

## **BATSON CHECKLIST**

*Batson v. Kentucky*, 476 US 79, 106 S.Ct 1712, 90 L.Ed.2d 69 (1986)

- **EITHER PARTY MAY CHALLENGE THE OTHER’S USE OF PEREMPTORY STRIKES.**
  - There is no requirement that the objecting party belong to the same class (race/gender) as the stricken juror(s). *State v. Span*, 819 P.2d 329 (Utah 1991)
  - Batson analysis applies to defense peremptory challenges. *Georgia v. McCollum*, US 112 S.Ct 2348 (1992). The same timeliness requirement and same three-part analysis applies no matter who raises the *Batson* objection.
  
- **WHEN A *BATSON* OBJECTION IS RAISED, DO NOT REACT BY VOLUNTEERING YOUR REASONS FOR THE STRIKES!**
  - Volunteering your reasons for the strike before Step Two moots Step One and relieves the burden on the defense to establish a prima facie case.

## **TIMELINESS**

- **IS THE *BATSON* OBJECTION TIMELY RAISED?**
  - A *Batson* objection “must be raised both before the jury is sworn and before the remainder of the venire is dismissed.” *State v. Rosa-Re*, 2008 UT 53, ¶ 8 (quoting *State v. Valdez*, 2006 UT 39, ¶ 25).
  
- **IS THE *BATSON* OBJECTION TIMELY RESOLVED?**
  - “[T]rial courts *must* resolve *Batson* challenges before the jury is sworn and the remainder of the venire is excused.” *Rosa-Re*, 2008 UT 53, ¶¶ 13-15.
  - “Defense counsel also has an absolute obligation to notify the court that resolution is needed before the jury is sworn and the venire dismissed. Failure to do so, or acquiescing in the court’s inaction, will in the future constitute a waiver of the original objection.” *Rosa-Re*, 2008 UT 53, ¶ 14.

## STEP ONE: THE PRIMA FACIE SHOWING

- **HAS THE DEFENSE ALLEGED FACTS THAT SUPPORT AN INFERENCE OF DISCRIMINATORY PURPOSE?**
  - In Step 1, the defense must allege sufficient facts, which if believed, support a factual finding that the prosecutor purposely struck the juror(s) solely based on the juror's race or gender. At this stage, the defense need not prove purposeful discrimination (that occurs in Step 3), but the defense must show "that the totality of the relevant facts gives rise to an inference of discriminatory intent." *Johnson v. California*, 545 U.S. 162, 168 (2005). The defense must show a strong likelihood that the potential juror was challenged because of his group association rather than because of any specific bias. *State v. Alvarez*, 872 P.2d 450, 456 (Utah 1994); *State v. Cantu*, 778 P.2d 517 (Utah 1998).
  - Incumbent upon counsel to make a record of the group identity of the prospective jurors challenged. *Alvarez*, 872 P.2d 450
  
- **COGNIZABLE GROUPS:**
  - A cognizable group is a group that is capable of being singled out for differential treatment. *Batson*, 90 L.Ed.2d at 86
  - Race or ethnic origin. *State v. Span*, 819 P.2d 329, 342 (Utah 1991)
    - Membership in Hispanic group cannot be established by surname alone. *State v. Alvarez*, 872 P.2d at 457, note 6.
  - Gender, *J.E.B. v. Alabama*, 511 US 127 (1994).
  
- **STATISTICS ALONE ARE USUALLY INSUFFICIENT**
  - Simply stating the prosecutor struck 2 or 3 women is usually insufficient to make a prima facie showing required in Step One. *State v. Colwell*, 2000 UT 8, ¶ 18, 994 P.2d 177 (citing *State v. Alvarez*, 872 P.2d at 457). Numerical evidence alone may be sufficient to show a pattern or peremptory strikes against jurors of a cognizable group, but the opponent of the challenges must show that **all or most** of the members of the cognizable group were struck from the venire or that a **disproportionate** number of peremptory challenges were employed against the group. *Alvarez*, 872 P.2d at 457.
  - Prima facie case established:
    - *State v. Pharris*, 846 P.2d 454, 462 (Utah Ct.App.1993)  
Prosecutor used 3 or 4 peremptories to strike Native American potential jurors and didn't ask one of them any questions

- Prima facie case not established:
  - *State v. Alvarez*: a) Prosecutor struck 2 Hispanic potential jurors  
b) Defendant struck 1 Hispanic potential jurors
  - *State v. Shepherd*, 989 P.2d 503, 510 (Utah Ct.App.1999): a)  
Prosecutor struck 4 white males b) Defendant gave no evidence  
of the composition of the jury venire
  - *State v. Harrison*, 805 P.2d 769 (Utah 1991) Prosecutor struck 2  
out of 5 Hispanic panel members

□ **DO NOT VOLUNTEER YOUR REASONS FOR THE STRIKES AT ANY POINT IN STEP ONE.**

□ **IF THE DEFENSE HAS NOT MADE A PRIMA FACIE SHOWING, ASK THE COURT TO OVERRULE THE *BATSON* OBJECTION FOR LACK OF A PRIMA FACIE SHOWING.**

Step 1 is the time to stop further inquiry. Objecting to a lack of prima facie showing requires you to explain why the alleged facts, even if believed, are insufficient to support a finding of purposeful discrimination. Do this without stating your reasons for the strikes.

**RIGHT:** Defendant has not made a prima facie showing. He alleges only that two Hispanics were struck, but does not allege any facts supporting that these strikes were done for a discriminatory purpose, especially where the State did not use all its peremptory strikes against other Hispanics on the jury.

**WRONG:** Defendant has not made a prima facie showing. He knows that I struck the two Hispanics because one had a drug conviction and the other went to school with the defendant's brother.

□ **IF THE COURT RULES THAT A PRIMA FACIE SHOWING WAS NOT MADE (STEP ONE NOT SATISFIED), THE *BATSON* INQUIRY STOPS.**

□ **IF THE COURT RULES THAT THE DEFENSE MADE A PRIMA FACIE SHOWING, THE INQUIRY PROCEEDS TO STEP TWO.**

□ **IF NECESSARY, REMIND THE COURT THAT A STEP ONE RULING IS NECESSARY BEFORE PROCEEDING TO STEP TWO.**

## **STEP TWO: THE FACIALLY-NEUTRAL EXPLANATION**

### **□ IN STEP TWO, YOU MUST PROVIDE A FACIALLY-NEUTRAL EXPLANATION FOR EACH CHALLENGED STRIKE.**

If the judge finds a prima facie case of discrimination, burden is on the party who struck the potential juror to provide a group-neutral explanation for the challenge. *Cantu*, 750 P.2d at 595; *State v. Colwell*, 2000 UT 8, 994 P.2d 177 The explanation for each strike must be facially race or gender neutral. Step Two involves no assessment of credibility. Consequently, stating a facially neutral explanation satisfies Step Two, even if the explanation is ultimately rejected in Step 3. *Purkett v. Elem*, 514 U.S. 765, 768 (1995). If the prosecutor provides no reason or a discriminatory reason for the strike, the inquiry does not stop, but still must continue to Step Three, where the lack of a facially neutral explanation may be weighed in favor of a finding of discriminatory intent. *Johnson*, 545 U.S. at 171.

### **□ IN RESPONDING, ADDRESS EACH STRIKE INDIVIDUALLY.**

- The group-neutral explanation must be (*State v. Colwell*, 2000 UT 8)
  - Neutral
  - Related to the case or Juror – may be subjective (*Rice v. Collins*, 546 U.S. 333, 343 (2006))
  - Clear & reasonably specific
  - Legitimate
- A mere denial of discriminatory intent is not sufficient. *State v. Harrison*, 805 P.2d 769, 778 (Utah 1991). However, the explanation need not rise to the level justifying a challenge for cause. *Colwell*, 994 P.2d at 177

### **□ YOUR EXPLANATION SHOULD BE DETAILED AND RELATE TO THE SPECIFIC JUROR OR CASE.**

- Batson does not curtail normal peremptory strikes, but precludes only strikes that “serve as a proxy for bias.” *J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994). Articulate all reasons for the strike.
  - **RIGHT:** I struck male juror x because I wanted jurors that were single or around the same age as the victim. I felt they might be less judgmental of the victim’s decision to stay at the party after her ride left. I also struck male juror x because he is a social worker and might be sympathetic to defendants. Also, juror x smiled at the defendant and did not smile at me.
  - **WRONG:** I struck male juror x because I wanted women jurors because I think women will convict more often in rape cases.

- **INSUFFICIENT EXPLANATIONS:**
  - *State v. Cantu (II)*, 778 P.2d 517, 519 (Utah 1989) prosecutor used peremptory challenge to remove Hispanic potential juror because prosecutor knew defense attorney wanted that potential juror to sit because she was Hispanic.
  - *Harrison* - prosecutor's explanation that he simply liked Hispanic female potential juror less than other potential female jurors was no more than an unsupported denial of racial discrimination.
  - *State v. Chatwin*, 2002 UT App. 363, 58 P.3d 867. Three men struck because men are more likely than not respondents to protective orders.
  - *State v. Jensen*, 2003 UT App. 273. Struck a minority because he was a man and prosecutor wanted to balance the genders.
- **SUFFICIENT EXPLANATIONS:**
  - *State v. Macial*, 854 P.2d 543 (Utah Ct. App. 1993) prosecutor struck only African American on panel because she was unwilling to talk in front of the other potential jurors about a lawsuit in which she was involved.
  - *State v. Higinbotham*, 917 P.2d 545 (Utah 1996) prosecutor struck only minority member of panel because she gave the prosecutor a hostile expression.
  - *State v. Merrill*, 928 P.2d 401 (Utah Ct. App. 1996) prosecutor struck the only minority on the panel because the potential juror had recently unsuccessfully challenged a speeding ticket.
  - *State v. Bowman*, 945 P.2d 153 (Utah Ct. App. 1997) prosecutor struck an Asian woman because she did not appear to have command of the English language. Prosecutor also struck Hispanic woman because he was currently prosecuting a defendant with the same name
  - *State v. Colwell* - Prosecutor struck only African American on panel because she had a hearing problem
  - *State v. Cannon*, 2002 UT App 8 – prosecutor struck only minority on panel because potential juror appeared to not understand or to communicate with the other jurors

□ **MAKE SURE YOU ADDRESS ALL THE CHALLENGED STRIKES.**

□ **ASK IF THE DEFENSE CHALLENGES YOUR EXPLANATIONS OR YOUR CREDIBILITY.**

The objecting party “at all times” carries the burden of persuasion and risk of non-persuasion. *Johnson*, 545 U.S. at 171-172. Do not allow the defense to have the benefit of challenging your explanations for the first time on appeal.

## **STEP THREE: THE COURT'S DETERMINATION OF INTENT**

- **THE COURT MUST DETERMINE IF THE DEFENSE HAS CARRIED ITS BURDEN TO PROVE THE STRIKES WERE EXERCISED SOLELY FOR A DISCRIMINATORY PURPOSE.**
  - If the proponent of the peremptory strike's explanation is valid, the court must determine if the opponent of the strike has proved purposeful discrimination. *Colwell*, 994 P.2d at 182.
  - The court should consider the totality of the jury selection process, including but not limited to:
    - the voir dire questions and answers, including whether there was a failure to examine the potential juror or only a perfunctory examination, or singling the prospective juror out for special questioning designed to invoke a certain response
    - the stricken jurors' characteristics and demeanor
    - whether a challenge is based on reasons equally applicable to other potential jurors not stricken
    - failure to strike other potential jurors of the same group
    - the clarity and specificity of the prosecutor's explanations
    - the credibility of the prosecutor
    - the strength or weakness of the prima facie showing; and
    - the court's own observations or notes.
  - The court may rule differently on each strike (find a discriminatory purpose on one and not on another). The ruling is a factual finding and entitled to deference on appeal. See *State v. Rosa-Re*, 2008 UT App 472, ¶¶ 24-26, 200 P.3d 670. See also list of cases, especially *Purkett*, *Hernandez*, *Colwell*, *Higginbotham*, *Cantu*, & *Bowman*.
  
- **HELP THE COURT. IF THE COURT SIMPLY DENIES THE *BATSON* OBJECTION, EXPLAIN THAT A MORE DETAILED RULING IS NECESSARY TO PROTECT THE RECORD.**
  - A denial of a *Batson* objection should include, at minimum, a statement that the prosecutor is credible and that the defense failed to prove the strikes were exercised for a discriminatory purpose. The determination may turn upon the credibility of the proponent of the strike. *State v. Cannon*, 2002 UT App 8. But minimal rulings invite trouble on appeal if the appellate court cannot discern the basis of the court's ruling. See, e.g., *Snyder v. Louisiana*, 554 U.S. 472, 479 (2008).

**OUTCOME:**

- **IF THE COURT OVERRULES THE *BATSON* OBJECTION (FINDS NO DISCRIMINATORY PURPOSE), THE SELECTED JURY IS SWORN.**
- **IF THE COURT SUSTAINS THE OBJECTION (FINDS A DISCRIMINATORY PURPOSE), THE IMPROPERLY STRICKEN JURORS ARE REINSTATED ON THE JURY OR THE ENTIRE PANEL MAY BE DISMISSED.**

## **SIGNIFICANT BATSON CASES**

*Thaler v. Haynes*, 130 S. Ct. 1171 (2010) (limits and clarifies *Snyder*)

*Snyder v. Louisiana*, 552 U.S. 472 (2008) (held prosecutor's reasons for striking black prospective jurors were pretext for racial discrimination)

*Miller-El v. Cockrell*, 537 U.S. 322 (2003) (reaffirming that trial court's credibility determination in step 3 is factual and entitled to deference, but reversing trial court ruling as clear error based on record)

*Rice v. Collins*, 546 U.S. 333 (2006) (on habeas review, upholds state court's decision to credit prosecutor's explanations)

*Johnson v. California*, 545 U.S. 162 (2005) (held defense established prima facie case and burden should have shifted to prosecution to explain strikes)

*Purkett v. Elem*, 514 U.S. 765 (1995) (recognizing in step 2, explanation must be facially neutral, but its believability is not judged until step 3).

*J.E.B. v. Alabama*, 511 U.S. 127 (1994) (gender)

*Hernandez v. New York*, 500 U.S. 127 (1991) (good general analysis)

*Batson v. Kentucky*, 476 U.S. 79 (1986) (race)

*State v. Rosa-Re*, 2008 UT 53, 190 P.3d 1259 (reaffirming *Valdez* timeliness rule, but because rule not settled at time of trial, directs court of appeals to consider merits); *State v. Rosa-Re*, 2008 UT App 432, 200 P.3d 670 (affirming trial court's ruling that no gender discrimination established)

*State v. Valdez*, 2006 UT 39, 140 P.3d 1219 (establishing timeliness rule)

*State v. Colwell*, 2000 UT 8, 994 P.2d 177 (good general analysis)

*State v. Bowman*, 945 P.2d 153 (Utah App. 1997) (steps 2 & 3)

*State v. Higginbotham*, 917 P.2d 545 (Utah 1996) (good general analysis)

*State v. Alvarez*, 872 P.2d 450 (Utah 1994) (step 1)

*State v. Cantu*, 774 P.2d 517 (Utah 1989) (good general analysis)