

JURY SELECTION

Governing Law

Ut. R. Crim. P. 18

- (a) The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.
- (1) Strike and Replace Method
 - (2) Struck Method¹
 - (3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.
- (b) The court **may permit** counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court **may permit** counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant. . . The court **may permit** the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.
- (c) Challenges - The Panel or An Individual Juror
- (1) The panel is a list of jurors called to serve. A challenge to the panel is an objection made to **all** jurors summoned and may be taken by either party.
 - (i) A challenge to the panel can be founded **only** a material departure from the procedure with respect to the selection, drawing, summoning and return of the panel.
 - (ii) The challenge to the panel **shall be taken before** the jury is sworn and **shall be in writing or made upon the record**. It **shall** specifically set for the facts constituting the grounds of the challenge.
 - (iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.
 - (iv) The Court shall decide the challenge. If the challenge to the panel is allowed, the court **shall** discharge the jury so far as the trial in question is concerned. If the challenge is denied, the court **shall** direct the section of jurors to proceed.
 - (2) A challenge to an individual juror **may be either peremptory or for cause**. A challenge to an individual juror **may be made only** before the jury is sworn to try the action, **except** the court may, for good cause, permit it to be made after the

¹ The principal difference between the strike and replace method and the struck method is the order of individual voir dire. In the strike and replace method, questioning focuses on only enough prospective jurors to seat a jury, including alternates, assuming all parties exercise all peremptory challenges. The judge and the parties question the prospective jurors either as a group or individually. A juror removed for cause is replaced and voir dire of the replacement juror proceeds. After challenges for cause are complete, the parties exercise their peremptory challenges, and the remaining jurors try the case. In the struck method, questioning is directed towards the entire venire panel. Jurors removed for cause are not replaced. After challenges for cause are complete, the parties exercise their peremptory challenges, and the court selects from among the remaining jurors enough to try the case. Final Report to the Utah Supreme Court and Utah Judicial Council, 2000 at ¶ 81.

juror is sworn but ***before any of the evidence is presented***. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause ***shall be*** taken first by the prosecution and then by the defense.

- (d) A peremptory challenge is an objection to a juror for which no reason need be given.
- Capital cases: each side gets 10 peremptory challenges
 - Felony cases: each side gets 4 peremptory challenges.
 - Misdemeanor cases: each side gets 3 peremptory challenges.
 - ***IF*** there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.
- (e) A challenge for cause is an objection to a particular juror and ***shall*** be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.
- (1) Want of any of the qualifications prescribed by law.²
 - (2) Any mental or physical infirmity which renders one incapable of performing the duties of a juror.
 - (3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.
 - (4) The existence of any social, legal, business, fiduciary, or other relationship between the prospective juror and any party, witness, or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.
 - (5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.
 - (6) Having served on the grand jury which found the indictment.

² **78B-1-105. Jurors -- Competency to serve -- Persons not competent to serve as jurors -- Court to determine disqualification.**

- (1) A person is competent to serve as a juror if the person is:
- (a) a citizen of the United States;
 - (b) 18 years of age or older;
 - (c) a resident of the county; and
 - (d) able to read, speak, and understand the English language.
- (2) A person who has been convicted of a felony which has not been expunged is not competent to serve as a juror.
- (3) The court, on its own initiative or when requested by a prospective juror, shall determine whether the prospective juror is disqualified from jury service. The court shall base its decision on:
- (a) information provided on the juror qualification form;
 - (b) an interview with the prospective juror; or
 - (c) other competent evidence.
- (4) The clerk shall enter the court's determination in the records of the court

- (7) Having served on a trial jury which has tried another person for the particular offense charged.
 - (8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or was discharged without a verdict after the case submitted to it.
 - (9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.
 - (10) If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and juror's oath in subsection (h).
 - (11) Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling, or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.
 - (12) Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.
 - (13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.
 - (14) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.
- (f) Peremptory challenges **shall be taken first** by the prosecution and then by the defense alternately. Challenges for cause **shall be completed** before peremptory challenges are taken.
- (g) Alternate Jurors: The court may direct that alternate jurors be impaneled. **The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen.**
- (h) When the jury is selected an oath shall be administered to the jurors.

VOIR DIRE

Two purposes:

1. An opportunity to discover the biases of prospective jurors to permit the exercise of challenges to removal of those who are not wanted.
2. Prepare and educate the jury about the evidence that is likely to be presented.

Overarching principle: *State v. Saunders*, 1999 UT 59, P34 (Utah 1999)

Accordingly, effective voir dire questioning of prospective jurors must not be prevented by a procedure designed to qualify jurors as quickly as possible on the basis of superficial questions and a declaration by each juror that he or she can follow the judge's instructions and decide the case fairly. In *State v. Worthen*, 765 P.2d 839 (Utah 1988), this Court declared that although a trial judge has discretion in limiting voir dire examination, that discretion must be "liberally exercised" in favor of allowing counsel to elicit necessary information for ferreting out bias, whether for a for-cause or a peremptory challenge. *Id.* at 845. Worthen made clear that the fairness of a trial may indeed depend upon the right of counsel to ask voir dire questions

designed to discover and explore biases that would affect a juror's decision (even if such biases do not support a for-cause challenge): "All that is necessary for a voir dire question to be appropriate is that it allow 'defense counsel to exercise his peremptory challenges more intelligently.'" Id. (quoting [***29] State v. Ball, 685 P.2d 1055, 1060 (Utah 1984)). The Court in Worthen concluded:

Thus, trial counsel should be given considerable latitude in asking voir dire questions, especially in view of the fact that only counsel will, at the beginning, have a clear overview of the entire case and the type of evidence to be adduced.

Voir dire should not be restricted to a "stark little exercise" which discloses little. 765 P.2d 839 at 845 (citations omitted). The term "stark little exercise" referred to the all too prevalent practice of avoiding any real inquiry into possible bias by a trial judge's asking a prospective juror if he or she could decide the case fairly and follow the law given by the judge and then taking a prospective juror's affirmative answer as dispositive of the issue of bias. The reason that such an exercise is inadequate for ferreting out bias was explained in State v. Ball:

The most characteristic feature of prejudice is its inability to recognize itself. It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor and openness to raise their hand in court and declare themselves biased. Voir dire is intended to provide a tool for counsel and the court to carefully and skillfully determine, by inquiry, whether biases and prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it.

685 P.2d at 1058.

(A) **Oral Voir Dire**

"The Committee spent considerable time on the manner in which judges implement these rules. Judge-conducted voir dire first appeared to be a uniform practice in Utah. Upon closer inquiry, however, lawyer-conducted voir dire, while clearly the minority practice, appears to be a growing practice. Some judges permit lawyers to conduct most of the questioning, and nearly all judges let lawyers ask some questions, particularly follow-up questions that might lead to a challenge for cause. Judges are finding that, far from relinquishing control to lawyers, lawyer-conducted voir dire may require judges to be more alert during questioning. Some members of the Committee perceive advantages to attorney-conducted voir dire, but all members believe further education and experience are necessary to alleviate fears. If lawyer-conducted voir dire is permitted, it must be supervised by the judge. In addition, the judge may set time limits and disclosure requirements, curtail references to evidence and otherwise govern the questioning."

Final Report to the Utah Supreme Court and Utah Judicial Council, 2000 at ¶ 44

Problems with Oral Voir Dire:

- (1) Silent Prospective Jurors: Mize, Gregory E., *The Importance of Spotting UFO's Entering the Juryroom*, Court Excellence 13 (Summer 1999).
- (2)
- (3)
- (4)
- (5)

(B) **Voir Dire Questionnaires**

"Utah has no statutes, rules or case law authorizing or regulating written questionnaires as part of jury voir dire. Yet some judges use questionnaires on either a regular or an occasional basis." Final Report to the Utah Supreme Court and Utah Judicial Council, 2000 at ¶ 50

The Report continues:

Questionnaires are useful in some circumstances. With the rule amendments recommended by the Committee (see the analysis on privacy in the following section), questionnaires will routinely protect the confidentiality of the juror better than oral questioning, so questionnaires may elicit sensitive or embarrassing information better than oral questioning. The written responses of one juror are not shared with another, so jurors cannot mimic one another. Neither will the answers of one juror taint another. Questionnaires blend the efficiency of group voir dire with the detail of individual voir dire. Questionnaires do not replace oral voir dire, but serve as a tool to focus oral questioning. Written questionnaires do not permit a spontaneous exchange, nor do they permit the exchange of information through body language and other non-verbal communication.

Id. at ¶ 51.

Batson Challenges

Batson analysis involves three steps: first, the party opposing a peremptory strike must establish a prima facie case of discrimination (“step one”). See *Purkett v. Elem*, 514 U.S. 765, 767 (1995). Then, the proponent of the strike is required to provide a neutral explanation for the strike (“step two”). See *id.* Finally, the trial court evaluates whether the strike constituted purposeful discrimination (“step three”). See *id.* The ultimate burden of persuasion lies with the party opposing the peremptory strike. See *id.* at 768. Therefore, if the strike proponent offers a sufficiently neutral explanation at step two, then the party opposing the strike must convince the trial court at step three that the explanation is a pretext for purposeful discrimination. See *id.* As such, a party seeking to challenge discrimination in the jury selection process must be prepared to satisfy both step one and step three of the Batson analysis.

Challenges to Criminal Defense's Peremptory Strikes

The exercise of peremptories by criminal defendants is also subject to a *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *United States v. De Gross*, 960 F.2d 1433, 1442 (9th Cir. 1992) (en banc).

Basis for Batson Challenge

- (1) **Race**
- (2) **Gender:** The exercise of peremptory challenges based on gender violates the Equal Protection Clause. *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994); *DeGross*, 960 F.2d at 1437-43.
- (3) **Age, Religion, Membership - NOT a Basis:** *Batson* challenges based on age, religion, and membership in other definable classes have generally not been upheld. *Weber v. Strippit, Inc.*, 186 F.3d 907, 911 (8th Cir. 1999) (declining to extend *Batson* to peremptory challenges based on age), *cert denied*, 528 U.S. 1078 (2000); *Fisher v. Texas*, 169 F.3d 295, 305 (5th Cir. 1999) (no precedent exists dictating extension of *Batson* to religion); *United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995) (no

Batson challenge based on obesity), *cert denied*, 516 U.S. 1044 (1996); *United States v. Pichay*, 986 F.2d 1259, 1260 (9th Cir. 1993) (young adults are not a cognizable group for purposes of a *Batson* challenge); *but see United States v. Berger*, 224 F.3d 107, 119-20 (2d Cir. 2000) (not reaching whether *Batson* applies to religion, but even assuming it did, peremptory strike of juror who was a rabbi did not violate *Batson*); *United States v. Greer*, 968 F.2d 433, 437-38 (5th Cir. 1992) (en banc) (defendants were not denied the opportunity to use their peremptory challenges effectively where trial court refused to make prospective Jewish jurors identify themselves), *cert denied*, 507 U.S. 962 (1993).

Batson Procedure

1. *Three-Step Process*

A *Batson* challenge is a three-step process:

- (a) the party bringing the challenge must establish a prima facie case of impermissible discrimination;
- (b) once the moving party establishes a prima facie case, the burden shifts to the opposing party to articulate a neutral, nondiscriminatory reason for the peremptory; and
- (c) the court then determines whether the moving party has carried his/her ultimate burden of proving purposeful discrimination.

See Hernandez v. New York, 500 U.S. 352, 358-59(1991). *See also Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Stubbs v. Gomez*, 189 F.3d 1099, 1104 (9th Cir. 1999), *cert. denied*, 531 U.S. 832 (2000).

2. *Prima Facie Case*

To establish a prima facie case of discrimination, the moving party must demonstrate that:

- (a) the prospective juror is a member of a protected group;
- (b) the opposing party exercised a peremptory challenge to remove the juror; and
- (c) the facts and circumstances surrounding the exercise of the peremptory challenge raise an inference of discrimination.

Cooperwood v. Cambra, 245 F.3d 1042, 1045-46 (9th Cir.), *cert. denied*, 534 U.S. 900 (2001). If the moving party fails to establish a prima facie case, the opposing party is not required to offer an explanation for the exercise of the peremptory challenge. *Id.*

The Utah Supreme Court applied this standard for the first time in *State v. Cantu*, 750 P.2d 591, 595 (Utah 1988) (“Cantu I”). One year later, however, the court employed a different test requiring the defendant to establish a “strong likelihood” that the juror was struck because of her association with the group. See *State v. Cantu*, 778 P.2d 517, 518 (Utah 1989) (citing *People v. Wheeler*, 583 P.2d 748, 764 (Cal. 1978)) (“Cantu II”). The court returned to the inference standard without explanation in *State v. Colwell*, 2000 UT 8, ¶ 18, 994 P.2d 177, and the Supreme Court verified the standard five years later in *Johnson v. California*, 545 U.S. 162, 170-72 (2005) (explaining that the challenger was not required to prove his case at step one, but simply raise an inference that discrimination “may have infected the jury selection process”).

Evidence that Raises an Inference of Discrimination

A trial judge must ultimately consider all relevant circumstances before drawing an inference of discriminatory intent. See *State v. Valdez*, 2006 UT 39, ¶ 15 n.9, 140 P.3d 1219 (“The Supreme Court has consistently declined to specify what type of evidence the challenging party must offer to establish a prima facie case, and instead has relied on trial judges to determine whether ‘all relevant circumstances...give rise to an inference of discrimination.’” (quoting *Batson*, 476 U.S. at 96-97) (omission in original)). Even so, Utah courts have either found or indicated in dicta that certain evidence is particularly compelling. Other jurisdictions find this evidence equally convincing in civil cases.

(A) Numerical Evidence:

Numerical evidence that demonstrates a discriminatory pattern of peremptory strikes supports a prima facie case. See *State v. Alvarez*, 872 P.2d 450, 457 (Utah 1994). To raise suspicion, numerical evidence must demonstrate that the striking party either (1) excluded “most or all” minorities from jury selection or (2) used a disproportionate number of challenges on minority venire members. See *id.*

(B) Most or All

Seventy-five percent reduction of minority jurors “might raise an inference of intentional discrimination,” but a twenty-seven percent reduction (three out of eleven) did not meet the “most or all” threshold. *State v. Rosa-Re*, 2008 UT App 472, ¶ 4 n.1, 200 P.3d 670 (“*Rosa-Re II*”).

(C) Disproportionate Number:

- Seventeen percent (two out of twelve) of peremptory challenges used on minority jurors was not a disproportionate number of challenges. See *id.*
- Seventy-five percent (three out of four) of peremptory challenges used on minority jurors was disproportionate and thus supported strike opponent’s prima facie case. See *State v. Pharrus*, 846 P.2d 454, 463 (Utah Ct. App. 1993); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, Case No. 04 Civ. 10014, 2009 WL 3321047, at *2 (S.D.N.Y. Oct. 9, 2009) (same for civil case).
- Sixty-six percent reduction of minority jurors (two out of three) was sufficient to establish a prima facie claim in *Jaquith v. S. Orangetown Cent. Sch. Dist.*, 349 Fed. Appx. 653 (2d Cir. 2009), a civil case. See *id.* at 654.

While numerical data can help demonstrate discriminatory intent, it is unclear whether this evidence alone can support a prima facie case. See Pharrus, 846 P.2d at 462. Numerical data complemented by evidence of suspicious questioning by the strike opponent, however, has proved sufficient. See *id.* at 463 (finding a prima facie case where the strike opponent demonstrated both a discriminatory pattern of strikes and deficient questioning by strike proponent).

(D) Line of Questioning by Strike Proponent

Courts consider the strike proponent's questions and statements during the voir dire as important potential evidence of discrimination. See *State v. Alvarez*, 872 P.2d at 450, 458 (Utah 1994) (upholding a finding that defendant failed to make a prima facie case, in part, because he did not point to any discriminatory questions or statements made by prosecutor). Unless the discrimination is blatant, the most obvious initial evidence of improper motive is a complete lack of questioning. See *Cantu II*, 778 P.2d at 519 (holding that the strike proponent's "desultory voir dire, uninvolved demeanor, and failure to pursue a studied or deliberate course of questioning regarding specific [juror] bias" supported a showing of purposeful discrimination).

(E) Lack of Questioning

- Strike proponent neglected to question one of the three excluded minority jurors entirely, which indicated that he made his decision solely on the basis of race and supported a prima facie case. See Pharrus, 846 P.2d at 463.
- Court would have considered the argument that the prosecutor's voir dire was "suspiciously sparse" had the challenger made it to the trial court. *State v. Harrison*, 805 P.2d 769, 777 (Utah Ct. App. 1991).
- Civil defendant used first three strikes on minority jurors, but trial court found a prima facie case for only one of them because the juror "hardly spoke throughout voir dire." Arizona appellate court upheld the finding. See *Felder v. Physiotherapy Assoc.*, 158 P.3d 877, 891 (Ariz. Ct. App 2007).

(F) Questioning is Inconsistent with Stated Explanation

Civil defendant claimed he excluded a potential juror based on his medical background; because the defendant neglected to ask the juror questions related to his experience in the field or whether his occupation would affect his view the case, the court found a prima facie case of racial discrimination. See *U.S. Xpress Enter., Inc. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 813 (8th Cir. 2003).

(G) Similar Characteristics

Courts will often look to evidence of similarities between the stricken minority juror and various litigation participants to evaluate whether the strike raises an inference of discrimination. While this evidence is not conclusive, it can be supportive. See *Cantu I*, 750 P.2d at 597 (warning that strike opponents may not merely point to racial similarities between the prospective juror and the defendant, but concluding that the defendant did establish a prima facie case in light of all the facts and circumstances).

(i) *Between Excluded Juror and Party Opposing Strike:*

The law initially required an excluded juror to be the same race as the strike opponent. See *Batson*, 476 U.S. at 89; *Cantu I*, 750 P.2d at 595. In the wake of *Powers v. Ohio*, 499 U.S. 400 (1991), racial parity is no longer required, but courts still consider it as evidence tending to show discrimination. See *State v. Alvarez*, 872 P.2d 450, 458 (Utah 1994) (“[R]acial or ethnic ‘identity between the [strike opponent] and excused prospective jurors’ may make it easier to prove a prima facie case.” (citation omitted)).

(ii) *Between Excluded Juror and Victim*

Victim’s gender was relevant to establishing an inference of discrimination because “the ‘potential for cynicism is particularly acute in cases where gender-related issues are prominent.’” *Rosa-Re II*, 2008 UT App 472, ¶ 6 n.2 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994)). The holding was limited, however, to “typical” cases where the victim was female: in a case involving a male victim, the incentive to remove jurors of the same gender arguably did not exist (or there may have even been a reverse incentive for the prosecutor to retain male jurors). See *id.*

The Eighth Circuit considered plaintiff’s experience as a rape victim to be a relevant circumstance where defendant struck three female jurors and ultimately upheld a district court finding of prima facie discrimination. See *Kahle v. Leonard*, 563 F.3d 736, 740 (8th Cir. 2009).

(iii) *Between Excluded Juror and Empanelled Juror*

In *Cantu I*, the strike opponent argued that because an excluded juror had a “pro-prosecution” background and lived within a few blocks of an empanelled juror, the only plausible explanation for the strike was the juror’s race. See *Cantu I*, 750 P.2d at 597. The court posited several potential reasons for this exclusion, but ultimately concluded that the challenger had presented sufficient evidence to meet his initial burden of establishing a prima facie case. See *id.*

(H) Evidence that Counterbalances an Inference of Discrimination

Because courts are required to look at the “totality of the relevant facts” in a Batson analysis, evidence leaning toward an inference of discrimination may be counterbalanced by other factors. See *Rosa-Re II*, 2008 UT App 472, ¶ 6.

(i) Minority Status of Strike Proponent's Witnesses

Evidence that the strike proponent intended to call witnesses from the same minority group as the excluded juror weighed against an inference of discrimination. See *State v. Alvarez*, 872 P.2d 450, 458 (Utah 1994). The court reasoned that this was because minority jurors might be “prone to find credibility” in minority witnesses, giving the strike proponent a neutralizing incentive to keep them on. See *id.*

(ii) Strike Opponent's Own Use of Peremptory Strikes

The fact that both parties struck three men and one woman was relevant with regard to the strength of the strike opponent’s prima facie claim of gender discrimination. See *Rosa-Re II*, 2008 UT App 472, ¶ 6.

(iii) Minority Jurors on Final Jury

Evidence that two individuals with a minority background ultimately served on the jury detracted from the strike opponent’s argument that opposing counsel’s pattern of strikes raised an inference of discriminatory intent. See *State v. Harrison*, 805 P.2d 769, 777 (Utah Ct. App. 1991).

Presence of jurors of the pertinent minority group on the final panel goes against a prima facie case, but only when the strike proponent has had an opportunity to eliminate them. See *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1216 (10th Cir. 2002).

3. *Waiver of Step One: Prima Facie Case Assumed*

A prima facie case of discrimination is assumed if the strike proponent fails to challenge it. See *State v. Higginbotham*, 917 P.2d 545, 547 (Utah 1996). Generally, a strike proponent will waive an analysis of step one by jumping straight to step two and offering a neutral explanation for the strike. See *id.* (“Where the proponent of the peremptory challenge fails to contest the sufficiency of the prima facie case at trial and merely provides a rebuttal explanation for the challenge, the issue of whether a prima facie case was established is waived.” (emphasis added)); accord *Davey*, 301 F.3d at 1215; *Davis v. Baltimore Gas & Elec. Co.*, 160 F.3d 1023, 1027 (4th Cir. 1998); *Jacox v. Pegler*, 665 N.W.2d 607, 612-13 (Neb. 2003). Thus, it may be very easy for a plaintiff to establish a prima facie case. Nevertheless, there is still reason to introduce prima facie evidence, as courts often consider it in evaluating the allegedly neutral explanation at step three of the analysis. In fact, the strength of a prima facie case can be influential in a court’s decision as to whether the strike opponent ultimately proved purposeful discrimination. See *Rosa-Re II*, 2008 UT App 472, ¶ 6.

4. *Opposing Party's Burden*

Once a prima facie case is established, the challenged party need only offer facially nondiscriminatory reasons; the reasons need not be “persuasive or even plausible.” The persuasiveness of the challenged party’s reasons is not relevant until the third part of the inquiry when the trial court determines whether the moving party has carried its burden of proving purposeful discrimination. *Purkett*, 514 U.S. at 767-68 (1995); *United States v. Bauer*, 84 F.3d 1549, 1554 (9th Cir. 1996), *cert. denied*, 519 U.S. 1131 (1997).

5. *The Court's Duty*

The trial court has the duty to determine whether the party objecting to the peremptory challenge has established purposeful discrimination. This finding turns largely on the court’s evaluation of the credibility of the justification offered for the peremptory challenge. A court must undertake “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Batson*, 476 U.S. at 94. *See also Collins v. Rice*, 365 F.3d 667, 678 (9th Cir. 2004).

Once a plaintiff establishes a prima facie case and the defendant offers a facially neutral explanation for the strike, the goal at step three is to convince the trial court that this explanation is a pretext for purposeful discrimination. This evaluation largely depends on the credibility of the strike proponent’s explanation and is only overturned if it is clearly erroneous. *See Higginbotham*, 917 P.2d at 548. But, “[t]o promote comprehensive analysis, trial courts must allow [strike opponents] an opportunity to attack the justifications offered by the [strike proponent] for striking prospective jurors.” *State v. Cannon*, 2002 UT App 18, ¶ 11, 41 P.3d 1153. It is important for plaintiffs to take advantage of this opportunity, not only because they have the ultimate burden of persuasion as the opponent of the strike, but also to develop the record for appeal. *See State v. Valdez*, 2006 UT 39, ¶ 15 n.10, 140 P.3d 1219; *see also Johnson v. Gibson*, 169 F.3d 1239, 1248 (10th Cir. 1999) (refusing to address pretext argument made on appeal because trial court had no independent duty to “pore over the record...searching for evidence of pretext, absent any pretext argument or evidence presented by counsel”); *Davis*, 160 F.3d at 1027 (“[Plaintiff’s] failure to respond to [defendant’s] explanation for its strikes could have been reasonably construed by the trial judge as Plaintiff’s agreement that the expressed reasons were racially neutral.”).

Utah courts have developed a list of circumstantial factors that cast doubt on the legitimacy of a strike proponent’s explanation which include:

(1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning

designed to evoke a certain response, (4) [strike proponent's] reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.

Cantu II, 778 P.2d at 518-19 (internal quotation marks omitted); See also Cannon, 2002 UT App 18, ¶ 9. Arguments made at step three with regard to the strike proponent's questioning and similar characteristics between excluded and empanelled jurors will often overlap with the arguments made to establish a prima facie case. The difference is that, at this stage, the plaintiff can examine this evidence in light of the defendant's explanations.

6. *Timeliness of Batson Challenges*

Under clearly established Utah law, "Batson challenges must be raised both before the jury is sworn and before the remainder of the venire is dismissed in order to be deemed timely." Id. P 26. This bright line rule is necessary so that "the trial court is able to fashion a remedy in the event a Batson violation has occurred." Id. P 44. Furthermore, requiring that a Batson objection be resolved before the jury is sworn and the venire is dismissed "efficiently allows the trial court to determine the issues the Batson test is designed to resolve." Id. P 43. Accordingly, we reiterate that a Batson objection will only be deemed timely if it is raised by counsel before the jury is sworn and before the venire is dismissed. Rosa-Re argues that his Batson challenge was timely because during the sidebar conference, which occurred prior to the swearing of the jury and the dismissal of the venire, he referenced Batson in the context of jury selection and noted that male jurors had been stricken. Rosa-Re insists that this language, while minimal, was enough to put the trial court on notice that a Batson objection was being raised, and that the trial court's failure to act in an expedient manner should not affect the timeliness of his challenge.

State v. Rosa-Re, 2008 UT 53, P8 (Utah 2008)

7. *Specific Findings*

"Neither *Batson* nor its progeny requires that the trial judge make specific findings, beyond ruling on the objection." *United States v. Gillam*, 167 F.3d 1273, 1278 (9th Cir.), *cert. denied*, 528 U.S. 900 (1999).