***BATSON***

1. Someone says the word *Batson* during jury selection and everyone seems to sort of freeze
2. Most of us understand that *Batson* is an allegation of racial bias in jury selection
3. But how do you go through the analysis?
4. And what do you do if you find a violation?
5. Today’s episode will hopefully answer those questions and serve as a refresher for those of us who try jury trials across Georgia.
6. Remember that we post written outlines of our notes on our website, GoodJudgePod.com

***Batson, McCollum* and *Edmonson* GENERALLY**

1. *Batson v. Kentucky[[1]](#endnote-1)* was the seminal case that almost everyone references when they allege racial bias in jury selection
	1. If the prosecutor raises the issue, it is referred to as a *McCollum* motion[[2]](#endnote-2) but occasionally you will hear someone refer to a motion by the prosecutor as a “reverse *Batson*” motion
	2. If the issue arises in a civil trial, it is referred to as a *Edmonson* motion[[3]](#endnote-3)
2. While these cases usually are focused on racial bias, both the US Supreme Court and the Ga Supreme Court have recognized that parties are also prohibited from exercising gender bias during jury selection.[[4]](#endnote-4)
3. “Although the United States Supreme Court has extended its holding in *Batson* to instances where peremptory strikes are exercised solely on the basis of gender, *Batson* has not been extended to strikes based on ***national origin***.”[[5]](#endnote-5)
4. Just for sake of clarity, one of these motions are objections to the peremptory challenges the other party made to potential jurors and it suggests that the other party’s challenges were based upon racial/gender bias.
5. During this episode, we will refer to race as the issue being objected to but understand that the same rules apply to alleged gender bias[[6]](#endnote-6)

**TIMING OF OBJECTION**

1. In a jury trial, motion must be made before jury is sworn[[7]](#endnote-7)
2. But in a civil trial, the jury is not sworn (discuss differences between Wade and Tain)
3. The cases say that “logic dictates that such a challenge should be raised at a time when opportunity exists to correct any possible violation”[[8]](#endnote-8)
4. **PRACTICE POINT:** I usually delay swearing jury until after lunch or some other logical break point just in case there is a problem with witnesses, etc. because jeopardy attaches when jury is sworn. But some recent cases say that any time before jury is sworn, a *Batson* motion can be made. Hmmm…

**PERFECTING THE RECORD**

1. The burden is on the party making the objection to “complete the record” including information revealing the racial composition of the panel, the racial breakdown of the strikes exercised by both parties and the racial composition of the resulting jury.
2. “Colloquies between court and counsel and argument of counsel, though included in the record, are not competent evidence of the facts observed therein, and do not suffice to make a proper record of facts required to establish a prima facie case of discrimination.”[[9]](#endnote-9)
	1. In a recent order on a motion for new trial, I wrote: “The Court is unclear what other manner would be utilized to create a factual record of the racial makeup of the venire panel and the race of those jurors who were stricken by the parties.”
		1. [I would really like to receive any input from other judges or lawyers what other way the record could be perfected on these issues]

**HOW A CHALLENGE IS MADE**

1. Regardless of whether it is a civil or criminal case and regardless of which party is making the objection, following process must be followed:
2. A ***three-step*** process must be used. The opponent of a peremptory challenge must:
	1. first make a prima facie showing of racial discrimination;[[10]](#endnote-10)
	2. the burden of production then shifts to the proponent of the strike to give a race-neutral reason for the strike (considering the totality of the circumstances); and
	3. the trial court then decides whether the opponent of the strike has proven discriminatory intent.[[11]](#endnote-11)
3. The appellate courts routinely refer to the “first step” or “second step” in their decisions so it is important that we follow this formula in deciding the issues
4. The ultimate burden of persuasion regarding racial or gender motivation rests with, and never shifts from, the opponent of the strike.[[12]](#endnote-12)

**STEP 1 OF THE ANALYSIS**

**(MAKING A PRIMA FACIE CASE)**

1. Most lawyers simply rely upon the numbers in attempting to satisfy this first step of the analysis
	1. i.e. the venire panel had 50% African Americans and the resulting petit jury only has 25% African American members
2. The cases seem to say that numbers alone may not always establish a prima facie case of discrimination, but that is usually all you have and is usually sufficient
3. “The first step is not particularly onerous; it requires only evidence sufficient for the trial judge to draw an inference of discrimination.”[[13]](#endnote-13)
4. **PRACTICE POINT:** We know that if the objecting party cannot make a prima facie case of discrimination, the analysis ends and the motion is denied. But most of us are reluctant to “take the chance” of being wrong and find a prima facie case has been made whenever the numbers are not nearly exact between the minority members of the venire and the petit juries. Discuss…

**STEP 2 OF THE ANALYSIS**

**(STATING THE REASONS FOR THE STRIKES)**

1. First, make a finding that a prima facie case has been established. If not, do not proceed and deny the motion. (see **PRACTICE POINT** above)
2. It is important that the judge not rush this process and somehow confuse step two and rush to step three.
	1. Where the trial court rejects the alleged race-neutral reason for the strike articulated by the proponent of the strike (without moving to step 3), the trial court commits reversible error.[[14]](#endnote-14)
3. Have the party who struck the potential jurors provide their alleged race-neutral reasons for their strikes
	* 1. I do not require them to explain any of their strikes of non-minority jurors
4. “A race-neutral explanation need not be persuasive, plausible or even make sense; it must simply be based on something other than the juror's race. Unless a discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race-neutral.”[[15]](#endnote-15)
5. There is no longer a requirement that the reasons for the strikes be “case-related.”[[16]](#endnote-16)
6. The trial court must not intervene or suggest potential race-neutral reasons for a strike during step two because the trial court will ultimately be called upon to determine whether the party’s intent was race-neutral in step three.
	1. “Observing the proponent of the strike as he struggles to put his thoughts into words provides the court with information that may prove important in evaluating the credibility of the reasons in step three.”[[17]](#endnote-17)

**STEP 3 OF THE ANALYSIS**

**(WAS PROFFERED RACE-NEUTRAL REASON VALID?)**

1. It is not until the third step of *Batson* analysis that the persuasiveness of the race-neutral justification given by the party who struck the juror becomes relevant.
2. “Totality of the circumstances” analysis is applicable
	1. So you can consider whether any similarly-situated jurors of another race/gender were not struck
3. Very Important—unless discriminatory intent is inherent in the explanation given, do not rule on whether you are persuaded by the proffered reason for the strike until step 3
4. You are to determine if the proffered race-neutral reasons were pretextual or valid.
5. “Thus although a trial judge must accept a facially race-neutral explanation for purposes of determining whether the proponent has satisfied his burden of production at stage two, this does not mean that the judge is bound to believe such explanation at stage three.”[[18]](#endnote-18)
6. “At [the third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.”[[19]](#endnote-19)
7. After the proponent of the strike offers race-neutral explanations for the strikes, the burden then shifts back to the opponent of the strike to prove that the proffered explanations are pretexts for discrimination.[[20]](#endnote-20)
	1. It is in the third step that the trial court is expected to make credibility determinations of the proponent to determine if the stated reasons were actually race-neutral or were so unbelievable that they were pretextual and, therefore, also must have been based on an illegal intention.
	2. “In determining whether a strike is pretextual, the trial court, which can directly evaluate an attorney’s credibility and whether discriminatory intent is present, ‘should focus on the genuineness of the explanation, rather than its reasonableness.’”[[21]](#endnote-21)
8. The reason for the strike can be “superstitious, silly or implausible,” but the “striking party’s burden is satisfied as long as the articulated reason is race or gender-neutral.”[[22]](#endnote-22)

**EXAMPLES OF ACCEPTED AND REJECTED RACE-NEUTRAL REASONS FOR STRIKES**

1. Where a potential juror seemed disinterested in the process or the case, that disinterest is a race-neutral explanation for a preemptory strike.[[23]](#endnote-23)
2. A juror’s prior criminal history has been found to be race-neutral.[[24]](#endnote-24)
3. Juror having previously served on a jury that returned a not guilty verdict is race-neutral[[25]](#endnote-25)
4. Lack of employment by a juror has been held to be race-neutral.[[26]](#endnote-26)
5. The arrest history of a juror and/or the juror’s family members has also been found to be race-neutral.[[27]](#endnote-27)
6. Body language, facial expressions and other non-verbal displays of demeanor have been found to be race-neutral reasons for the exercise of peremptory challenges.[[28]](#endnote-28)
7. If a juror appears to be mentally challenged, their strike was deemed race-neutral[[29]](#endnote-29)
8. Where the proponent stated that a juror “had gold teeth,” that characteristic “is specific to a racial group or a stereotypical belief that is imputed to a particular race.”[[30]](#endnote-30)
	1. Where the stated reason for the strike is obviously based in such a racial stereotype, that reason is simply not race-neutral and the proponent has therefore failed to carry its burden as to that particular juror in step two.[[31]](#endnote-31)
9. Where the proponent proffers some reasons that are race-neutral and some that are clearly not race-neutral or are so stereotypically race-based, the proffered reason must be rejected because any race-based reason for a strike is improper.[[32]](#endnote-32)
	1. “In short, under current Georgia law, an alternative race-neutral basis does not cure the facially race-based reason given by the [proponent].”[[33]](#endnote-33)
10. Where the proponent indicates that he cannot recall the actual reason for the strike and then incorrectly states that the juror “worked in the science field” but it was determined that the juror actually worked in pest control, the trial court can find pretext and reseat the juror.[[34]](#endnote-34)

**REMEDY UPON FINDING THAT A VIOLATION HAS OCCURRED**

1. There is no single remedy if a violation is found to have occurred.
	1. It has been found appropriate to reinstate the improperly struck juror, and the previously chosen 12th juror can be made into an alternate juror (reseating the improperly struck juror and making the last one on the panel an additional alternate).[[35]](#endnote-35)
	2. It has also found to be proper is to reinstate improperly struck jurors, and then permit selection to resume starting with the first reinstated juror.[[36]](#endnote-36)
	3. The court may restrike the entire jury from the same panel that has been subjected to voir dire and disallow any peremptory strikes against the jurors that were previously improperly struck.[[37]](#endnote-37)
	4. *Batson* itself allows for the obvious remedy of discharging the entire venire panel and selection of a new jury from a new venire panel not previously associated with the case.

**CONCLUSION**

1. Follow the 3 step analysis
2. A ***three-step*** process must be used. The opponent of a peremptory challenge must:
	1. first make a prima facie showing of racial discrimination;[[38]](#endnote-38)
	2. the burden of production then shifts to the proponent of the strike to give a race-neutral reason for the strike (considering the totality of the circumstances); and
	3. the trial court then decides whether the opponent of the strike has proven discriminatory intent.[[39]](#endnote-39)
3. Take your time and allow the process to play out (i.e. do not rule that a proffered race-neutral reason is valid or invalid until you hear all of the proffered reasons
4. In Step 3, consider the totality of the circumstances such as whether other jurors similarly situated were allowed to serve.
5. Make your findings clearly and show that you know and are following the 3 step process.
	1. Credibility of the lawyers, their demeanor, etc. are all valid considerations
6. If there is a violation, decide how to best remedy the situation
	1. Not a bad idea to ask the parties how they suggest you remedy the violation
7. Thanks for listening and remember that we post outlines of these podcasts on our website, goodjudgepod.com
8. We would really appreciate it if you would rate and review the podcast and tell us how we are doing. We realize we will never be a “most followed” podcast but it does help us know how to improve and how to better serve you.

**ENDNOTES**

1. *Batson v. Kentucky*, 476 U.S. 79 (1986). [↑](#endnote-ref-1)
2. *Georgia v. McCollum*, 505 U.S. 42 (1992). [↑](#endnote-ref-2)
3. *Edmonson v. Leesville Concrete*, 500 U.S. 614 (1991); *Strozier v. Clark*, 206 Ga App 85 (1992). [↑](#endnote-ref-3)
4. *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *McGlohon v. State*, 228 Ga. App. 726 (1997); *Henderson v. State*, 320 Ga. App. 553 (2013). [↑](#endnote-ref-4)
5. *Nelson v. State*, 289 Ga. App. 326, 333 (2008). [↑](#endnote-ref-5)
6. “The same standards used for determining claims of race discrimination in jury selection are used for gender discrimination claims.” *McGlohon v. State*, 228 Ga. App. 726 (1997). [↑](#endnote-ref-6)
7. *Littlejohn v. State*, 320 Ga. App. 197, 200 (2013). [↑](#endnote-ref-7)
8. *Sharp v. Fagan*, 215 Ga. App. 44, 45 (1994). [↑](#endnote-ref-8)
9. *Shaw v. State*, 201 Ga. App. 438, 439 (1991). [↑](#endnote-ref-9)
10. If all preemptory challenges used to strike a particular race, a prima facie case has likely been made. *Rose v. State*, 287 Ga. 238, 240 (2010); *Tillman v. State*, 240 Ga. App. 78-79 (1999). [↑](#endnote-ref-10)
11. *Edwards v. State*, 301 Ga. 822, 824-825 (2017) [↑](#endnote-ref-11)
12. *Griffeth v. State*, 224 Ga. App. 462, 463 (1997). [I]n the situation in which a racially-neutral reason for the strike is given, the trial court must ultimately decide the credibility of such explanation. Thus although a trial judge must accept a facially race-neutral explanation for purposes of determining whether the proponent has satisfied his burden of production at stage two, this does not mean that the judge is bound to believe such explanation at stage three. *Stokes v. State*, 281 Ga. 825, 829 (2007); *McKenzie v. State*, 227 Ga. App. 778, 779 (1997); *Brown v. State*, 307 Ga. App. 797 (2011). [↑](#endnote-ref-12)
13. *Ananaba v. State*, 325 Ga. App. 829, 830 (2014), citing *Stacey v. State*, 292 Ga. 838, 841 (2013). [↑](#endnote-ref-13)
14. *Burkett v. State*, 230 Ga. App. 676, 677 (1998). [↑](#endnote-ref-14)
15. *Culver v. State*, 314 Ga. App. 492, 493 (2012), citing *Bass v. State*, 271 Ga. App. 228, 231 (2006). [↑](#endnote-ref-15)
16. *Toomer v. State*, 230 Ga. 49, 53-54 (2012), citing *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008) and *Arrington v. State*, 286 Ga. 335, 340 (2009). [↑](#endnote-ref-16)
17. *Toomer v. State*, 292 Ga. 49, 57 (2012), citing *Walton v. State*, 267 Ga. 713 (1997). [↑](#endnote-ref-17)
18. *Stokes v. State*, 281 Ga. 825, 829 (2007); *McKenzie v. State*, 227 Ga. App. 778, 779 (1997); *Brown v. State*, 307 Ga. App. 797 (2011). [↑](#endnote-ref-18)
19. *Toomer v. State*, 292 Ga. 49, 55 (2012). [↑](#endnote-ref-19)
20. *Culver v. State*, 314 Ga. App. 492, 493-494 (2012). [↑](#endnote-ref-20)
21. *Dunn v.* State, 304 Ga. 647, 652 (2018), citing *Rose v. State*, 287 Ga. 238, 241 (2010). [↑](#endnote-ref-21)
22. *Rose v. State*, 287 Ga. 238, 241 (2010). [↑](#endnote-ref-22)
23. *Toomer v. State*, 292 Ga. 49, 53-54 (2012), citing *Rakestrau v. State*, 278 Ga. 872, 875 (2005). [↑](#endnote-ref-23)
24. *Clayton v. State*, 341 Ga. App. 193, 197 (2017), citing *Jackson v. State*, 288 Ga. App. 339, 344 (2007). [↑](#endnote-ref-24)
25. *Crawford v. State*, 220 Ga. App. 786, 787 (1996). [↑](#endnote-ref-25)
26. *Littlejohn v. State*, 320 Ga. App. 197, 201 (2013). [↑](#endnote-ref-26)
27. *Alexander v. State*, 273 Ga. 311, 32 (2001); *Chunn v. State*, 210 Ga. App. 209, 210 (1993); *Dixon v. State*, 214 Ga. App. 374, 377 (1994). [↑](#endnote-ref-27)
28. *Arrington v. State*, 286 Ga. 335, 340 (2009). [↑](#endnote-ref-28)
29. *Stevens v. State*, 245 Ga. App. 237, 239-240 (2000). [↑](#endnote-ref-29)
30. *Clayton v. State*, 341 Ga. App. 193, 197-198 (2017). It should be noted that the Court in *Clayton* acknowledged that the issue was not race-neutral but noted that characteristics such as tattoos, hair color or other, similar issues might be race-neutral. [↑](#endnote-ref-30)
31. *Clayton v. State*, 341 Ga. App. 193, 197-198 (2017). [↑](#endnote-ref-31)
32. *Clayton v. State*, 341 Ga. App. 193, 197-198 (2017), citing *Lingo v. State*, 261 Ga. 664 (1993). [↑](#endnote-ref-32)
33. *Clayton v. State*, 341 Ga. App. 193, 200 (2017). [↑](#endnote-ref-33)
34. *Culver v. State*, 314 Ga. App. 492, 494 (2012). [↑](#endnote-ref-34)
35. *Stokes v. State*, 281 Ga. 825, 829 (2007); *Holmes v. State*, 273 Ga. 644, 645-646 (2001); *Brown v. State*, 307 Ga. App. 797 (2011). [↑](#endnote-ref-35)
36. *Eppinger v. State*, 231 Ga. App. 614, 616 (1998). [↑](#endnote-ref-36)
37. *Ellerbee v. State*, 215 Ga. App. 312, 315-318 (1994), overruled on other grounds *Felix v. State*, 271 Ga. 534 (1999). [↑](#endnote-ref-37)
38. If all preemptory challenges used to strike a particular race, a prima facie case has likely been made. *Rose v. State*, 287 Ga. 238, 240 (2010); *Tillman v. State*, 240 Ga. App. 78-79 (1999). [↑](#endnote-ref-38)
39. *Edwards v. State*, 301 Ga. 822, 824-825 (2017) [↑](#endnote-ref-39)