of the civil law, either with the defendant or with the prosecutor or the person alleged to be injured.

(5) That he has been convicted of a felony.

(6) That he has an interest in the conviction or acquittal of the defendant or has made any promise or given any assurance that he will convict or acquit the defendant.

(7) That he has a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict.

(8) That he is under 19 years of age.

(9) That he is of unsound mind.

(10) That he is a witness for the other party.

(11) That the juror, in any civil case, is plaintiff or defendant in a case which stands for trial during the week he is challenged or is related by consanguinity within the ninth degree or by affinity within the fifth degree, computed according to the rules of the civil law, to any attorney in the case to be tried or is a partner in business with any party to such case.[17]

(12) That the juror, in any civil case, is an officer, employee or stockholder of or, in case of a mutual company, is the holder of a policy of insurance with an insurance company indemnifying any party to the case against liability in whole or in part or holding a subrogation claim to any portion of the proceeds of the claim sued on or being otherwise financially interested in the result of the case."[18]
Id.

V. "PROBABLE PREJUDICE"- COMMON LAW "FOR CAUSE" CHALLENGES

In addition to the statutory "for cause" challenges, Alabama also recognizes common law challenges for cause. However, "a common law challenge for cause must entail some matter which imports absolute bias or favor, and leaves nothing for the discretion of the court."[19]

The test for determining whether a common law challenge for cause is appropriate depends upon the prospective juror's answers given during voir dire, and the standard is "probable prejudice." Just what "probable prejudice" means, and how the test is to be applied by the trial court, is set forth in Wood v. Woodham, 561 So. 2d 224 (Ala. 1989):

In challenging a juror for cause, the test to be applied is that of probable prejudice. While probable prejudice for any reason will serve to disqualify a prospective juror, qualification of a juror is a matter within the discretion of the trial court. This Court must look to the questions propounded to, and the answers given by, the prospective juror to see if this discretion was properly exercised. Id. A reversal is not appropriate absent abuse of this discretion.

Ultimately, the test to be applied is whether the juror can set aside her opinions and try the case fairly and impartially, according to the law and the evidence.

Id., 561 So.2d at 227 (internal citations omitted).

In the authors' experience, most venire members respond in the affirmative when asked whether they are capable of setting aside their opinions in order to render a verdict on the evidence. In some instances, however, a potential juror will initially respond that he is "biased or prejudiced" or "has deep-seated impressions" that could affect his neutrality, only to respond to further questioning that he can set aside those biases. In Knopp v. McCain, 561 So. 2d 229 (Ala. 1989),

the Supreme Court addressed this scenario and held that it constituted "probable prejudice" for purposes of a for cause challenge:

Once a juror indicates initially that he or she is biased or prejudiced or has deep-seated impressions, so as to show that he or she cannot be neutral, objective, or impartial, the challenge for cause must be granted. This is particularly true when a juror, such as Ms. Fuller, volunteers her doubts.

Id., 561 So. 2d at 234.[20] The following are examples of when probable prejudice has been found under common law:

Juror in contract failed to disclose he previously had been defendant in contract cases.

Conference America, Inc. v. Telecommunications Co-op Network, Inc., 885 So. 2d 772 (Ala. 2003).

Doctor-Patient relationship between veniremember and party is prima facie evidence of probable prejudice: venire member should have been excused for cause where she stated she would have felt "awkward" serving on jury where claims were made against her doctor.

Bell v. Vanlandingham, 633 So. 2d 454 (Ala. 1994).

Venire member whose daughter had been patient of key defense witness doctor in medical malpractice case should have been excused for cause where she "might feel bad if [her daughter] had to be back and see the [defense witness doctor]."

Boykin v. Keebler, 648 So. 2d 550, 552 (Ala. 1994).

Employees of parties.

Hutchins v. DCH Regional Medical Center, 770 So.2d 49, 55 (Ala. 2000), which explains

... [i]f the employer makes the challenge, it must make a showing of prejudice or bias on the part of its employee, when it challenges for cause the employees' qualifications for serving as a juror in its case. If the employer can justify its motion by proving that the employee will be prejudiced in some manner as a trier of fact, then the trial court should strike that prospective juror for cause. Without such proof, the trial court should not strike the employee for cause. The party opposing the employer of the prospective juror, however, should be allowed a challenge for cause against the prospective juror, under the rules stated in Kendrick [v. Birmingham S. R.R., 254 Ala. 313, 48 So.2d 320 (1950)] without a showing of bias or prejudice.

Our two-year pronged approach to this issue is based upon a recognition of the unique relationship between an employer and its employee. Undoubtedly, this relationship implies a partiality on the part of the employee in favor of the employer. We must presume that the employer and the employee have a friendly working relationship. If such a relationship does not exist, then the employer, to have a challenge for cause, must show the court what the true relationship is. Conversely, the party opposing the employer should not be required to show prejudice in order to challenge the employee; when that party challenges the employee, a prejudice in favor of the employer must be presumed to exist, and the trial court is consequently left without discretion in ruling on the challenge for cause.

Id., quoting CSX Transportation, Inc. v. Dansby, 659 So.2d 35, 39-40 (Ala. 1995) (emphasis as in Hutchins).

## VI. PEREMPTORY CHALLENGES

In Knight v. State,[21] the Court of Criminal Appeals succinctly stated the necessity, and importance, of protecting a party's right to exercise peremptory challenges:

It is fundamental to our system of impartial justice that parties have a right to have questions answered truthfully by prospective jurors to enable them to exercise their discretion wisely in exercising their peremptory strikes.

. . .

The examination of a juror on voir dire has a dual purpose, namely, to ascertain whether a legal cause for challenge exists and also to determine whether prudence and good judgment suggest the exercise of a peremptory challenge. The right of peremptory challenge implies the right to make an intelligent judgment as to whether a juror should be excused. Counsel have the right to truthful information in making that judgment ... . Failure to enforce the right to elicit from prospective jurors truthful answers to material questions renders hollow the right of peremptory challenge."

Id. at 494 (internal citations omitted).

Before the adoption of the Alabama Rules of Civil Procedure and the 1975 Code of Alabama, there were two methods for selecting a jury: demanding a struck jury, or using peremptory strikes as jurors were empaneled. 1 Champ Lyons, Jr., Alabama Rules of Civil Procedure Annotated, § 38.4 at 684 (3d ed. 1996). If a struck jury was not demanded by one of the parties, the trial judge or clerk could draw 12 names out of a box containing the names of veniremen for that term. Ala. Code Tit. 30, § 38 (1940). As the jurors' names were drawn from the box by the court, either party could challenge the juror by exercising one of four peremptory strikes. See Ala. Code Tit. 30, § 53 (1940), which was referred to as the "Peremptory Challenge Statute." As for the other way of obtaining a jury before 1975, i.e., where a party demanded a "struck jury" - the court would furnish the names of 24 "jurors in attendance upon the court" from which each side would alternatively strike six jurors, one juror at a time, until the jury con-

sisted of 12 persons. Ala. Code Tit. 30, § 54 1940).

Almost one hundred years ago, when applying these earlier versions of the "Struck Jury Statute," the Alabama Supreme Court held that the struck jury venire had to consist of exactly 24 persons, no more and no less. Brilliant Coal Co. v. Barton, 203 Ala. 38, 81 So. 828 (1919). In the Brilliant case, the Court held that it was reversible error for a trial court to allow a venire panel of more than 24 jurors when a struck jury had been demanded. Id. at 829.

When the 1975 Code of Alabama was adopted, the Struck Jury Statute (§ 12-16-140) was re-adopted, but the Peremptory Challenge Statute was not. The Struck Jury Statute states:

In all civil actions triable by jury, either party may demand a struck jury and must thereupon be furnished by the clerk with a list of 24 jurors in attendance upon the court, from which a jury must be obtained by the parties or their attorneys alternately striking one from the list until 12 are stricken off, the party demanding the jury commencing. The jury thus obtained must not be challenged for any cause, except bias or interest as to the particular case.

Ala. Code § 12-16-140 (1975).

With the adoption of the new Judicial Article, the Supreme Court was granted the power to establish rules of civil procedure that would govern in all civil actions. The Alabama Rules of Civil Procedure were adopted in 1973. Cowin Equip. Co., Inc. v. Robison Mining Co., Inc., 342 So.2d 910 (Ala. 1977). The Supreme Court promulgated a rule concerning peremptory challenges in civil cases. That rule, Rule 47(b), states:

Regular jurors shall be selected from a list containing the names of at least twenty-four (24) competent jurors and shall be obtained by the parties or their attorneys alternately striking one (1) from the list until twelve (12) remain, the party demanding the jury having the first strike.

The Court may direct that not more than six (6) jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors shall have the same qualifications, shall be subject to the same examination, shall take the same oath, and shall have the same functions, powers, facilities and privileges as regular jurors. Unless the parties agree otherwise, the parties shall be entitled to strike from a list containing the names of three (3) competent jurors for each alternate juror required in addition to at least twenty-four (24) competent jurors required for a regular jury.

When the Court has determined the total number of jurors, including alternates, to be impaneled and has imparted that information to counsel and the clerk, the parties will proceed to strike the jury. When they reach the number determined by the court to be impaneled, the striking shall continue until the regular number of jurors is reached. The alternate jurors will be those jurors whose names had not been struck when the total number determined by the court had been reached, but whose names were stricken before the regular number of jurors was reached. When the jury has been selected, the clerk shall furnish the court with a list of the alternate jurors, in inverse order in which their names were stricken, i.e., the last name stricken will be listed as alternate juror number 1, the next to last name stricken as alternate juror number 2 and so on until the number of alternates determined by the court is reached. The regular jury and the alternates will be impaneled. Jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties shall be discharged. Just prior to the time the jury retires to consider its verdict, the court shall supply any vacancies from the list furnished by the clerk, beginning with the last name stricken, then next to last and so on until the regular number of jurors has been reached. Other alternate jurors impaneled but not used shall be discharged.

Ala.R.Civ.P. 47(b).

Rule 47(b) preserves the right of the parties to pick a jury using peremptory strikes, and it therefore implicitly acknowledges abandonment of the old method of pulling 12 names out of a box. The rule, by its express terms, provides that a minimum of 24 jurors must be in the venire, even though § 12-16-140 requires exactly 24 jurors. This conflict between the plain language of Rule 47(b) and § 12-16-140 created a tension that required resolution by the Supreme Court.

In 1986, the Court issued Wallace v. Alabama Power Co., 497 So.2d 450 (Ala. 1986), and held that Rule 47(b) controls the selection of jurors. There, the trial court had allowed voir dire to commence with a venire consisting of 30 veniremen. The Supreme Court held that the trial court did not err in requiring the jury to consist of at least 24 competent jurors as provided by Rule 47(b).[22]

Historically, there were few safeguards ensuring that the peremptory striking process was free of purposeful discrimination. As observed in 1965, "[The United States Supreme Court] extensively reviewed the purpose and history of the peremptory challenge system as it has developed over the last 300 years. The strikes have historically been available to the defense and prosecution without cause and without justification."[23] Such was the state of the law until 1986, when the United States Supreme Court issued its opinion in Batson v. Kentucky, 476 U.S. 79 (1986).

A. Batson-Protecting the Peremptory Challenge Process from Discrimination

In Batson, the United States Supreme Court held that racial dis-

crimination in jury selection violated both the defendant's and the excluded juror's rights under the Equal Protection Clause. In Batson, the prosecutor used peremptory challenges to strike all four African-American members of the panel. In examining these strikes, the Court held that the race-based challenges violated the defendant's equal protection rights by distorting the impartiality of the jury process. The challenges were also deemed to violate the equal protection right of the excluded jurors by denying them participation in jury service.

At its core, Batson prohibits the use of peremptory challenges based on discriminatory motives. When a party believes that Batson's mandate has been violated, he may initiate a Batson challenge by establishing a prima facie case of racial discrimination. If the moving party carries this burden, the burden of establishing race-neutral justifications for the peremptory challenges shifts to the offending party. The burden imposed on the Court in this situation is heavy, as studies have shown that out of 2,994 Batson challenges surveyed, the offending party admitted that race influenced the decision to use a peremptory challenge only 1.8% of the time (55 out of 2,994 challenges).[24] This low percentage of admissions about discrimination is belied by the fact that 533 of the Batson challenges surveyed (17.8%) resulted in a ruling that Batson had indeed been violated.[25]

B. Batson's Prohibition Against Discrimination Applies to Race and Gender Bias

Since its release, Batson's rationale has been extended to prohibit strikes premised on gender and all other "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." J.E.B. v. Alabama ex. rel, T.B., 511 U.S. 127, 128 (1994). In J.E.B., the State of Alabama used peremptory strikes to eliminate males from a panel in a paternity suit against the alleged father. The strikes resulted in an all-female jury. After exhausting his state appellate remedies, the father's petition for certiorari was granted by the United States Supreme Court which reversed, reasoning in part that "while the prejudicial attitudes towards women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, overpower those differences." J.E.B., 511 U.S. at 135.

In Belisle v. State,[26] the court noted that Batson

... was extended to white jurors in Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); to Asian jurors in Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); and to gender-biased challenges in J.E.B. v. Alabama.

Id. at * 21.

As observed in Williams v. State,[27]

"We believe that the failure of white venire members to fall within a cognizable group should not preclude a defendant from successfully raising a Batson objection to the state's striking of white venire members for racial reasons. Batson and Powers both hold that a state is prohibited from striking venire members on account of their race. It would be terribly unjust for us to recognize that Batson applies to the state's striking of blacks, Hispanics, Native Americans, and Asians when they were struck for racial reasons, but does not apply to the state's striking of white venire members when those strikes are exercised on account of race. We, therefore, hold that Batson does apply to the striking of white venire members when they are struck on account of their race."

Id. at 1038.

Batson, of course, applies to civil cases. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Thomas v. Diversified Contractors, Inc., 551 So.2d 343 (Ala. 1989).

C. Challenging a Peremptory Challenge as Discriminatory Under Batson

What is the procedure for making a Batson challenge at trial? In 2006, the United States Supreme Court outlined a three-step process for asserting a Batson challenge:

A defendant's Batson challenge to a peremptory strike requires a three-step inquiry.

First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race.

Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible"; so long as the reason is not inherently discriminatory, it suffices.

Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."

Rice v. Collins, 546 U.S. 333, 338 (2006) (internal citations omitted).

1. Step One: Establishing a Prima Facie Case of Discrimination

"The burden of persuasion is initially on the party alleging discriminatory use of peremptory challenges to establish a prima facie case of discrimination. In determining whether there is a prima facie case, the Court is to consider 'all relevant circumstances' which could lead to an inference of

discrimination." Ex parte Bird, 594 So. 2d 676, 679 (Ala. 1991). In Ex parte Bird, the Alabama Supreme Court offered a nonexhaustive list of factors that can be considered to carry this burden of proof:

The following are illustrative of the types of evidence that can be used to raise the inference of discrimination:

1. Evidence that the "jurors in question share[d] only this one characteristic-their membership in the group-and that in all other respects they [were] as heterogeneous as the community as a whole.' . . . For instance 'it may be significant that the persons challenged, although all black, include both men and women and are [of] a variety of ages, occupations, and social or economic conditions ....

2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors.

3. The past conduct of the state's attorney in using peremptory challenges to strike all blacks from the jury venire ....

4. The type and manner of the state's attorney's questions and statements during voir dire, including nothing more than desultory voir dire ....

5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions ....

6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner; e.g., ... a black elementary school teacher [is] struck as being potentially too liberal because of his job, but a white elementary school teacher [is] not challenged ....

7. Disparate examination of members of the venire; e.g., ... a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors.

8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury ....

9. The state used peremptory challenges to dismiss all or most black jurors ....

Id. at 679-680 (internal citations omitted). "This catalog of factors is illustrative only and not exhaustive." Id.

2. Step Two: Offending Party's Burden of Presenting a Race-Neutral Reason for Offending Strike

"After a prima facie case is established, there is a presumption that the peremptory challenges were used to discriminate against black jurors." Batson, 476 U.S. at 97. "The state then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried, and which is nondiscriminatory." Ex parte Branch, 526 So. 2d 609, 622-23 (Ala. 1987) (citing Batson). Cf., Ex parte Bird, supra

The burden having shifted to the state to rebut the inference the prosecutors' proffered explanations for their strikes must be examined in light of a particularly strong prima facie case. It thus becomes the prosecution's burden to articulate justifications for its strikes that were clear, cogent, and pertinent to the facts of this particular case.

Id. at 682, citing Branch, 526 So.2d at 623. As previously stated, "[a] lthough the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." Rice. v. Collins, 546 U.S. 333, 337 (2006) (internal citations omitted).

It is important to note that simply presenting a non-discriminatory reason at this stage is not in itself sufficient to overcome the presumption of discrimination. Otherwise stated, "[a]t this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Purkett v. Elem., 514 U.S. 765, 768 (1995).

3. Step Three: Final Determination by Trial Court as to whether Purposeful Discrimination Occurred in Violation of Batson

Assuming that the offending party articulates a race-neutral reason for the offensive strike, the trial court must then determine whether the stated reason sufficiently overcomes the presumption of bias. In other words, is the "race-neutral" reason offered by the offending party really nothing more than a "sham or a pretext"? Mashburn v. State, 2007 WL 3226600, *5 (Ala. Crim. App. 2007). This final step involves evaluating "the persuasiveness of the justification" proffered by the offending party, all the while bearing in mind that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768; cf., Ex parte Bird, supra, 549 So.2d at 680-85. It is at this stage of the Batson challenge process that the trial court "must evaluate the evidence and explanations presented" and "determine whether the explanations are sufficient to overcome the presumption of bias." Waters v. Williams, 821 So.2d 1000, 1003 (Ala.Civ.App. 2001). Moreover, the trial judge "cannot merely accept the specific reasons given ... at face value; the judge must consider whether the facially neutral explanations are contrived to avoid admitting the acts of group discrimi-

nation." Id.

The trial court's duty at this juncture is a heavy one, as "the removal of even one juror for a racially discriminatory reason is a violation of the equal protection rights of both the excluded juror and the party challenging the peremptory strike." Id. Accord, Ex parte Bird, 594 So.2d at 683. Perhaps in recognition of this heavy burden, Alabama law recognizes the moving party's right to examine the offending party and his lawyer in order to fully develop facts necessary to determine whether the stated reason for the offending strike is truly legitimate. As observed in Thomas v. Diversified Contractors, Inc., supra:

During the hearing, the trial judge stated that although he found that Thomas had failed to establish a prima facie showing of discrimination, he would, out of an abundance of caution, require that Thompson provide reasons for his strikes of the four blacks, but the trial court would not allow Thomas to examine Thompson's attorney concerning his reasons for his strikes. In this, the trial court again erred. In Ex parte Lynn, 543 So.2d 709 (Ala.1988), cert. denied, 493 U.S. 945 (1989), this Court recognized the right of an attorney to examine an opposing attorney regarding his use of peremptory strikes, when, of course, the court has found a prima facie showing of discrimination. At that time, an attorney may examine the opposing party or that party's counsel regarding his use of peremptory strikes in order to determine if sufficient race-neutral reasons exist for the strikes. By refusing to require the plaintiff's counsel to state his reasons for his peremptory challenges, the trial judge erred.

Thomas, 578 So. 2d at 1256.

While the parameters for this fact-finding process are not set in stone, the courts have provided guidance as to the type of evidence necessary to evaluate whether a stated reason is a "sham" or pretextual. As observed in Mashburn v. State:

Other than reasons that are obviously contrived, the following are illustrative of the types of evidence that can be used to show sham or pretext:

1. The reasons given are not related to the facts of the case.

2. There was a lack of questioning to the challenged juror, or a lack of meaningful questions.

3. Disparate treatment-persons with the same or similar characteristics as the challenged juror were not struck....

4. Disparate examination of members of the venire; e.g., a question designed to provoke a certain response that is likely to disqualify the juror was asked to black jurors, but not to white jurors....

5. The prosecutor, having 6 peremptory challenges, used 2 to remove the only 2 blacks remaining on the venire....

6. '[A]n explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically. For instance, an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potentially liberal nature of the challenged juror."

Mashburn v. State, 2007 WL 3226600 at *5 -*6 (Ala. Crim. App. 2007) (internal citations omitted). Cf., Ex parte Bird, 594 So.2d at 683 ("... the failure of the State to engage in any meaningful voir dire on a subject of alleged concern is evidence that the explanation is a sham and a pretext for discrimination.").

The potential combinations of factors giving rise to a presumption of discrimination, coupled with race-neutral reasons ultimately deemed to be pretexts or shams, is virtually limitless. The Supreme Court noted as much in Ex parte Bird:

It follows, therefore, that the strength of the defendant's prima facie case depends, in large part, on the number of these factors present. Although a prima facie case is always rebuttable, the existence of a number of suspicious factors requires a more cogent explanation in rebuttal."

Ex parte Bird, 594 So.2d at 680 (emphasis in original). Thus, the trial lawyer who finds his or herself in the midst of a Batson challenge must be well-versed not only on the procedural framework under Batson, but must also possess a knowledge of whether the reasons stated by the offending party for exercising a peremptory strike violate Batson under the circumstances of his or her particular case.

The following cases are representative of factors that do, and do not, suggest a violation of Batson.

3(a). Factors Suggestive of Purposeful Discrimination

Side-by-side comparisons of jurors stricken with those not stricken.

Miller-El v. Dretke, 545 U.S. 231, 241 (U.S. 2005) ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.). See, also, Ex parte Bird, 594 So.2d at 681; Freeman v. State 651 So. 2d 576 (Ala. Crim. App. 1994).

"Gut reactions" and "bad" feelings about potential juror insufficient to overcome presumption of discriminatory intent.

Ex parte Bird, 594 So.2d at 684; Ex parte Bankhead, 625 So. 2d 1146 (Ala. 1993). Indeed, "'seat-of-the pants instincts' may often be just another term for racial prejudice." Batson, 476 U.S. at 106 (Marshall, J., concurring).

Failing to ask questions of the targeted veniremember(s) related to the "race-neutral" reason for exercising strikes may be evidence of discriminatory intent.

Ex parte Bird, 594 So.2d at 683; Ex parte Branch, 526 So.2d at 623; Jackson v. State, 557 So. 2d 855 (Ala. 1990).

Striking juror based on membership in a political organization deemed insufficient as race-neutral reason where six of eight peremptory strikes had been used to strike same-race veniremembers from venire.

Parker v. State, 568 So. 2d 335 (Ala. Crim. App. 1990).

Striking veniremembers on basis of poor communication skills not supported by record may constitute purposeful discrimination.

Millette v. O'Neal Steel, Inc., 613 So.2d 1225, 1230-31 (Ala. 1992); Moss v. City of Montgomery, 588 So. 2d 520 (Ala. Crim. App. 1991).

Strikes based on a sheer allegation that a veniremember lives in a "high crime area" are constitutionally deficient.

Ex parte Bird, 594 So.2d at 682; Williams v. State, 548 So.2d 501, 506 (Ala. Crim.App. 1988).

Strikes predicated upon unemployment are "highly suspect" for Batson violations as unemployment is an area "especially subject to abuse."

Carter v. State, 603 So.2d 1137, 1139 (Ala.Crim.App. 1992).

Striking black venire member on basis that he did not understand "concepts" presented in voir dire insufficient race-neutral reason.

Neal v. State, 612 So. 2d 1347 (Ala. Crim. App. 1992).

Striking veniremember on basis that he was "laughing and cutting up" during voir dire insufficient race-neutral reason.

Ex parte Nguyen, 751 So. 2d 1224 (Ala. 1999).

Striking veniremember because her husband was a pastor insufficient race-neutral reason.

Lucy v. State, 785 So. 2d 1174 (Ala. Crim. App. 2000).

Striking veniremember on basis of age insufficient race-neutral reason.

McElemore v. State, 798 So. 2d 693 (Ala. Crim. App. 2000).[28]

Statistical evidence indicating that higher percentage of strikes used for targeted group (e.g., blacks or women) raises "strong inference" of discriminatory intent.

Brown v. State, 686 So. 2d 385 (Ala. Crim. App. 1995).[29]

Evidence of recidivism, i.e., that a particular lawyer has violated Batson in the past can be considered as evidence of present, discriminatory intent in exercising peremptory challenges in the present case.

Ex parte Bankhead, 625 So. 2d 1146 (Ala. 1993).[30]

3(b) Factors Suggesting that Batson was not Violated

Striking black jurors because they were not married when party struck white jurors for the same reason sufficiently race-neutral reason.

Tomlin v. State, 909 So. 2d 213 (Ala. Crim. App. 2002), rev'd on other grounds, 909 So. 2d 283 (Ala. 2003).

Involvement with criminal activity is a sufficiently race-neutral reason.

Tomlin v. State, 909 So. 2d 213 (Ala. Crim. App. 2002), rev'd on other grounds, 909 So. 2d 283 (Ala. 2003).

Striking veniremember because he/she has been represented by opposing counsel sufficiently race-neutral.

Tomlin v. State, 909 So. 2d 213 (Ala. Crim. App. 2002), rev'd on other grounds, 909 So. 2d 283 (Ala. 2003).

Asking fewer questions of black jurors who were struck than of white jurors who were struck does not raise inference of discriminatory intent.

Taylor v. State, 808 So. 2d 1148 (Ala. Crim. App. 2000), affm'd, 808 So.2d 1215 (Ala. 2001).

Striking veniremember who had family members who had been on probation or parole sufficiently race-neutral.

Moss v. City of Montgomery, 588 So. 2d 520 (Ala.Crim.App.), cert. quashed, No. 1901379 (Ala. Oct. 18, 1991).

Striking veniremember who recently was given citation by police was race-neutral reason for strike in criminal prosecution.

Moss v. City of Montgomery, 588 So.2d 520 (Ala.Crim.App.), cert. quashed, No. 1901379 (Ala. Oct. 18, 1991).

Striking veniremember because she was employed as a nurse deemed sufficiently race-neutral.

Millette v. O'Neal Steel, Inc., 613 So. 2d 1225, 1229-30 (Ala. 1992).[31]

Striking veniremember who vocalizes his desire not to serve on the jury deemed sufficiently race-neutral.

Hall v. State, 820 So. 2d 113, 129 (Ala. Crim.App. 1999), affm'd 820 So.2d 152 (Ala. 2001); Lewis v. State, 659 So.2d 183 (Ala.Crim.App. 1994).

Striking veniremember on basis that venire member's employer had been sued by plaintiff's lawyer deemed sufficiently race neutral for plaintiff to strike white venire member.

Waters v. Williams, 821 So. 2d 1000, 1006 (Ala. Civ. App.), cert. denied No. 1010094 (Ala. Dec. 14, 2001).

D. Batson is Violated- What is the Remedy?

The United States Supreme Court stopped short of formulating a procedure for trial courts to follow when faced with a Batson violation.[32] As a consequence, Alabama, along with a majority of other jurisdictions, leaves the remedy for a Batson violation to the sound discretion of the trial court.[33] As the Alabama Court of Criminal Appeals observed in Tomlin v. State, numerous remedies have been developed in the exercise of this discretion, ranging from placing the improperly stricken person onto the jury, to declaring a mistrial:

While Alabama has recognized that a proper way to remedy a Batson violation is to excuse the entire venire and to start anew, we have also held that another way to cure a Batson objection is to place a juror who was improperly removed back on the venire.

. . .

Some jurisdictions require trial courts finding a Batson violation to disallow the strike or to re-seat the improperly stricken juror.

. . .

A minority of jurisdictions require the trial court to discharge the entire venire and conduct jury selection from a newly convened 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.

. . .

Alabama is one of the jurisdictions that leave the choice of the method to deal with a Batson violation to the sound discretion of the trial court. Alabama has never required that the trial court follow a certain procedure. We believe that the method used will depend on the facts presented in each case.

Tomlin v. State, 909 So. 2d 213, 249-51 (Ala. Crim. App.), rev'd on other grounds, 909 So.2d 283 (Ala. 2003).

T he practical consequences of selecting which remedy to follow are self-evident. For example, if trial courts choose to declare mistrials in face of Batson violations, the potential is created for parties to offensively use Batson in an effort to shop for juries. The same concern holds true if trial courts choose to strike entire panels and start anew. These concerns are eliminated, however, if the trial court simply places the improperly stricken person onto the jury or places the improperly stricken person back onto the existing panel.

VII. CONCLUSION

Every time a jury is struck, the lawyer carries into the courtroom the duty to protect the jury selection process from discrimination. Exacting this duty is a burden of the highest order, as it serves to protect the very sanctity of our jury system. In a very real sense, we serve as advocates for our clients, and as advocates for the civil and criminal justice system. Accordingly, it is essential that practicing trial lawyers have a working knowledge of the law pertinent to jury selection, including, especially, Batson v. Kentucky and its progeny.

[1] Ally Windsor Howell, "Trial Handbook for Alabama Lawyers, § 10:1 (2007) (citing Paula Di Perna, Juries on Trial: Faces of American Justice (1984); William Forsysthe, History of Trial by Jury 2nd Ed (1971); William Blackstone, Commentaries on the Laws of England (1765)).

[2] Alabama Const Art. I, § 11; U.S. Const. Amends. V, VI, XIV.

[3] See Wilson v. State, 8 So. 2d 422 (1942).

[4] E.g. Clark v. State, 551 So. 2d 1081 (Ala. Crim.App.), affm'd, 551 So.2d 1091 (Ala. 1989).

[5] Acts No. 594, Acts of Alabama, 1978. For a historical account of this Act, see O'Leary v. State, 417 So. 2d 219 (Ala. Crim. App. 1981).

[6] Ex parte Branch, 526 So. 2d 609, 618 (Ala. 1987), reh'g denied (Dec. 4, 1987).

[7] Chambliss v. State, 373 So. 2d 1185, 1205-06 (Ala. Crim.App.), cert. denied 373 So.2d 1211 (Ala. 1979).

[8] Guthrie v. State, 689 So. 2d 935, 938-40 (Ala. Crim.App. 1996), later proceedings, 689 So.2d 948 (Ala.Crim.App) affm'd, 689 So.2d 951 (Ala. 1997).

[9] Gavin v. State, 891 So. 2d 907, 945-46 (Ala. Crim.App. 2003), cert. denied 891 So.2d 998 (Ala. 2004).

[10] Battle v. State, 574 So. 2d 943, 947 (Ala. Crim.App. 1990), cert. denied, No. 1900474 (Ala. 1991).

[11] Dorsey v. State, 881 So. 2d 460, 485 (Ala. Crim.App. 2001), rev'd in part on other grounds, 881 So.2d 533 (Ala. 2003).

[12] See Land & Associates Inc. v. Simmons, 562 So. 2d 140, 148 (Ala. 1989); Sanders v. Scarvey, 284 Ala. 215, 224 So.2d 247 (1969).

[13] Welborn v. Snider, 431 So.2d 1198, 1201 (Ala. 1983); Thompson v. Havard, 285 Ala. 718, 235 So.2d 853 (1970).

[14] Welborn v. Snider, supra, 431 So.2d at 1201; see, also, Walker v. State, 932 So.2d 140, 156 (Ala.Crim.App. 2004).

[15] See McLain v. Routzong, 608 So. 2d 722 (Ala. 1992) ("It is an abuse of discretion

for a trial court to so limit the voir dire examination as to infringe upon a litigant's ability to determine whether a prospective juror is free from bias or prejudice and thereby to effectively exercise his strikes.").

[16]E.g., Keibler-Thompson Corp. v. Steading, 907 So. 2d 435, 440-43 (Ala. 2005) (new trial required where juror did not reside in county of trial though she received mail in that county).

[17] See General Motors Corp. v. Jernigan, 883 So.2d 646, 670-73 (Ala. 2003) (trial court erred in denying challenges for cause where five jurors were related within prohibited degree to attorney of counsel of law firm representing plaintiff). "Consanguinity" measures relationship by blood, and "affinity" measures relationship by marriage. Id.

[18]In Welborn v. Snider, supra, at 431 So. 2d at 1201, the Supreme Court held that a trial court erred in refusing to permit questioning during voir dire beyond ascertaining merely that members of the venire were policyholders with the defendant's insurance carrier. The Court held that the plaintiff was entitled to determine, by appropriate questioning, whether the policyholders could fairly and impartially decide the case without favoring the insurance company, as same was necessary in order for the plaintiff to fairly exercise his challenges for cause.

In Harper v. Meadows, 751 So. 2d 523, 526 (Ala. Civ.App.) cert. denied, No. 1982232 (Ala. Nov. 19, 1999), the Court of Civil Appeals held the trial court erred in prohibiting the plaintiff from determining in voir dire whether members of the venire or their family members had ever been employed in the insurance industry.

In Shelby County Com'n v. Bailey, 545 So.2d 743, 744-46 (Ala. 1989), the Court held that merely asking about employment in an insurance claims department does not improperly inject insurance into the voir dire.

In Cooper & Co., Inc. v. Lester, 832 So. 2d 628, 633 (Ala. 2000), the Court found no abuse of discretion where a trial court granted a for cause challenge to an insurance agent who represented the insurer of the defendant.

[19]CSX Transp., Inc. v. Dansby, 659 So.2d 35, 39 (Ala. 1995).

[20]Knopp was abrogated on other grounds. Bethea v. Springhill Memorial Hospital, 833 So. 2d 1 (Ala. 2002). In Bethea, the plaintiffs asserted a for cause challenge against a prospective juror who knew personally the defense lawyer and one of the defendant's representatives. The jury ultimately returned a defense verdict and the plaintiff appealed, arguing in part that the trial court committed reversible error by denying plaintiff's challenge. The Supreme Court affirmed, reasoning:

[T]his court has returned to the 'harmless-error' analysis articulated in the Ross v. Oklahoma, 488 U.S. 81 (1988) and Martiniz-Salazar, 528 U.S. 304 (2000) decisions. Because a defendant has no right to a perfect jury or a jury of his or her choice, but rather only to an 'impartial' jury, see Ala. Const. 1901 § 6, we find the harmless-error analysis to be the proper method of assuring the recognition of that right.

In this instance, even if the plaintiffs could demonstrate that the trial court erred in not granting their request that the prospective juror be removed from the venire for cause (an issue we do not reach), they would need to show that its ruling somehow injured them by leaving them with a less-than-impartial jury. The plaintiffs do not proffer any evidence indicating that the jury that was eventually impaneled to hear this action was biased or partial. Therefore, the plaintiffs are not entitled to a new trial on this basis.

Id., 833 So. 2d at 7. Bethea is silent about how a party is supposed to prove that an empaneled jury was impartial. Bethea also fails to address the prejudicial impact that denying a proper for cause challenge has on a party's right to use all peremptory challenges. Justice Johnstone expressed concern over these issues when he dissented in Bethea, noting:

The erroneous denial of a challenge for cause relegates the challenging party to spending a peremptory challenge to remove the biased prospective juror and thereby deprives the challenging party of the opportunity to use that peremptory challenge for its purpose intended by law; the removal of a prospective juror not subject to a challenge for cause. The effect of the holding in the main opinion is that the erroneous denial of a challenge for cause is not reversible unless it causes a biased juror to remain on the jury after the challenging party has exhausted all of his peremptory challenges, including the one necessarily spend on removing the prospective juror who should have been removed by the trial court in response to the challenge for cause. If, however, the challenging party could prove that a remaining juror is biased, the challenging party would not need the spent peremptory challenge inasmuch as proof of such bias would constitute ground for another challenge for cause. Thus the burden imposed by the main opinion on the challenging party defies the very purpose of a peremptory challenge and essentially eliminates the peremptory challenge as an enforceable right.

Id., at 11 (Johnstone, J., dissenting).

[21]Knight v. State, 675 So.2d 487 (Ala.Crim. App.), cert. denied 675 So.2d 502 (Ala. 1995).

[22]Additionally, the official notes following § 12-16-140 state that Rule 47(b) governs the selection of juries in civil trials.

[23]Swain v. Alabama, 380 U.S. 202 (1965), overruled by Batson v. Kentucky, 476 U.S. 79 (1986) (holding modified by Powers v. Ohio, 499 U.S. 400 (1991)).

[24]Samuel R. Sommer, Michael I. Norton, "Race-Based Judgment, Race-Neutral Justifications: Experimental Examination of Peremptory Use and The Batson Challenge Procedure," 31 Law & Hum. Behav. 261 (2007).

[25] Sommer, 31 Law & Hum. Behav. at p. 274.

[26]Belisle v. State, 2007 WL 625025 (Ala. Crim.App. 2007).

[27]Williams v. State, 634 So. 2d 1034 (Ala. Crim. App. 1993) cert. stricken, No. 1921043 (Ala. May 4, 1993); accord, White Consolidated Indus., Inc. v. American Liberty Ins. Co., 617 So.2d 657 (Ala. 1993).

[28]McElemore notes that age may be an appropriate factor in certain circumstances, but that as a general principle it is a "highly suspect" basis for exercising peremptory strikes:

Based on the record before us, we cannot conclude that the prosecutor's assertion that age was the reason he struck juror 251 established a race-neutral reason. "This Court has recognized that 'the age rationale is highly suspect because of its inherent susceptibility to abuse. Batson, 476 U.S. at 106, 106 S.Ct. at 1728 *699

(Marshall, J., concurring).' Ex parte Bird, 594 So.2d 676, 683 (Ala.1991). In fact, '[a] mere summary declaration that age was a factor in the decision to strike is, therefore, constitutionally deficient and warrants reversal. Owens v. State, 531 So.2d 22, 26 (Ala.Crim.App.1987).' Bird, at 683. Despite its susceptibility to misuse, however, this Court has also noted: "[W]e realize that in certain cases age may serve as a legitimate racially neutral reason for a peremptory strike.

McElemore, 798 So.2d 693 at 698 -699.

[29]In Brown, the trial court held that the prosecutor violated Batson by using 87% of his strikes against blacks. The Alabama Court of Criminal Appeals affirmed the trial court's holding, reasoning in part:

"Statistical evidence may be used to establish a prima facie case of discrimination. In both Ex parte Bird, 594 So.2d 676 (Ala.1991), and Ex parte Yelder, 630 So.2d 107 (Ala.1992), the prosecution struck substantial numbers of black veniremembers. In Bird, the venire was 36% black. The State used 17 of its 20 (85%) peremptory strikes to remove blacks, leaving a jury that was 8% black. In Yelder, the venire was 31% black. The State used 24 of its 32 (75%) strikes to remove blacks, leaving a jury that was 16% black. With reference to both cases, the Alabama Supreme Court stated: '[T]he sheer weight of statistics such as these raises a strong inference of racial discrimination requiring clear and cogent explanations by the State in rebuttal.' Ex parte Yelder, 630 So.2d at 109." Kidd v. State, 649 So.2d 1304 (Ala.Crim.App.1994). See also Ex parte Thomas, 659 So.2d 3 (Ala.1994).

Brown, 686 So.2d at 390.

Further, while the fact that that the percentage of blacks on the jury is greater than the percentage from the venire can be considered, that fact alone is insufficient to prevent a party from establishing a primae facie case of discrimination under Batson. Ex parte Thomas, 653 So. 2d 3 (Ala. 1994).

[30]See Freeman v. State, 651 So. 2d 573, 575 (Ala. Crim.App. 1992) ("[W]e cannot ignore the past conduct of the state's attorney in using peremptory challenges to strike all blacks from the jury venire."). Also of interest - in Carter v. State, 603 So. 2d 1137 (Ala. Crim.App. 1992), the Alabama Court of Criminal Appeals noted the "significant pattern" of Batson violations arising out of Mobile County ("we find significant the pattern of jury strikes against black members arising from Mobile County meriting reversal"). Likewise, in Ex parte Bird, supra, the Alabama Supreme Court commented that "... also relevant is what appears to be a pattern in the use of peremptory strikes by the Montgomery County District Attorney's Office. ... [t]his issue has reached the appellate level in a number of cases from Montgomery County." Id. 594 So.2d at 681. Cf., Harrell v. State, 571 So.2d 1270 (Ala.1990), cert. denied, 499 U.S. 984 (1991); Jackson v. State, 557 So.2d 855 (Ala.Cr.App.1990); Madison v. State, 545 So.2d 94 (Ala.Cr.App.1987).

[31]In Millette, the Alabama Supreme Court held that Batson had not been violated when a black nurse was struck, reasoning in part:

We first hold that with regard to veniremembers 258, the trial court's determination was not clearly erroneous. In Bass v. State, 585 So.2d 225, 237 (Ala.Crim. App.1991), the Court of Criminal Appeals held that the prosecutor presented a race-neutral reason where a black veniremembers was struck because "she was a nurse and indicated that she had a relative who had had a nervous breakdown" and insanity was a potential defense in the case being tried.

In this case, venire member 258 was employed by Carraway Methodist Hospital, and O'Neal's counsel had formerly been employed by the law firm that represents Carraway Methodist Hospital. O'Neal's counsel stated that he had had bad experiences with nurses on juries. Moreover, he said he was concerned that venire member 258 would be especially sympathetic toward Ted Millette because Ted Millette's voice box had been removed and he had to use a special device to talk. Accordingly, we hold that O'Neal's explanation for the challenge was a clear, specific, and legitimate reason that relates to this particular case and which is nondiscriminatory. Millette, 613 So.2d at 1230.

[32]See Batson, 476 U.S. at 99-100 ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.").

[33]Ex parte Branch, 526 So. 2d 609, 625 (Ala. 1987).

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