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Edmonson v. Leesville Concrete Co.: Will the Peremptory Challenge Survive Its Battle with the Equal Protection Clause, 25 J. Marshall L. Rev. 37 (1991)

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RECENT DEVELOPMENTS

EDMONSON v. LEESVILLE CONCRETE CO.:* WILL THE PEREMPTORY CHALLENGE SURVIVE ITS BATTLE WITH THE EQUAL PROTECTION CLAUSE?

STEVEN M. PUISZIS**

The true rule, in determining to embrace, or reject any thing is not whether it [has] any evil in it; but whether it [has] more of evil, than of good. There are few things wholly evil, or wholly good. Almost every thing, especially of governmental policy, is an inseparable compound of the two; so that our best judgment of the preponderance between them is continually demanded. . . . . Why not apply it then upon this question?
Abraham Lincoln
From a speech in the U. S. House of Representatives on Internal Improvements [June 20, 1848].

Experienced trial counsel have at one time or another exercised a peremptory challenge to excuse a prospective juror for reasons they could not precisely put their finger on. Was it the manner in which the juror "slouched" in the jury box or the juror's refusal to make eye contact? Perhaps it was the loud sports coat that did not fit the juror's three hundred pound frame. Was it the juror's unemployment during the past year? Could it have been that the juror was Irish, Italian, Jewish, a Democrat, a Republican, a schoolteacher, an accountant, or an ex-Marine, and was therefore either too liberal or too conservative to fit the ideal juror profile? Perhaps it was that admonition he received from a so-called "behavioral scientist" to never put a housewife on a jury in a "products" case because they too frequently experience appliances that break down at home.

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* 111 S. Ct. 2077 (1991)

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Until the United States Supreme Court's recent decision in *Edmonson v. Leesville Concrete Co.*,[1] civil trial counsel by and large have not had to justify their exercise of peremptory challenges.[2] In *Edmonson*, the Supreme Court held that a private civil litigant may not use peremptory challenges to exclude prospective jurors on account of their race or ancestry. The Court remanded the case to the district court for a determination as to whether the plaintiff had established a prima facie case of discrimination under the guidelines set forth in *Batson v. Kentucky*.[3]

In light of *Edmonson*, civil trial counsel will now have to be prepared to explain why a particular juror was excused from service on a jury or run the risk of court-imposed sanctions against the client,[4] a reversal of a favorable verdict,[5] or a claim that the

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1. 111 S. Ct. 2077 (1991).

2. Prior to the Supreme Court's decision in *Edmonson*, several courts of appeal had divided on the issue of whether *Batson* applied to a civil proceeding. The Seventh and Eleventh Circuits held that a private litigant may not use a peremptory challenge to exclude jurors on account of race. *See* Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281, 1284 (7th Cir. 1990); Fludd v. Dykes, 863 F.2d 822, 828 (11th Cir. 1989). In Dias v. Sky Chefs, Inc., 919 F.2d 1370, 1377-80 (9th Cir. 1990), *vacated*, 111 S. Ct. 2791 (1991) (remanded in light of *Edmonson*), *opinion on remand*, No. 89-35778, 1991 U.S. App. LEXIS 25, 116 (9th Cir. Oct. 29, 1991). In it original opinion, the Ninth Circuit held that a corporation may not raise a *Batson* challenge in a civil lawsuit. On remand, the Ninth Circuit avoided the issue by holding the corporate defendant's objections were not timely made. 1991 U.S. LEXIS 25116 at *3-8. The Eighth Circuit, in Reynolds v. City of Little Rock, 893 F.2d 1004 (8th Cir. 1990), held that when the government is involved in civil litigation, it may not use its peremptory challenges in a racially discriminatory manner. *See also* Chavous v. Brown, 396 S.E.2d 98 (S.C. 1990) (private attorney's use of peremptory challenges did not involve "state action" and therefore *Batson* was inapplicable), *vacated*, 111 S. Ct. 2791 (1991) (remanded in light of *Edmonson*), *aff'd*, 1991 WL 155762 (S.C. Aug. 12, 1991) (applying *Edmonson*); McDaniel v. Mutchnick, No. WD 4149, WL 165952 (Mo. Ct. App. Oct. 30, 1990) (*cause trans. to Mo. S. Ct.)* (Fourteenth Amendment does not prohibit racially discriminatory peremptory strikes in civil litigation because no state action involved).

3. 476 U.S. 79 (1986). In *Batson*, the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibited a prosecutor from exercising peremptory challenges solely on account of a juror's race or on the assumption that black jurors, as a group, would be unable to impartially consider the state's case against a black defendant. *Id.* at 84. The *Batson* Court enunciated a three-part test for establishing a prima facie case of purposeful discrimination in the selection of a jury. To prevail on a "Batson" challenge a party must demonstrate that: 1) he is a member of a cognizable racial group; 2) members of his race have been excluded from jury service through the exercise of peremptory strikes; and 3) these facts and other relevant circumstances raise an inference that the prosecutor used the peremptory challenge to excuse the venireperson on account of race. *Id.* at 94-96.

4. *See* Clark v. City of Bridgeport, 645 F. Supp. 890, 898 (D. Conn. 1986) where the court, after finding a *Batson* violation, dismissed three separately selected juries and imposed court costs and attorneys' fees against the defendant. *See also* Maloney v. Plunkett, 854 F.2d 152, 155-56 (7th Cir. 1988) (trial court's sanction, which included the discharge of a jury already selected and an order precluding the use of peremptory challenges in connection with the parties' next attempted jury selection, was vacated on writ of mandamus, due to the

attorney exercising the challenge violated a Rule of Professional Conduct.[6]

This article analyzes the rationale underlying the *Edmonson* decision and discusses the historical progression and expansion of Equal Protection challenges to the use of peremptory strikes. It will then acquaint civil trial attorneys with the issues that may arise in a *Batson* hearing, should opposing counsel make the argument that counsel's exercise of peremptory challenges was racially or ethnically motivated, or should counsel wish to challenge his opponent's use of peremptory strikes.

BACKGROUND OF THE *EDMONSON* DECISION

In *Edmonson*, the plaintiff was a construction worker who was injured in a job site accident.[7] He sued Leesville Concrete Co. in the United States District Court for the Western District of Louisiana. Edmonson claimed that a Leesville employee caused a company truck to roll backward and pin him against construction equipment.[8]

During voir dire, Leesville used two of its three peremptory challenges, authorized by statute,[9] to remove blacks from the jury. Edmonson, who was black, requested that the defendant articulate "race-neutral" explanations for the removal of the two jurors. The District Court denied the request, holding that the principles of *Batson v. Kentucky* did not apply to civil proceedings. The jury, which was comprised of one black and eleven white jurors, returned a verdict in favor of the plaintiff and assessed his total damages at $90,000. The jury also determined that Edmonson's comparative negligence was 80% and reduced his award to $18,000.[10]

In an opinion driven by the concern that racial discrimination in the courtroom would raise serious doubts as to the integrity of

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concern that the *Batson* issue might not be preserved if the parties were foreclosed from using peremptory challenges in their next attempt at selecting a jury).

5. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2089 (1991).

6. Rule 8.4(d) of the ABA's Model Rules of Professional Conduct provides that a lawyer shall not engage in conduct prejudicial to the administration of justice. The majority of jurisdictions include this principle within their codes of professional responsibility. *See, e.g.*, Rule 8.4(a)(5) of the Illinois Rules of Professional Conduct. ILL. REV. STAT. ch. 110A, Rule 8.4(a)(5)(1990). A violation of *Batson*, if sustained, could warrant a finding that the attorney violated this rule of professional conduct. *See* AMERICAN BAR ASS'N/THE BUREAU OF NAT'L AFFAIRS, *Lawyers Manual on Professional Conduct* (1991).

7. *Edmonson*, 111 S. Ct. at 2080.

8. *Id.*

9. 28 U.S.C. § 1870 (1990) entitles each party to three peremptory challenges in a civil lawsuit.

10. *Edmonson*, 111 S. Ct. at 2081.

our system of justice, the *Edmonson* Court stretched to find the necessary "state action" to bring a private civil litigant's use of peremptory challenges within the penumbra of the Equal Protection component of the Fifth Amendment's Due Process clause.[11]

The *Edmonson* Court ostensibly relied on the state-action test outlined in *Lugar v. Edmonson Oil Co.*[12] Under *Lugar*, a private actor must rely on "a right or privilege having its source in state authority" and must be deemed a governmental actor when exercising that right or privilege, before state-action will be found.[13] Since the peremptory challenges in question were authorized by statute, and in view of the fact that there is no constitutional right to the use of peremptory challenges,[14] the *Edmonson* Court had little difficulty in concluding that their use constituted a "right or privilege" derived from state authority. This conclusion satisfied the first element of the *Lugar* state-action test.

However, the Court noted that the private use of state-sanctioned procedures does not automatically trigger a finding of state-action.[15] Prior decisions had recognized state-action only when private parties "make extensive use of state procedures with the

11. *Id.* at 2080. The Fifth Amendment does not contain an Equal Protection Clause as does the Fourteenth Amendment, which applies only to the states. In Bolling v. Sharpe, 347 U.S. 497 (1954), a companion case to Brown v. Board of Education, 347 U.S. 483 (1954), the *Bolling* Court found that concepts of "Equal Protection" and "Due Process," which both stem from notions of "fairness," are not mutually exclusive. *Id.* at 499. The *Bolling* Court found that since the Equal Protection Clause of the Fourteenth Amendment prohibits states from maintaining racially segregated schools, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.* at 500. The Court then held that racial discrimination in the public schools of the District of Columbia violated the Due Process Clause of the Fifth Amendment. *Id.*

The fact, that the *Edmonson* decision is based on the Fifth and not the Fourteenth Amendment is of little importance to state court practitioners. A long line of decisions have held that the Supreme Court's approach to Equal Protection claims is the same under either amendment. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (the gender-based distinction in the federal Social Security Act violates the Equal Protection right secured by the Due Process Clause of the Fifth Amendment); Johnson v. Robison, 415 U.S. 361 (1974) (Veterans' Readjustment Benefits Act of 1966 violates the Fifth Amendment's guarantee of Equal Protection of the laws); Shapiro v. Thompson, 394 U.S. 618 (1969) (state statutory welfare provisions held to violate the Equal Protection Clause of the Fourteenth Amendment, while identical federal statutes violate the Due Process Clause of the Fifth Amendment); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).

12. 457 U.S. 922 (1982).

13. *Id.* at 937.

14. *Edmonson*, 111 S. Ct. at 2083 (citing Ross v. Oklahoma, 487 U.S. 81, 88 (1988) and Stilson v. United States, 250 U.S. 583, 586 (1919)).

15. *Edmonson*, 111 S. Ct. at 2083-84 (citing Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 485 (1988).

'overt, significant assistance of state officials.' "[16] In an attempt to satisfy the second prong of the *Lugar* test, the *Edmonson* Court pointed to the substantial role that the trial judge plays in conducting the voir dire.[17] The Court observed that the trial judge rules upon challenges for cause, thereby determining which jurors remain eligible for removal via a peremptory challenge.[18] The *Edmonson* Court also noted that the party who exercises a peremptory challenge "invokes the formal authority of the court, which must discharge the prospective juror."[19] Thus, the Court concluded that a private party's exercise of peremptory challenges could not be accomplished without the overt and significant assistance of the trial judge.[20] The Court then attempted to buttress its analysis by noting that a jury is a "quintessential governmental body, having no attributes of a private actor"[21] and, therefore, private litigants who select and shape a jury through the use of peremptory challenges achieve state-actor status.[22]

The *Edmonson* Court, having found the requisite state-action, then applied the rationale of its decision in *Powers v. Ohio*.[23] The Court in *Powers* held that the race-based exclusion of potential jurors violated the excluded juror's Equal Protection rights, and allowed the defendant to raise the Equal Protection claim on behalf of the excluded juror.[24] The *Powers* decision recognized that jurors wrongfully excluded from service on account of their race would have little incentive to vindicate their rights, given the substantial economic burden involved in litigation.[25] The *Powers* Court con-

16. *Edmonson*, 111 S. Ct. at 2084 (quoting *Tulsa*, 485 U.S. at 486, and citing Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)).

17. *Edmonson*, 111 S. Ct. at 2084. *See also* Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981) (noting that federal trial courts have been accorded broad discretion in the conduct and regulation of voir dire).

18. *Edmonson*, 111 S. Ct. at 2084.

19. *Id.* at 2085.

20. *Id.*

21. *Id.*

22. *Id.* at 2086. The *Edmonson* Court analogized the jury selection process to several of its earlier decisions wherein state governments had conferred, to a private organization, the power to choose governmental officials. When that occurs, the private organization is bound to choose those officials in a racially neutral fashion. *Id.* (citing National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192-93 (1988); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); and Terry v. Adams, 345 U.S. 461, 481 (1953)).

23. 111 S. Ct. 1364 (1991).

24. *Id.* at 1373.

25. *Id.* The *Powers* Court noted several other barriers which might prevent an excluded juror from bringing suit: that potential jurors are not parties to the litigation and have no opportunity to be heard during the voir dire; that an excluded juror cannot easily obtain declaratory or injunctive relief and that it would be difficult for the excluded juror to show the chances for reoccurrence. *Id.* In Carter v. Jury Comm'r of Greene County, 396 U.S. 320, 329 (1970), the

cluded, therefore, that persons wrongfully excluded from jury service would be unable to protect their own rights, and granted the defendant standing to raise the excluded juror's Equal Protection claim.[26]

THE CONTINUED EROSION OF PEREMPTORY CHALLENGES

Edmonson is the third in a trilogy of decisions announced last term which expanded the scope of *Batson*'s Equal Protection challenge to the use of peremptory strikes.[27] The *Edmonson* decision,

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Court granted jurors who were excluded from service, due to racial discrimination, the right to bring suit on their own behalf. The *Powers* Court observed that the number of such suits are rare. *Powers*, 111 S. Ct. at 1372.

26. *Powers*, 111 S. Ct. at 1373.

27. As this article was going to publication, the Supreme Court accepted certiorari in Georgia v. McCollum, No. 91-372, 1991 U.S. LEXIS 6467 (Nov. 4, 1991). In *McCollum*, the Court will address whether *Batson* applies to a criminal defendant's use of peremptory challenges, as has been suggested by many, following its decision in *Edmonson*. It is anticipated that the Court, in *McCollum*, will be asked to address whether a criminal defendant's right to a fair and impartial trial under the Sixth Amendment and a defendant's right to due process under the Fourteenth Amendment outweighs the Equal Protection rights of a prospective juror whose liberty or property is not at risk and who is not on trial.

While there is no constitutional right to a peremptory challenge (see cases cited in *supra* note 14 and accompanying text), criminal defendants have been granted its use since at least the 14th century in England, and the peremptory challenge has been a part of our common and statutory law since that time. *See infra* note 34. In Pointer v. United States, 151 U.S. 396, 408 (1894) the Court described the peremptory challenge as "one of the most important of the rights secured to the accused" and condemned any system that would prevent an accused from the full and unrestricted exercise of those challenges.

Although a criminal defendant's right to a peremptory challenge is not explicit in the text of the Sixth or Fourteenth Amendment, it can be argued that an accused's right to the unfettered use of peremptory challenges is implicit and fundamental to the American tradition of trial by jury, much in the same way the Supreme Court found the Sixth Amendment's fair cross-section requirements applicable to civil proceedings in Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946). *See infra* note 38; *Swain*, 380 U.S. at 219 (1965) (peremptory challenges are a necessary part of a trial by jury).

In *McCollum*, two concepts central to our American system of justice will be at loggerheads; a defendant's right to a fair and impartial trial versus a citizen's right to be free from discrimination based on the color of his skin or ethnic heritage. Since the purpose of the peremptory challenge is to eliminate partiality on both sides, as the Court observed in *Swain*, 380 U.S. at 219-20, the *McCollum* Court may be requested to carve out a limited exception to *Batson* for criminal defendants tried under conditions such as in *McCollum*.

In *McCollum*, the crime involved racial overtones, and there was significant pre-trial publicity concerning a boycott by members of the victim's race against the defendant's store where the crime took place. Prospective jurors were exposed to this pre-trial publicity which could have had an impact on thier deliberations in a racially charged setting. Georgia v. McCollum, 405 S.E 2d 688 (Ga. 1991).

It can be argued that strict adherence to *Batson*'s principles in this type of setting actually lessens the protections enjoyed by blacks or ethnic minorities in the courtroom. The *Swain* Court noted that it is the availability of peremptory

which extended Batson's holding to civil cases, was preceded by *Powers v. Ohio*.[28] In *Powers*, the Court allowed a white defendant in a criminal case to challenge the discriminatory use of peremptory strikes against black jurors.[29] The *Powers* decision narrowed *Batson*'s three-pronged test by eliminating the requirement that a party raising a *Batson* challenge show that members of his race have been improperly excluded from jury service.[30] In a plurality opinion announced shortly before *Edmonson*, the Court in *Hernandez v. New York*[31] appears to have extended *Batson*'s coverage to the exclusion of "Latino" jurors by reason of their ethnic heritage.[32] The Court's decision in *Edmonson* continues *Batson*'s[33] erosion of the historical role which the peremptory challenge has

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challenges which allows defense counsel to ascertain the possibility of juror bias through voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility that might result from probing questions by counsel. *Swain*, 380 U.S. at 219-20. What about a black defendant on trial before an all-white jury in Mississippi? Presumably, those jurors during voir dire stated they could be fair and impartial. However, a number of lower courts have recognized that a party has a right to disbelieve a juror's answers on voir dire in deciding whether to exercise a peremptory challenge. *See infra* note 141 and accompanying text. A strict application of *Batson* in this situation could result in the selection of a jury about which a black defendant would not feel comfortable. All trial counsel have experienced situations where jurors who fit their ideal "profile" stated they could not be fair and impartial, simply to remove themselves from the jury. The converse may be true as well.

Batson and its progeny are concerned with the elimination of "overt" discrimination in the courtroom that arises from the use of racially motivated peremptory challenges. However, a rigid application of *Batson*'s principles to criminal defendants in certain settings can potentially result in a "covert" form of racial bias directed against the accused on trial. The question that the Court must address is whether the juror or the accused on trial in this type of setting would suffer the greater harm from that potential discrimination. Jurors improperly excluded from service due to racial discrimination have been afforded the right to bring suit on their own behalf. Carter v. Jury Comm'r of Green County, 395 U.S. 320, 329 (1970); *see also supra* note 25 and accompanying text. Therefore, the "potential" impact of that discrimination on a juror cannot compare to the "potential" harm that an accused could suffer at the hands of a racially skewed jury.

If the Court recognizes that in certain situations, such as in *McCollum*, a defendant's right to a fair and impartial trial could be jeopardized by not allowing the accused the right to an unfettered use of peremptory challenges due to the nature of the crime involved and the surrounding conditions under which the trial takes place, it faces a difficult task in carving out a limited exception that will not swallow *Batson* while still adhering to the principle that racial discrimination has no place in the courtroom.

28. 111 S. Ct. 1364 (1991).

29. *Id.*

30. For a discussion of the *Batson* three-pronged test, see *supra* note 3.

31. 111 S. Ct. 1859 (1991). For a fuller discussion of *Hernandez* and its impact on *Batson*, see *infra* notes 55-61 and accompanying text.

32. The *Hernandez* Court stated:

> Petitioner . . . asks us to review the New York State Court's rejection of his claim that the prosecutor in his criminal trial exercised peremptory challenges to exclude Latinos from the jury by reason of their *ethnicity*. If true, prosecutor's discriminatory use of peremptory strikes would violate

played in the Anglo-American system of jurisprudence.[34] The Supreme Court has sent a clear signal that the Equal Protection clause prohibits the use of peremptory challenges based on a juror's race, ancestry,[35] or ethnic heritage.

Despite this expansion in the scope of *Batson*'s protections, the Supreme Court continues to recognize the important role which the peremptory challenge serves in the trial process. Several lower

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the Equal Protection Clause as interpreted by our decision in *Batson v. Kentucky*.

Hernandez, 111 S. Ct. at 1864 (citation omitted) (emphasis added).

Hernandez was a plurality opinion of the Court. Four Justices (Kennedy, Rehnquist, White and Souter) found that an explanation given for the exclusion of two "Latino" jurors was "racially neutral." *Id.* at 1868. In a concurring opinion, Justices O'Connor and Scalia concluded that since the finding of the trial court was not "clearly erroneous," the Court's inquiry should end, and that the plurality opinion went further than necessary in assessing the constitutionality of the prosecutor's asserted reasons for the exercise of his peremptory challenges. *Id.* at 1873-75 (O'Connor, J., concurring).

Had the *Hernandez* Court not intended to extend the protection of *Batson* to classifications based on ancestry or ethnic heritage, there would have been no need for Justices O'Connor and Scalia's concurring opinion. Implicit in the *Hernandez* opinion is the understanding that *Batson*'s protections prohibit the exclusion of jurors based upon their ancestry or ethnic heritage.

33. *Batson* itself represented a dramatic reversal from prior Court decisions. In Swain v. Alabama, 380 U.S. 202, 222 (1964), the Court found that the Constitution did not require an examination of a prosecutor's reasons for the exercise of peremptory challenges in a given case. The Court held that there was a presumption that a prosecutor's use of peremptory challenges was intended to obtain a fair and impartial trial. The presumption was not overcome even by a showing that all blacks were removed from a jury because of their race. *Id.* It was only when the defendant could demonstrate that blacks had been systematically removed from juries repeatedly in the past that the presumption might be overcome. *Id.* at 223-24. In Lewis v. United States, 146 U.S. 370, 376 (1890), the Court noted that peremptory challenges are exercised without the need to state a reason for their use; that they are beyond the court's inquiry and not subject to a court's control. Their use is often based upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." *Id.*

34. The peremptory challenge appears to have its origins in The Ordinance for Inquests, 33 Edw. 1 Stat. (1305) and "became the settled law of England, . . . until after the separation of the colonies," and remains the law of England today. *Swain*, 380 U.S. at 213 n.12 (citation omitted). In the United States, Congress passed the Act of 1790, Ch. 9, § 32, 1 Stat. 119, which entitled a defendant to thirty-five peremptory challenges in trials for treason and twenty in trials for other felonies punishable by death. *Id.* at 214. In 1865, Congress passed 13 Stat. 500, which granted the government five peremptory challenges and the defendant twenty challenges for cases involving capital offenses and treason. *Id.* at 214. For a thorough history of the peremptory challenge, see Jere W. Morehead, *Prohibiting Race-Based Peremptory Challenges: Should the Principle of Equal Protection be Extended to Private Litigants?*, 65 TUL. L. REV. 835-37 (1991).

35. In *Edmonson*, the Court stated that, "if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on *ancestry* or skin color." Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991) (emphasis added).

courts have suggested that *Edmonson* will ultimately lead to the abolition of the peremptory strike.[36] However, the Court had the opportunity to eviscerate the use of peremptory challenges in *Holland v. Illinois*,[37] and chose not to do so.

In *Holland*, the Court rejected the argument that the "fair cross section requirement" of the Sixth Amendment[38] should apply to the use of peremptory challenges or "require petit juries, as opposed to jury panels or venires to reflect the composition of the community at large."[39] The significance of the *Holland* opinion lies in the fact that a "fair cross section" challenge does not require evidence of a discriminatory intent. All a petitioner must demonstrate to establish a prima facie violation is a mere statistical under-representation of a "cognizable group" in a jury pool.[40] Thus, the *Hol-*

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36. *See, e.g.*, McDaniel v. Mutchnick, No. WD 41498, 1990 WL 165952 (Mo. Ct. App. Oct. 30, 1990) (en banc).

37. 493 U.S. 474 (1990).

38. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. CONST. amend. VI.

The "fair cross section requirement" was found implicit in how an "impartial jury" is assembled. Taylor v. Louisiana, 419 U.S. 522, 527 (1975). It was intended to prevent a state from "stacking the deck" in its favor by the manner it draws up jury lists or compiles a pool of prospective jurors. *Holland*, 493 U.S. at 807.

To establish a prima facie violation of the fair cross-section requirement of the Sixth Amendment, a petitioner must show: (1) that the group allegedly excluded from jury service is a "cognizable" or "distinctive" group in the community; (2) that the level of representation of that group in the venires from which juries are selected is not fair or reasonable in relation to the number of such persons in the community; and (3) that the under-representation in petitioner's venire is due to the systematic exclusion of the group from the jury-selection process. *Holland*, 493 U.S. at 478-79.

The application of the Sixth Amendment and its fair cross-section requirement to civil jury trials is not explicit in the text of the amendment, but is widely accepted, based on the Supreme Court's statement in Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946), that "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." However, the decisions cited as authority by the Court in *Thiel* only involved criminal matters. At least one court has observed that in *Thiel*, the Court rested its decision on its administrative powers over the federal court system, and did not specifically reach the constitutional issue with regard to both civil and criminal trials. *See, e.g.*, Malvo v. J.C. Penney Co., 512 P.2d 575 (Alaska 1973). While the authority supporting *Thiel*'s holding appears murky, the concept that civil jury pools should be drawn from a fair cross-section of the community is well-rooted in our common law and is based on notions of fairness. Therefore, its application in civil cases has firm support in the Constitution and Bill of Rights, although its precise constitutional foundation may not be completely clear.

39. *Holland*, 493 U.S. at 478 (citing Lockhart v. McCree, 476 U.S. 162 (1986)).

40. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

land opinion demonstrates that the Supreme Court still requires evidence of intentional discrimination to establish a prima facie *Batson* violation.[41]

Furthermore, various courts have extended the protection of the Sixth Amendment to a number of "cognizable groups" not recognized by *Batson*.[42] The application of the Sixth Amendment in *Holland* could have opened the floodgates to *Batson* challenges whenever "blue collar workers, Yuppies, Rotarians, Eagle Scouts [or] an endless variety of other classifications"[43] were struck and likely would have sounded the "death knell" for the peremptory challenge.

The application of *Batson*'s principles to ethnic minorities was forecasted by several earlier decisions, one of which found that "Italian-Americans" constituted a "cognizable racial group" for purposes of a *Batson* challenge.[44] Yet another decision found that *Batson* condemned the striking of "Spanish-surnamed" jurors on the basis of presumed group characteristics.[45] As several of these lower court decisions observed, the Supreme Court in 1987 had twice equated the term "race" with "identifiable classes of persons" who were subjected to intentional discrimination "solely because of their ancestry or ethnic characteristics" in connection with claims

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41. *See, e.g.*, Hernandez v. New York, 111 S. Ct. 1859, 1865-66, 1873 (1991) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. . . . [A] defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination.") (O'Connor, J., Scalia, J., concurring).

42. *See, e.g.*, Duren v. Missouri, 439 U.S. 357 (1979) (women); Ballard v. United States, 329 U.S. 187 (1946); Barksdale v. Blackburn, 610 F.2d 253 (5th Cir. 1980) (wage earners), *cert. denied*, 454 U.S. 1056 (1981); United States v. Brady, 579 F.2d 1121 (9th Cir. 1978) (Indians), *cert. denied*, 439 U.S. 1074 (1979); Julian v. State, 215 S.E.2d 496 (Ga. Ct. App. 1975) (age, where average age of jurors was 69); Paciona v. Marshall, 359 N.Y.S. 2d 360 (1974) (students), *aff'd*, 319 N.E.2d 199 (N.Y. 1974); People v. Marr, 324 N.Y.S. 2d 608 (1971) (young adults between the ages of 21 and 29).

43. Barber v. Ponte, 772 F.2d 982, 999 (1st Cir. 1985) (en banc), *cert. denied*, 454 U.S. 1056 (1986). The *Barber* Court warned against the recognition of "young adults" as a cognizable group for purposes of a Sixth Amendment fair cross-section challenge. *Id.* at 1000.

44. United States v. Biaggi, 673 F. Supp. 96, 101 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (1988), *cert. denied*, 489 U.S. 1052 (1989). *Contra* United States v. Sgro, 816 F.2d 30 (1st Cir. 1987). *See also* Chew v. State, 527 A.2d 332, 347 (Md. 1987), *vacated*, 562 A.2d 1270 (1989):

> What will be the limits of the logic of *Batson*?. . . will the rule of *Batson* be available to white defendants and to defendants who would be classified as members of the Mongoloid race? Will American Indians be treated as members of the Mongoloid race? Will Hispanics be treated as a distinct racial group? Will European Spaniards qualify as Hispanics, even without an Indian component to their racial makeup?

45. Fields v. People, 732 P.2d 1145, 1155 (Colo. 1987).

brought under the Civil Rights Act of 1866.[46]

In *St. Francis College v. Al-Khazraji*, an Arab-American professor brought a claim under the Civil Rights Act for an alleged denial of tenure based upon his "race." St. Francis College had contended that the respondent was a member of the Caucasian race and therefore could not allege the type of discrimination which section 1981 of the Civil Rights Act forbade.[47] The Court, however, rejected the college's position and held that section 1981 was intended to protect Arab-Americans.[48]

Similarly, in *Shaare Tefila Congregation v. Cobb*,[49] the Court allowed a Jewish congregation and several of its individual members to maintain a claim under section 1982 of the Civil Rights Act[50] against a defendant who had spray painted the walls of a synagogue with anti-semitic symbols. The *Shaare Tefila Congregation* Court noted that although Jews are now considered Caucasian and not members of a separate race, that does not mean they cannot constitute a "cognizable group" or be protected from intentional discrimination.[51]

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46. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987).

47. In *St. Francis College*, the Court observed that modern scientific concepts of "race" differ from how that term was understood in the 19th Century when the Civil Rights Act was passed. *See St. Francis College*, 481 U.S. at 610-12. Those who might be classified as Caucasian today were not thought to be of the same "race" at the time Congress enacted § 1981. *Id.* The Court pointed to several 19th Century dictionary definitions of race.

> "The 1863 version of the New American Cyclopedia divided Arabs into a number of subsidiary races, represented the Hebrews as of the Semitic race and identified numerous other groups as constituting races including Swedes, Norwegians, Germans, Greeks, Fins, Italians, Spanish, Mongolians, Russians, and the like. The Ninth edition of the Encyclopedia Britannica also referred to Arabs, Jews, and other ethnic groups such as Germans, Hungarians, and Greeks as separate races."

Id. at 611-12 (citations omitted). The Court also noted that anthropology currently views there to be three major human races, Caucasoid, Mongoloid and Negroid and that due to the variability in human beings, some scientists believe racial classifications have greater socio-political importance than biological significance. *Id.* at 611 n.4.

48. In *St. Francis College*, the Court held that the respondent could make out a claim under 42 U.S.C. § 1981, if he could prove he was subjected to discrimination because he was born an "Arab." In his concurring opinion, Justice Brennan observed that the line between discrimination based on ancestry or ethnic characteristics, and discrimination based on place of birth or nation of origin is not a bright one, and that in the Title VII context, the terms overlap as a legal matter.

49. 481 U.S. 615 (1987).

50. 42 U.S.C. § 1982 forbids racially discriminatory interference with property rights.

51. The *Powers* and *Hernandez* decisions, which extended *Batson*'s protections to peremptory challenges based on "ancestry" and "ethnic heritage," appear to equate *Batson*'s coverage to groups similarly protected from discrimination under the Civil Rights Acts. As the Court in *St. Francis College* observed, "Congress intended to protect from discrimination classes of persons

The extension of *Batson's* protections to "white" and "ethnic minority" jurors can be readily justified. It would be logically inconsistent for the court to limit *Batson's* protections solely to "black" defendants and refuse this protection to other races or ethnic groups. It also provides some measure of protection against changing biological, anthropological, and socio-political concepts of race.[52] For trial counsel, however, this will only serve to complicate the jury selection process, since lower courts appear quite ready to identify new ethnic groups[53] that potentially fall within the coverage of *Batson* and its progeny.[54]

The extension of *Batson* to "ethnic minorities" will not, however, obviate the need to undertake the unseemly task of identifying and categorizing the proper ethnic group that a given juror fits within. Furthermore, the Court's recent decision in *Hernandez v. New York* may prove to be a source of confusion for lower courts having to address this issue.

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who are subjected to intentional discrimination solely because of their *ancestry* or ethnic characteristics." St. Francis College v. Al Khazraji, 481 U.S. 604, (1987) (emphasis added). For a discussion of the *Powers* and *Hernandez* decisions, see *supra* notes 21-35 and accompanying text.

52. *See supra* note 47.

53. *See* Castaneda v. Partida, 430 U.S. 482, 495 (1977) (Mexican-Americans are a cognizable group, and "Spanish surnames are just as easily identifiable as race"); United States v. Chalan, 812 F.2d 1302, 1313-14 (10th Cir. 1987) (American Indians are a cognizable group under *Batson*); United States v. Bedonie, 913 F.2d. 782 (10th Cir. 1990) (Members of Navajo tribe are a cognizable group under *Batson*), *cert. denied*, 111 S. Ct. 2895 (1991); Commonwealth v. Gagnon, 449 N.E.2d 686, 691-92 (Mass. App. Ct. 1983) (French-Canadians have been recognized as a distinctive group, and their deliberate exclusion on the basis of group characteristics violates Article 12 of the Massachusetts Declaration of Rights), *rev'd on other grounds sub. nom.*, Commonwealth v. Bourgeois, 465 N.E.2d 1180 (Mass. 1984) (court reversed because the prosecutor was never given an opportunity to explain the use of his peremptory challenges); Commonwealth v. Garabedian, 503 N.E.2d 1290, 1292 (Mass. 1987) (Armenians also are a discrete group under Article 12 of state Declaration of Rights, but defendant failed to establish prima facie case of discrimination).

54. Trial counsel and the courts should be aware that a number of the "cognizable groups" have been identified in connection with Sixth Amendment fair cross section challenges. Although in Holland v. Illinois, 493 U.S. 474 (1990) the Supreme Court rejected the application of the Sixth Amendment's fair cross section requirements to the use of peremptory challenges, (*see supra* notes 28-32 and accompanying text), at least one lower court has noted that while there is an important difference between the meaning of "cognizability" for the two tests, the criteria used to identify "cognizable groups" under the Sixth Amendment might be helpful in determining whether a given ethnic minority group should be considered "cognizable" for purposes of a *Batson* challenge. *See* United States v. Biaggi, 673 F. Supp. 96 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989). A cognizable group under *Batson* must be: "(1) definable and limited by some clearly identifiable factor; (2) share a common set of ideas, attitudes or experiences; and (3) share a community of interests, such that the groups interests cannot be adequately represented if the group is excluded from the jury selection process." *Id.* at 100 (quoting United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987)).

In *Hernandez*, the plurality opinion of the Court observed that the parties used the terms "Latino" and "Hispanic" interchangeably at the trial and appellate levels. In its apparent zeal to extend *Batson's* coverage to ethnic minorities, the *Hernandez* plurality adopted the parties' characterization of the excused jurors as "Latinos." However, the Court failed to address an issue raised by several lower courts: whether immigrants from a number of different countries should be classified as "Hispanic" or "Latino" when they do not necessarily share the same "cultural backgrounds," "community of interests" or "ethnic characteristics." As one court has observed:

> If the proposed class were 'Cuban-Americans,' or 'Spanish-Americans,' or 'Puerto Rican-Americans,' the mental image of the 'cognizable class' would be easy to discern. Mexican-Americans, for example, were held to be a cognizable class in *United States v. Test.* But to lump persons from so many countries (even continents) together as a distinct class requires the exercise of considerable philosophical imagination. I do not believe the persons of Nicaraguan or Salvadoran heritage and persons of Cuban heritage could comfortably equate their cultural backgrounds and attitudes to one another. *See United States v. Rodriguez.* Persons of Puerto Rican heritage could not comfortably equate their backgrounds and attitudes to those persons of Mexican heritage.[55]

By accepting the parties' categorization of those jurors excluded from service as "Latino" or "Hispanic," the Court's decision in *Hernandez* appears to be at odds with its holdings in *St. Francis College* and *Shaare Tefila Congregation.* In *St. Francis College*, the Court indicated that individuals of Irish, Italian, German, or Greek heritage, for example, could individually constitute identifiable groups that should not be subjected to intentional discrimination based on their ancestry or ethnic characteristics. The Court in *St. Francis College* rejected the use of current anthropological-racial classifications which would have lumped those ethnic groups within the "Caucasoid" race.[56] If this reasoning had been applied in *Hernandez*, the Court should not have "categorized" as "Hispanic" or "Latino," jurors whose ancestors may have been born in Spain with those who may have been born in Mexico, Puerto Rico, Cuba, or any of the other Central American nations, unless the record demonstrated that the excluded jurors shared the same "ethnic characteristics" or "community of interests."

The mere fact that these diverse groups of American citizens may share a second common language, as mentioned by the *Hernandez* Court, does not justify a distinction in the protections afforded under the Equal Protection Clause. If a "shared common

55. United States v. Duran de Amesquita, 582 F. Supp 1326, 1328 (S.D. Fla. 1984).

56. For a discussion of anthropological-racial classifications, see *supra* note 47.

language" is to serve as a benchmark for lower courts to follow, then in theory "white" Americans of "French-Canadian" ancestry could be grouped with "black" Americans of "Haitian" descent. Such a result is illogical and not what the *Hernandez* Court intended.

It is clear the *Hernandez* plurality was concerned with furnishing guidance as to what factors or characteristics constitute "racially neutral" explanations for the exercise of peremptory challenges. The Court seized upon an opportunity to address an explanation that could have a disparate impact upon a given ethnic group.[57] The Court in *Hernandez* approved the use of peremptory challenges on the ground that bilingual jurors might be unwilling to accept the court's official translation of the trial proceedings, despite the fact that such an explanation could justify the exclusion of most, if not all, Spanish-speaking individuals from jury service. However, the Court may have been better served to remand the case for a determination on the question of whether the challenged jurors should have been considered on a "collective basis," in order to evaluate whether the defendant had established a prima facie case of discrimination.[58]

Further, the reference to a prospective juror's surname will not necessarily aid a court or counsel in their attempts to determine the ethnic group that a prospective juror properly belongs in. As suggested by several lower courts,[59] reliance on surnames might improperly include or exclude women who have married and adopted

57. In *Hernandez*, the prosecutor excused several bilingual jurors because their demeanor and responses during voir dire caused him to doubt their ability to defer to the official translation of the expected trial testimony. Hernandez v. New York, 111 S. Ct. 1859, 1867 (1991). This same explanation was held to constitute "group bias" and as impermissible explanation in Commonwealth v. Gagnon, 449 N.E.2d 686, 693 (Mass. App. Ct. 1984)(criticizing same explanation because jurors presumably would follow the court's instructions), *aff'd sub nom*, Commonwealth v. Bourgeois, 465 N.E.2d 1180 (Mass. 1984).

58. *See* Bartsch v. Northwest Airlines, Inc., 831 F.2d 1297, 1304 (7th Cir. 1987); Gupta v. East Texas State Univ., 654 F.2d 411, 415 (5th Cir. 1981). Trial courts should make findings of fact to provide reviewing courts with a clear understanding of the basis for a trial court's decision so as to allow "meaningful" appellate review. *See, e.g.*, Commonwealth v. Bourgesis, 465 N.E.2d 1180, 1187 (Mass. 1984). "Allegations of . . . violations based on national origin permit a trial judge to obtain information as to the national origin of members of the jury pool in order to create a record that enables the judge to rule on the claim that peremptory challenges are being abused and allows appellate review on an adequate record." *Id.* at 1187 n.12.

In the *Hernandez* plurality opinion, the Court found that since the prosecutor explained the basis for his challenges without awaiting a ruling on whether a prima facie case had been established, and since the trial court had ruled on the ultimate question of discrimination, the preliminary issue of whether the defendant had met his prima facie burden had been rendered moot. *See Hernandez*, 111 S. Ct. at 1866.

59. *See e.g.*, United States v. Biaggi, 673 F.2d 96, 100 (E.D.N.Y. 1987), *aff'd* 853 F.2d 89 (1988), *cert. denied*, 489 U.S. 1052 (1989).

the surnames of their spouses.[60] Obviously, a prospective juror's surname is not necessarily a true indication of the juror's ancestry or ethnicity.[61] Until the Supreme Court provides additional guidance on this issue, trial counsel and lower courts will be left to grope with how to properly categorize the ethnic heritage of selected and excluded jurors. Trial counsel should be cognizant of the apparent dichotomy in the holdings of the Supreme Court and be prepared to argue the position that is most favorable to their client's interests.

WILL *BATSON* BE EXTENDED TO GENDER-BASED CHALLENGES?

Justice O'Connor, writing in support of the Court's denial of the petition for certiorari in *Brown v. North Carolina*,[62] stated that *Batson* should solely be limited to the *racially* discriminatory use of peremptory challenges.[63] In Justice O'Connor's view, *Batson* and its progeny are "a statement about what this Nation stands for" and are "a product of the unique history of racial discrimination in this country; it should not be divorced from that context." A number of lower courts have adopted positions similar to Justice O'Connor's and refused to extend *Batson's* application beyond racial or ethnic discrimination.[64] Several jurisdictions have even gone so far as to hold that a party's attempt to achieve a "more gender balanced jury" is a permissible explanation for challenging minority jurors

60. People v. Ortega, 202 Cal. Rptr. 657, 662 (Cal. Ct. App. 1984).

61. *See Ortega*, 202 Cal. Rptr. at 662 (excluded prospective juror with a Spanish surname was not "Hispanic" but Indian). *See also* Commonwealth v. Gagnon, 449 N.E.2d 686, 691-92 (Mass. App. Ct. 1983) (a member of the venire who had a Gallic last name was of French-Canadian ancestry), *aff'd sub nom.*, Commonwealth v. Bourgeois, 465 N.E.2d 1180 (Mass. 1984).

62. 479 U.S. 940, 941-42 (1986).

63. *Id.* at 942.

64. United States v. Hamilton, 850 F.2d 1038, 1040-41 (4th Cir. 1988) (government's explanation that three black women were excluded, not because they were black, but because they were female, was a sufficiently race-neutral reason); State v. Adams, 533 So. 2d 1060, 1063 (La. Ct. App. 1988) (declining to extend *Batson* beyond purposeful racial discrimination); State v. Clay, 779 S.W.2d 673, 676 (Mo. Ct. App. 1989) (*Batson* would not be extended to peremptory challenges of women); State v. Culver, 444 N.W.2d 662, 666 (Neb. 1989) (refusing to extend *Batson* to peremptory challenges based on sex discrimination). *See also* Starkis v. State, 572 So. 2d 1301, 1302-03 (Ala. Crim. App. 1990) (same); Hannin v. Commonwealth, 774 S.W.2d 462, 463-65 (Ky. Ct. App. 1989); State v. Morgan, 553 So. 2d 1012, 1018 (La. Ct. App. 1989), *cert. denied*, 558 So. 2d 600 (La. 1990); State v. Pullen, 811 S.W.2d 463, 467-68 (Mo. Ct. App. 1991); State v. Oliviera, 534 A.2d 867, 867-70 (R.I. 1987). *Contra* United States v. DeGross, 913 F.2d 1417, 1424 (9th Cir. 1990) (prohibiting gender-based discrimination against male jurors through the use of peremptory challenges), *petition for rehearing granted*, 980 F.2d 695 (9th Cir. 1991) (per curiam); Di Donato v. Santini, 283 Cal. Rptr. 751 (Dist. Ct. App. 1991) (*Batson* applies to gender); People v. Irizarry, 560 N.Y.S.2d 279, 280 (N.Y. App. Div. 1990) (same).

under *Batson*.[65]

Furthermore, in *Holland v. Illinois*,[66] the Supreme Court held that the Sixth Amendment's requirement that the jury represent a fair cross section of the community does not prevent a party from exercising peremptory challenges to exclude prospective jurors of a cognizable racial group.[67] *Holland*, thus, also appears to foreclose a Sixth Amendment fair cross section challenge to the use of peremptory strikes on the basis of gender.

Despite Justice O'Connor's arguments to the contrary, if the driving force behind *Batson* and its progeny was the Court's concern that racial discrimination in the courtroom would raise questions about the integrity of our system of justice, a similar argument can be made as to other forms of discrimination as well. Discrimination against women on the basis of their sex, or against handicapped individuals by virtue of their disability, is no less pernicious than discrimination based on skin color. However, in light of the Court's holding in *Holland*, Justice O'Connor's comments in *Brown*,[68] and the current philosophical makeup of the Court, it appears questionable whether *Batson* will be extended to prohibit the use of gender-based peremptory challenges.[69]

Therefore, attorneys wishing to raise a gender-based challenge to the use of peremptory strikes should also review their state constitutions. New York, Hawaii, and New Mexico have upheld gender-based *Batson* challenges premised upon their respective state constitutions.[70]

For example, Illinois courts appear to have not yet addressed the issue of how the Equal Protection Clause found in Article I, Section 18 of the Illinois Constitution will affect a gender-based *Bat-*

65. United States v. Hamilton, 850 F.2d 1038, 1040-41 (4th Cir. 1988); People v. Hooper, 552 N.E.2d 684, 697-702 (Ill. 1989), *cert. denied*, 111 S. Ct. 284 (1990).

66. 493 U.S. 474 (1990).

67. *Id.* at 478.

68. 479 U.S. 940, 941-42 (1986).

69. Unlike racial classifications which receive a strict level of scrutiny under the Fourteenth Amendment's Equal Protection Clause, gender-based classifications receive only an intermediate level of scrutiny. A gender-based classification to be constitutionally permissible must be substantially related to the achievement of an important governmental objective. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971). In all likelihood, this reduced level of scrutiny will be one of the factors which the Court may rely upon should it decide not to extend *Batson*'s protections to gender-based peremptory challenges.

70. *See* State v. Levinson, 795 P.2d 845, 849 (Haw. 1990) (excluding jurors solely on basis of gender violates express provision of Hawaii Consititution); People v. Blunt, 561 N.Y.S.2d 90 (N.Y.A.D. 1990) (exercising peremptory challenges based solely on gender violates Equal Protection Clause of the New York Constitution), *supplemental opinion* 561 N.Y.S.2d 90 (N.Y. App. Div. 1990); State v. Gonzales, 808 P.2d 40, 47-49 (N.M. 1991) (systematic exclusion of females from jury through peremptory challenges violated Art. II §§ 14, 18 of the New Mexico Constitution).

son challenge.[71] In *People v. Ellis*,[72] the Illinois Supreme Court made the following observation about the scope of Illinois' Equal Protection Clause:

> In contrast to the Federal Constitution, which, thus far, does not contain the Equal Rights Amendment, the [Illinois] Constitution of 1970 contains [S]ection 18 of [A]rticle I, and in view of its explicit language, and the debates, we find inescapable the conclusion that it was intended to supplement and expand the guarantees of the [E]qual [P]rotection provision of the Bill of Rights and requires us to hold that a classification based on sex is a 'suspect classification' which, to be held valid, must withstand 'strict judicial scrutiny.'[73]

Should counsel wish to raise a gender-based equal protection challenge to opponent's use of a peremptory strike, he should include an argument that the exercise of that peremptory challenge violated not only the Equal Protection Clause of of the United States Constitution, but also the pertinent constitutional provision in his state constitution.[74]

THE *BATSON/EDMONSON* HEARING

The *Batson* Court held that when a party claims that a peremptory challenge was exercised on account of the "race" of a prospective juror, the trial court must hold a hearing to consider the charge of discrimination and determine whether the exercise of the challenge was racially or ethnically motivated. In *Hernandez*, the Court stated that the hearing procedure should allow for "prompt rulings on objections without substantial disruption of the jury selection process."[75] Counsel forced to defend a *Batson* challenge should re-

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71. The Equal Protection Clause of Article I, Section 18 of the Illinois Constitution provides that:

> The equal protection of the law shall not be denied or abridged on *account of sex* by the state or its units of local government and school districts.

ILL. CONST., art. I, § 18 (emphasis added).

72. 311 N.E.2d 98 (Ill. 1974).

73. *Id.* at 101.

74. Since under the Illinois Constitution gender-based classifications receive a higher level of judicial scrutiny than they receive under the Fourteenth Amendment, the likelihood of successfully raising a gender-based *Batson* challenge would seem to be greater under the Illinois Equal Protection Clause than under its federal counterpart.

75. Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991). *See also* United States v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988) (*Batson* hearing does not require trial-type procedures, such as the introduction of sworn testimony and cross examination); People v. Freeman, Nos. 1-89-2414, 1-89-2500, 1991 Ill. App. LEXIS 1734 (Ill. App. Ct. Oct. 9, 1991) (interrogatories directed to a party not permitted; however, it is within the court's discretion to order production of "training manuals" and "policies"); People v. Young, 538 N.E.2d 453, 460 (Ill. 1989) (rebuttal testimony of co-defendant and trial counsel regarding juror responses not permitted); People v. Mack, 538 N.E.2d 1107, 1116 (Ill. 1989) (trial court did not abuse its discretion when it refused to allow an expert to testify for the defense in a *Batson* hearing).

quest that the hearing be held outside the presence of the jury to avoid creating any potential resentment amongst the remaining jurors. Counsel should consider the use of a motion in limine to prevent his opponent from raising the issue in open court, before the venire, which would only serve to lessen his credibility in the eyes of the jury.

The procedure for a *Batson* hearing is similar to the type utilized in Federal Title VII employment discrimination cases.[76] The burden is initially on the party raising the challenge to demonstrate a prima facie case of discrimination. If the trial court finds that a prima facie showing of discrimination has been established, it must then determine whether the party exercising the peremptory challenges had racially neutral reasons that justified their use.

The burden of persuasion then shifts to the party who exercised the peremptory challenges to set forth "reasonable" and "specific" explanations that are "legitimate" and "racially neutral."[77] During the hearing, the trial judge must consider both the credibility of the attorney and the "race neutrality" of the explanations given.[78] While the burden of rebutting a prima facie case "is not a heavy one," a party is required to do more than merely list a series of factors of characteristics concerning a particular juror.[79] A court cannot presume or infer from the facts that an unarticulated neutral explanation exists which justifies the peremptory challenge. The court must focus its inquiry specifically on the reasons articulated at the hearing.[80] While the reasons given need not rise to the level of a challenge for cause, the mere assertion of a non-discriminatory motive or good faith will not rebut a prima facie case.[81] However, if an explanation corresponds to a valid "for-cause" chal-

76. Batson v. Kentucky 476 U.S. 79, 94 n.18, 96 n.19, 98 n.21 (1986). *See* People v. Harris, 544 N.E.2d 357, 381 (Ill. 1989) (comparing *Batson* hearing to Title VII hearing, and finding them similar), *cert. denied*, 110 S. Ct. 1323 (1990); Sloan v. State, 809 S.W.2d 224, 226-27 (Tex. Crim. App. 1991) (McCormick, J., dissenting).

77. *Batson*, 476 U.S. at 98; People v. Hope, 560 N.E.2d 849 (Ill. 1990), *vacated on other grounds and remanded*, 111 S. Ct. 2792; State v. Tomlin, 384 S.E.2d 707, 709-10 (S.C. 1989).

78. People v. Harris, 544 N.E.2d 357, 380 (Ill. 1989), *cert. denied*, 110 S. Ct. 1323 (1990). People v. Freeman, Nos. 1-89-2414, 1-89-2500, 1991 Ill. App. LEXIS 1734 (trial judge to weigh credibility of attorney offering explanations, however, "[r]equiring . . . [an] oath ought not to be the cutting edge for this task"); State v. Slappy, 522 So. 2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 214 (1988).

79. People v. Harris, 544 N.E.2d 357, 384 (Ill. 1989) (citing Uviedo v. Steve's Sash and Door Co., 738 F.2d 1425, 1430 (5th Cir. 1984)), *cert. denied*, 110 S. Ct. 1323 (1990).

80. *Id.*

81. *Batson*, 476 U.S. at 97-98.

lenge, in all likelihood it will be found racially neutral.[82] A trial judge cannot merely accept an attorney's explanations at face value, but must evaluate those explanations as the court would weigh any disputed issue of fact.[83]

If the trial court determines that the explanations given were racially neutral, the burden of proof then shifts back to the party who initially raised the issue.[84] That party must then demonstrate that the explanations were a "mere pretext" for the exclusion of the juror solely on the basis of his race, ancestry, or ethnic heritage.[85] At the conclusion of the hearing, the trial court has the duty to weigh the evidence and determine whether the defendant has established purposeful discrimination.[86]

ELEMENTS OF A PRIMA FACIE CASE OF DISCRIMINATION

In order to establish a prima facie case of discrimination as originally outlined under *Batson*, the party challenging the use of the peremptory strikes must demonstrate that:

> The party raising the challenge is a member of a racially cognizable group capable of being singled out for differential treatment;
>
> The opposing party used peremptory challenges to remove members of the defendant's race from the *venire*; and
>
> These facts and "other relevant circumstances raise an inference" of purposeful discrimination on the basis of race.[87]

Following the Court's opinion in *Powers*, a party no longer must demonstrate that a peremptory challenge was used to remove a member of his race from the jury. Thus, the *Powers* decision eliminated the second element of *Batson's* prima facie test.[88]

In determining what "other relevant circumstances" might raise an inference of purposeful discrimination, courts have looked to the following factors:

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82. Hernandez v. New York, 111 S. Ct. 1859, 1868 (1991).

In Illinois, challenges "for cause" are provided by statute. In Illinois jurors must: inhabit the court's jurisdiction; exceed 18 years of age; be free from legal exception; be of fair character, approved integrity, and sound judgment; and be able to understand the English language. ILL. REV. STAT. ch. 78, para. 2 (1991).

A juror may be validly challenged for cause if the juror lacks any one of the qualifications mentioned above, or if he is a party to a suit then pending for trial in that court or has served as a juror within the past year. *Id.* para. 14.

83. State v. Slappy, 522 So. 2d 18, 22 (Fla.), *cert. denied*, 487 U.S. 214 (1988).

84. Williams v. State, 804 S.W.2d 95, 101-02 (Tex. Crim. App.), *cert. denied*, 111 S. Ct. 2875 (1991).

85. State v. Green, 376 S.E.2d 727, 728 (N.C. 1989).

86. Batson v. Kentucky, 476 U.S. 79, 98 (1986).

87. *Id.* at 96.

88. Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991).

— A pattern of strikes against a specific race or ethnic group of jurors;[89]

— An attorney's questions and statements during the voir dire examination;[90]

— A disproportionate number of peremptory challenges used against jurors of a specific race or ethnic group;[91]

— The level of representation in the venire as compared with the level of representation in the jury itself of a given ethnic group;[92]

— Whether the jurors that were excluded were of a heterogenous group sharing "race" as their only common characteristic;[93] and

— The race or ethnic background of the defendant, the victim, the plaintiff and the witnesses.[94]

Various courts have commented on the "pattern of strikes" issue in an attempt to provide additional guidance as to the level of proof necessary to establish a prima facie case of discrimination under *Batson*. As one court observed:

> A pattern of strikes is not the same as a finished garment of adjudicated discrimination. To create a pattern, strikes should do more than occasionally involve venire members of a certain race. The strikes should affect those members to such a degree or with such a lack of apparent nonracial explanation as to suggest the possibility of racial motivation; but they need only suggest, because if the strikes and other relevant circumstances establish a prima facie case, merely the burden of production is then shifted to the State.[95]

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89. *Batson*, 476 U.S. at 97. People v. Mack, 538 N.E.2d 1107 (Ill. 1989) (thirteen of sixteen peremptory challenges were exercised against black jurors), *cert. denied*, 493 U.S. 1093 (1990).

90. *See Batson*, 476 U.S. at 97; People v. Mahaffey, 539 N.E.2d 1172, 1184 (Ill. 1989). *See also* Holley v. J&S Sweeping Co., 192 Cal. Rptr. 74, 78 (Cal. Ct. App. 1983) (prima facie case established when counsel failed to ask any questions of three black minority jurors that were peremptorily stricken). If counsel fails to ask excluded minority jurors certain questions asked of those jurors he accepted, this is evidence of an improper motive or discriminatory intent. *But see* People v. King, 241 Cal. Rptr. 189, 195 (1987) (follow-up questions not required if they might embarass a given juror or cause resentment among the other jurors).

91. People v. Wheeler, 583 P.2d 748, 764 (Cal. 1978); People v. Johnson, 557 N.E.2d 565 (Ill. App. Ct. 1990); State v. Gilmore, 511 A.2d 1150, 1164 (N.J. 1986).

92. *See Batson*, 476 U.S. at 93; People v. Holman, 547 N.E.2d 124, 143 (Ill. 1989) (quoting People v. Evans, 530 N.E.2d 1360 (Ill. 1988)); Aldridge v. State, 365 S.E.2d 111 (Ga. 1988).

93. *See Wheeler*, 583 P.2d at 764; People v. McDonald, 530 N.E.2d 1351, 1357 (Ill. 1988); State v. Gilmon, 511 A.2d 1150, 1165 (N.J. 1986) (quoting People v. Wheeler, 583 P.2d 748 (Cal. 1978)).

94. United States v. Mathews, 803 F.2d 325, 328 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988), *on remand*, 848 F.2d 196 (7th Cir. 1988); People v. Hooper, 552 N.E.2d 684, 698 (Ill. 1989), *cert. denied*, 111 S. Ct. 284 (1990); Fields v. People, 732 P.2d 1145, 1146 (Colo. 1987); Commonwealth v. McKendrick, 574 A.2d 144, 151 (Pa. Super. 1986), *appeal denied*, 522 A.2d 588 (Pa. 1987).

95. People v. Hope, 560 N.E.2d 849, 864 (Ill. 1990). *See also* Phillips v. State, 496 N.E.2d 87, 89 (Ind. 1986) (use of peremptory challenges against black jurors does not, by itself, raise an inference of racial discrimination).

Another court has defined a prima facie case as "the minimum quantum of evidence necessary to support a rational inference that the allegation is true."[96]

Various reviewing courts have advised their brethren at the trial court level to avoid arbitrarily deciding this "delicate question" solely on the number of blacks or minorities peremptorily excused.[97] In addition, it has also been noted that the determination of a prima facie violation should not be based solely on the fact that a party has used its peremptory challenges to exclude all minorities from the venire. Such a holding would be inconsistent with *Batson*'s mandate that "all relevant circumstances" be considered. The trial court should not be precluded from applying its observations and judicial experience in determining whether an inference of discrimination has been raised.[98]

However, the exclusion of even one minority juror on account of his race or ethnic background would mandate a reversal of a jury's verdict.[99] Furthermore, the fact that one or two minority jurors are ultimately selected for a jury should not affect a court's analysis. As one court has observed:

> [M]erely because two blacks were seated in the jury is not sufficient to prevent or defeat a prima facie case of racial discrimination. The affirmative racial exclusion of available black jurors by the State which results in only one or two blacks being seated on the jury is no less evil and no less constitutionally prohibited than the same procedure which results in the total exclusion of blacks. No available black person should be excluded either similarly or systematically from being a ju-

96. Tompkins v. State, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd*, 490 U.S. 754 (1989).

An example of the type of analysis a trial court typically undertakes in determining whether a prima facie case has been established can be found in People v. Holman, 547 N.E.2d 124, 144-45 (Ill. 1989). In *Holman*, the percentage of blacks in the venire was roughly 20% (11 of 59), while the percentage of blacks impaneled as jurors was over 33% (4 of 12). The State excused more than twice as many white jurors (10) as it did blacks (4). The court further noted that any racial questions raised by the jury selection process were minimized by the fact that all the victims in the case, like the defendant, were black. Under these circumstances, a prima facie case of discrimination was not established.

97. People v. Hooper, 552 N.E.2d 684, 699 (Ill. 1989), *cert. denied*, 111 S. Ct. 284 (1990); State v. Slappy, 522 So. 2d 18, 21 (Fla.), *cert. denied*, 487 U.S. 214 (1988) (numbers alone not dispositive); Williams v. State, 712 S.W.2d 835, 841 (Tex. Ct. App. 1986) (there is no quantitative formula with which to guage peremptory challenges against minority jurors).

98. *Hooper*, 552 N.E.2d at 699; People v. Thompson, 435 N.Y.S.2d 739, 755 (1981) (exclusion of a number of black jurors was insufficient in-and-of-itself to warrant remand of trial court's determinations).

99. United States v. David, 803 F. 2d 1567, 1570-71 (11th Cir. 1986); People v. McDonald, 530 N.E.2d 1351, 1359 (Ill. 1988); State v. Alvarado, 410 N.W.2d 118, 120-21 (Neb. 1987).

ror solely because he or she is black.[100]

Despite the admonition that courts should not base their decisions solely on the number of excluded jurors, many lower courts still focus primarily on that factor. If a party uses the bulk of its peremptory challenges against a given ethnic group, or strikes a majority of a given ethnic group from the venire during the selection process, a court will generally find that a prima facie case of discrimination has been established.[101] For example, in one case a prima facie *Batson* violation was found when three of six challenges were used against black jurors.[102] Similarly, a prima facie showing was demonstrated when the only two blacks on a venire were challenged by a party.[103] In yet another decision, a defendant established a prima facie case when the state peremptorily struck the only Hispanic juror in the entire venire.[104] Therefore, a practitioner must give careful consideration to every peremptory challenge that is exercised.

RACIALLY NEUTRAL REASONS FOR THE EXERCISE OF PEREMPTORY CHALLENGES

A neutral explanation in the context of a *Batson/Edmonson* hearing is "an explanation based on something other than the race of the juror."[105] At this stage of the proceedings, the issue involves the facial neutrality of the attorney's explanation.[106] A court should find the offered reason is racially-neutral, unless a discrimi-

100. People v. Andrews, 526 N.E.2d 628, 635 (Ill. App. Ct. 1988), *aff'd in part and rev'd in part*, 548 N.E.2d 1025 (Ill. 1989). *See also* Tucker v. Illinois Power Co., 577 N.E.2d 919 (Ill. 1991) (mere presence of some blacks on jury does not preclude a finding of prima facie case).

101. *See, e.g.*, People v. Hope, 560 N.E.2d 849, 864 (Ill. 1990) (markedly disproportionate use of strikes against black venire persons established prima facie case), *vacated on other grounds*, 111 S. Ct. 2792 (1991); State v. Sandoval, 736 P.2d 501, 504 (N.M. Ct. App. 1987) (prima facie case was established when a prosecutor removed the only two Hispanics in the venire). *Contra* Thorne v. State, 509 N.E.2d 877, 881 (Ind. Ct. App. 1987) (removal of the only two black venire persons does not, by itself, raise the inference of discrimination necessary to establish elements of prima facie case), *superseded*, 519 N.E.2d 566 (Ind. 1988); People v. Harvey, 208 Cal. Rptr. 910, 923 (Ct. App. 1984) (prima facie case not established where the two challenges did not operate to exclude all members of cognizable class).

102. People v. Harris, 537 N.E.2d 977 (Ill. App. Ct. 1989).

103. Haynes v. State, 739 P.2d 497, 502 (Nev. 1987).

104. Salazar v. State, 795 S.W.2d 187, 193-94 (Tex. Crim. App. 1990). *Contra* People v. Zayas, 510 N.E.2d 1125, 1129 (Ill. App. Ct. 1987) (removal of a single "Hispanic" juror did not necessitate a *Batson* hearing), *reversed*, 546 N.E.2d 513 (1989). *See also* Batson v. Kentucky, 476 U.S. 79, 101 (1986) (White, J., concurring) (it is not unconstitutional, without more, to strike one or more blacks from a jury).

105. Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991).

106. *Id.*

natory intent is "inherent in the [attorney's] explanation."[107] However, a court will not consider an explanation racially neutral if a party fails to exclude members of one racial or ethnic group whose members possess the same or similar characteristics as another excluded group of jurors and there are no meaningful or distinguishing factors separating the selected and excluded groups of prospective jurors.[108]

The analysis becomes more complex when the explanation justifying the use of a given challenge has a disproportionate impact upon a particular group of prospective jurors. The Supreme Court in *Hernandez* noted that while "disparate impact" should be given appropriate weight in determining whether an explanation is "racially neutral," it is not conclusive. Unless the attorney adopted the given explanation or criterion with the intent of causing a disproportionate impact, the explanation does not violate the principle of race-neutrality merely because it may impact on a given class of prospective jurors disproportionately.[109] The plurality opinion in *Hernandez* was quick to note that the prosecutor's explanations in that case rested neither on an intention to exclude "Latino" or bilingual jurors as a group, nor on "stereotypical assumptions" about those groups of jurors which could evidence a discriminatory intent.[110]

Numerous reviewing courts have addressed the "race-neutrality" of explanations asserted to justify the exercise of a peremptory challenge. The closer an explanation comes to a valid "challenge for cause," the more likely a court will find that the explanation is racially-neutral.[111] For example, courts have consistently found

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107. *Id.*

108. People v. Mack, 538 N.E.2d 1107, 1111 (Ill. 1989), *cert. denied*, 493 U.S. 1093 (1990). *See* Garrett v. Morris, 815 F.2d 509, 514 (8th Cir. 1987) (black jurors excused because of their level of education but white jurors with less education not challenged), *cert. denied*, Jones v. Garrett, 484 U.S. 898 (1987); People v. McDonald, 530 N.E.2d 1351, 1358-59 (Ill. 1988) (State excused several black jurors due to their advanced age and occupation yet permitted white jurors who were older than the black jurors excused and similarly employed).

109. *Hernandez*, 111 S. Ct. at 1867. *See also*, United States v. Montgomery, 819 F.2d 847, 850 (8th Cir. 1987) (defendant failed to establish a prima facie case even though black jurors were excused at more than twice the rate which proportionate use of challenges would have caused).

For example, if an attorney attempted to justify the removal of prospective jurors because they commonly read *Ebony* or *Jet* magazine, in view of the fact that those publications are directed principally towards a black audience, counsel could not legitimately argue that the criteria allegedly justifying the challenge of those jurors was not intended to result in the removal of black jurors. The intent to discriminate could definitively be inferred. Under the rationale of *Hernandez* as well as Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979), such an explanation is not racially neutral.

110. Hernandez v. New York, 111 S. Ct. 1859, 1867 (1991).

111. *Id.* at 1868.

that a prospective juror's criminal conviction,[112] or prior arrest by the same police agency in the case on trial,[113] are racially neutral explanations which justify the removal of that juror. Similarly, the fact that a juror's relative had been a defendant in an unrelated criminal trial,[114] or that a juror had a reputation in the community for unlawful activities, have been held valid explanations for the exercise of a peremptory challenge.[115]

Other racially neutral explanations often involved specific factors in a prospective juror's background that might cause the juror to identify with, or be sympathetic towards one of the parties.[116] For example, the fact that a prospective juror or one of the juror's children is of a similar age to one of the parties on trial is a racially neutral ground for a peremptory challenge.[117] Likewise, a juror's employment or the employment of a close friend in a similar line of

112. People v. Jones, 559 N.E.2d 112, 115 (Ill. App. Ct. 1990) (juror convicted of involuntary manslaughter), *appeal denied*, 561 N.E.2d 700 (Ill. 1990); Thorne v. State, 509 N.E.2d 877, 881 n.2 (Ind. Ct. App. 1987) (conviction for operation of a motor vehicle while intoxicated resulting in a death), *superseded*, 519 N.E.2d 566 (Ind. 1988); Ward v. State, 539 So. 2d 407, 408 (Ala. Crim. App. 1988). *Contra* Maloney v. Washington, 690 F. Supp. 687 (N.D. Ill. 1988) (in the facts of this case, exclusion of juror based on conviction for disorderly conduct was unquestionably a pretext for racial discrimination), *mandamus granted on other grounds, sub. nom.*, Maloney v. Plunkett, 854 F.2d 152 (7th Cir. 1988).

113. People v. Woods, 540 N.E.2d 1020, 1023 (Ill. App. Ct. 1989) (juror was arrested by the same police department which arrested the defendant, and the police department had treated the juror "rudely"). *See also* Ivatury v. State, 792 S.W.2d 845, 847-48 (Tex. Ct. App. 1990) (juror's prior "false arrest"); Scales v. State, 539 So. 2d 1074, 1075 (Ala. 1988) (prior arrest).

114. *See* United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987) (juro. s son had been in trouble with the law on prior occasions); United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir.) (juror's brother convicted of robbery), *cert. denied*, 484 U.S. 914, 928 (1987); People v. Hooper, 552 N.E.2d 684, 697-702 (Ill. 1989) (brother with robbery conviction), *cert denied*, 111 S. Ct. 284 (1990); People v. Harris, 544 N.E.2d 357, 380 (Ill. 1989) (relative was a defendant in a criminal trial), *cert. denied*, 110 S. Ct. 1323 (1990).

115. United States v. Alston, 895 F.2d 1362, 1367 (11th Cir. 1990). In Illinois, jurors must be of fair character and approved integrity. *See supra* note 82. Therefore, several of these explanations should apply with equal force in civil proceedings as well as in criminal trials.

116. United States v. Briscoe, 896 F.2d 1476, 1488 (7th Cir.), *cert. denied*, Usman v. United States, 111 S. Ct. 173 (1990) (juror who previously worked as a youth supervisor at a correctional center might have tendency to be sympathetic toward defendants; was a valid race-neutral excuse, despite juror's statement that her experience would not prejudice her, and she could be fair to both sides).

117. People v. Hope, 560 N.E.2d 849, 867 (Ill. 1990) (young male of about defendant's age), *vacated on other grounds*, 111 S. Ct. 2792 (1991); People v. Baisten, 560 N.E.2d 1060, 1069 (Ill. App. Ct.) (juror close in age to defendant), *appeal denied*, 564 N.E.2d 840 (Ill. 1990); People v. Batchelor, 559 N.E.2d 948, 954 (Ill. App. Ct. 1990) (son near defendant's age), *appeal denied*, 564 N.E.2d 840 (Ill. 1990); People v. Taylor, 524 N.E.2d 1216, 1221 (Ill. App. Ct.) (young, single, unemployed persons may have tendency to identify with young defendant), *appeal denied*, 530 N.E.2d 260 (Ill. 1988); People v. Barker, 446 N.W.2d 549 (Mich. App. Ct. 1989), *aff'd*, 468 N.W.2d 492 (Mich. 1991).

work as one of the parties on trial has also been held a racially neutral basis for challenging that prospective juror.[118]

Trial counsel have often developed "perceptions" or "opinions" about jurors who are employed in certain occupations. Those "perceptions" concerning a juror's occupation can constitute a permissible explanation[119] for excusing that juror, so long as similarly employed "non-minority" jurors are also excused, or counsel has a valid or bona fide reason for not excusing those similarly employed jurors.[120]

Any experiences in a juror's background or that of a family member that might tend to cause prejudice toward one of the parties are also valid explanations for the use of a peremptory challenge.[121] A prospective juror's occupation that might provide

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118. State v. Tubbs, 747 P.2d 1232, 1236-37 (Ariz. Ct. App. 1987) (lack of eye contact and possible former employment with defendant's employer held race-neutral explanation); People v. Melchor, 535 N.E.2d 1082, 1086 (Ill. App. Ct. 1989) (juror's relative and close friend were police officers and the defendant was a police officer charged with a drug sale).

119. *See* People v. Ortega, 202 Cal. Rptr. 657, 662-63 (Ct. App. 1984) (social worker excused because of prosecutor feared the worker might believe that society was responsible for the criminal acts rather than the defendant on trial); People v. Hope, 560 N.E.2d 849, 867-68 (Ill. 1990) (prospective juror's employment as a drug counselor), *vacated on other grounds*, 111 S. Ct. 2792 (1991); People v. Harris, 544 N.E.2d 357, 381 (Ill. 1989) (school teachers and their spouses excused "because they tend to be sympathetic and musicians because they tend to be creative and willing to move beyond structures of the law"), *cert. denied*, 110 S. Ct. 1323 (1990); People v. Jones, 559 N.E.2d 112, (Ill. App. Ct.) (prospective juror's employment as a social worker), *appeal denied*, 561 N.E.2d 700 (Ill. 1990); State v. Antwine, 743 S.W.2d 51, 65 (Mo. 1987) (prosecutor's legitimate "hunches" and "past experience" permissible so long as racial discrimination is not the motive).

120. *See* Barfield v. Orange County, 911 F.2d 644, 648 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2263 (1991). *Barfield* involved a discrimination claim based upon termination of employment. The attorney challenged a black venire person who had been a school board employee because he perceived him to be "pro labor." However, the attorney did not challenge two white school board employees because the attorney had only one challenge left when all three jurors were questioned and the selection procedure did not allow for "back striking." *Id. See also Harris*, 544 N.E.2d at 382 (State had no challenges left to strike "non-minority" jurors who were employed in occupations similar to "minority" jurors who were excluded; court held this to be a permissible explanation).

121. *See* United States v. Ratcliff, 806 F.2d 1253, 1256 (5th Cir. 1986) (in a prosecution for tax fraud, prospective juror who taught tax courses and had "run-ins" with the I.R.S. would be more inclined to view the defense case more favorably than other jurors), *cert. denied*, 481 U.S. 1004 (1987); People v. Jones, 559 N.E.2d 112, 115-17 (Ill. App. Ct. 1989) (prospective juror was not on friendly terms with his father who was a police officer; prosecutor was thus concerned that the juror might therefore be biased against police officers who were expected to testify), *appeal denied*, 561 N.E.2d 700 (Ill. 1990); People v. Walker, 547 N.E.2d 1036, 1038 (Ill. App. Ct. 1989) (State excluded a prospective juror on the basis of employment by a law enforcement agency due to the concern that the bias in favor of the state could jeopardize the fairness of the trial). *Contra* Maloney v. Washington, 690 F. Supp. 687, 690-91 (N.D. Ill.) (police officers on both sides of the litigation), *mandamus granted on other grounds, sub. nom.* Maloney v. Plunkett, 854 F.2d 152 (7th Cir. 1988). *See* Bueno-Hernandez v.

insight into the trial process and allow that juror to substitute his or her experiences in lieu of the evidence presented or the instructions given has also been recognized as a racially neutral ground for the exclusion of that juror.[122] Furthermore, a number of decisions have approved the striking of a juror due to either an unstable job history[123] or a history of unemployment.[124]

A prospective juror's knowledge or familiarity with one of the parties,[125] the attorneys,[126] or the witnesses expected to be called[127] are all valid race-neutral explanations for the use of a peremptory challenge. Courts have accepted challenges where a juror has occasionally seen one of the parties in passing,[128] or lives in the area where one of the parties[129] or a witness lives.[130] Courts have also permitted challenges based upon a juror's familiarity with the scene of an incident or the general area where an occurrence took

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State, 724 P.2d 1132, 1135 (Wyo. 1986) (juror had been sued by the prosecutor's office in a collection matter), *cert. denied*, 480 U.S. 907 (1987); People v. Hope, 560 N.E.2d 849, 866 (Ill. 1990) (in a criminal case, a juror was validly excused who had been the victim of an unsolved crime and could harbor feelings that might be held against the police agency or prosecutor's office involved), *vacated on other grounds*, 111 S. Ct. 2792 (1991).

122. People v. Chambie, 234 Cal. Rptr. 308, 312-13 (Ct. App. 1987) (juror was a first year law student and defense oriented); People v. Harris, 544 N.E.2d 357, 380 (Ill. 1989) (juror's employment involved "interpreting court procedures and policies"), *cert denied*, 110 S. Ct. 1323 (1990); People v. Mack, 538 N.E.2d 1107, 1112 (Ill. 1989) (juror employed by well known defense firm as a so called "brief specialist"), *cert. denied*, 493 U.S. 1093 (1990).

123. *Mack*, 538 N.E.2d at 1112 (security guard who frequently changed jobs).

124. *Harris*, 544 N.E.2d at 380 (juror was single, unemployed, and lacked ties to the community); State v. Martinez, 362 S.E.2d 641, 642 (S.C. 1987) (exclusion based on unemployed status permitted).

125. *See* United States v. Jackson, 696 F.2d 578, 593 (8th Cir. 1982), *cert. denied*, 460 U.S. 1073 (1983); Glanton v. State, 376 S.E.2d 386, 387-89 (Ga. Ct. App. 1988) (jurors knew the defendant); State v. White, 535 So. 2d 929, 934 (La. Ct. App. 1988) (juror knew defendant since childhood).

126. *See* United States v. Cartlidge, 808 F.2d 1064, 1070 (5th Cir. 1987) (defense attorney had worked for agency prospective juror was associated with); Williams v. State, 507 N.E.2d 997, 998-99 (Ind. Ct. App. 1986) (juror had been previously represented by defendant's lawyer); State v. Johnson, 561 So. 2d 922, 926 (La. Ct. App. 1990) (juror knew defense attorney's family and recognized defense council).

127. *See Jackson*, 696 F.2d at 593 (juror knew six of seven character witnesses); State v. Threet, 407 N.W.2d 766, 771 (Neb. 1987) (one of the witnesses was known by the juror); Henderson v. State, 360 S.E.2d 263, 265-66 (Ga. 1987) (jurors knew key witnesses).

128. *See* People v. Brown, 505 N.E.2d 397, 401 (Ill. App. Ct. 1987) (juror had seen the defendant in drinking establishments).

129. *See* People v. Batchelor, 559 N.E.2d 948 (Ill. App. Ct. 1990); Taitano v. Commonwealth, 358 S.E.2d 590, 592-93 (Va. Ct. App. 1987) (four jurors lived near the defendants, near scene of the crime, or in high crime areas in general).

130. *See* People v. Hope, 560 N.E.2d 849, 868 (Ill. 1990) (certain witnesses lived near or in the building where the prospective juror resided), *vacated on other grounds*, 111 S. Ct. 2792 (1991).

place.[131] A prospective juror's social relationships with lawyers and judges not involved in the case on trial has also been found to be a racially neutral explanation.[132]

Several courts have also approved explanations based upon the sex or gender of a prospective juror,[133] a juror's age,[134] a juror's marital status[135] and even a juror's religious beliefs or preferences.[136] In addition, courts have upheld peremptory challenges that are used against a prospective juror if a party or his counsel have had a difficult experience with that juror in the past.[137]

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131. *See* United States v. Andrade, 788 F.2d 521, 524-25 (8th Cir.) (juror lived in the area where the alleged crime occurred), *cert. denied*, 479 U.S. 963 (1986); United States v. Biaggi, 705 F. Supp. 867, 870 (S.D.N.Y. 1988) (juror lived in "Little Italy" where important meetings between the defendants on trial took place), *aff'd*, 909 F.2d 662 (2d Cir. 1990); People v. Baisten, 560 N.E.2d 1060, 1070-71 (Ill. App. Ct.) (juror lived within 5 miles of scene of crime), *appeal denied*, 564 N.E.2d 840 (Ill. 1990).

132. *See* People v. Mack, 538 N.E.2d 1107, 1111-12 (Ill. 1989), *cert. denied*, 493 U.S. 1093 (1990).

133. *See* United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988), *cert. denied*, 110 S. Ct. 1170 (1990). *See also* People v. Hooper, 552 N.E.2d 684, 701-02 (Ill. 1989) (court permitted the removal of black female jurors to restore a more gender balanced jury), *cert. denied*, 111 S. Ct. 284 (1990). *But see* United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990) (held that *Batson* applies to gender based discrimination and condemned the use of peremptory challenges against male jurors), *rehearing granted*, 930 F.2d 695 (9th Cir. 1991).

134. Harrel v. State, 555 So. 2d 263, 268 (Ala. 1989) (age may serve as a race-neutral explanation); People v. Moss, 233 Cal. Rptr. 153, 161 (Ct. App. 1986) (the exclusion of black women based upon their age was reasonable because prosecutor also challenged elderly white female jurors); Staley v. State, 582 A.2d 532, 536 (Md. Ct. Spec. App.) (age was valid race-neutral basis), *cert. denied*, 587 A.2d 247 (1990); People v. Kindelan, 572 N.E.2d 1138, 1142-43 (Ill. App. Ct. 1991) (youthfulness of juror was valid basis for peremptory strike). However, because the use of age as a racially neutral basis is "inherently susceptible to abuse," care should be used to ensure that age is directly connected to some important aspect of the litigant's case. *See* Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring).

135. Thomas v. State, 555 So. 2d 320, 321-22 (Ala. Crim. App. 1989) (preference for single jurors permissible explanation); Pritchett v. State, 548 So. 2d 509, 510 (Ala. Crim. App. 1988) (same).

136. *See* United States v. Clemmons, 892 F.2d 1153, 1157 (3d Cir. 1989) (prosecutor expressed some uncertainty over a juror's religious beliefs (Hinduism)). *See also* People v. Malone, 570 N.E.2d 584, 589-90 (Ill. App. Ct. 1991) (juror's strong religious beliefs permissible explanation); Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987); Grady v. State, 730 S.W.2d 191, 194-95 (Tex. Ct. App. 1987) (juror failed to list a religious preference on questionnaire and attorney claimed he preferred jurors with religious preferences), *vacated*, 761 S.W.2d 19 (Tex. Crim. App. 1988); Rasco v. State, 739 S.W.2d 437, 439 (Tex. Ct. App. 1987) (where excused juror was a Baptist minister).

137. *See* United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir.), (prospective juror had acquitted a defendant prosecuted by the same attorney in an earlier case), *cert. denied*, 490 U.S. 1028 (1989). People v. Chambie, 234 Cal. Rptr. 308, 311 (Ct. App. 1987) (excluded juror had previously served on panel which acquitted a defendant in a case tried by the same prosecutor); People v. Walker, 547 N.E.2d 1036, 1037 (Ill. App. Ct. 1989) (prospective juror's prior vote of not guilty in a criminal trial four years earlier was a valid basis for excluding that juror).

Any statement or answer by a juror during voir dire that is false,[138] equivocal or raises a question about a juror's ability to accept the type of evidence that will be presented,[139] or a juror's ability to be fair and impartial, also constitute permissible explanations for purposes of a *Batson* challenge. [140] This remains true even when that juror states that he can set aside those experiences in his background and be fair and impartial to both of the parties.[141]

Courts have also recognized that "non-verbal communication" by a juror, such as the prospective juror's posture and demeanor,[142] failure to make eye contact,[143] "hostile" expression,[144] or "casual manner"[145] can also provide a legitimate basis for excusing that juror. A juror's hesitancy in answering questions is also a racially

138. Foster v. State, 374 S.E.2d 188, 192 (Ga. 1988) (where juror's denials of having a friend or relative accused or convicted of a crime or knowing anyone with a drug or alcohol problem found to be untrue).

139. *See* People v. Davis, 234 Cal. Rptr. 859, 870-71 (Ct. App. 1987) (juror felt "direct" evidence should be given more weight than circumstantial evidence despite the court's instruction to weigh them equally); People v. Chambie, 234 Cal. Rptr. 308, 311 (Ct. App. 1987) (juror stated doubts about proof beyond a reasonable doubt standard); State v. Woodruff, 387 S.E.2d 453, 454 (S.C. 1989) (hesitancy in answers about willingness to impose death sentence).

140. People v. Mack, 538 N.E.2d 1107, 1111 (Ill. 1989) (juror's answers to questions about death penalty "did not appear candid" found to be a permissible explanation), *cert. denied*, 493 U.S. 1093 (1990).

141. *See* Adams v. State, 740 S.W.2d 60 (Tex. Ct. App. 1987). In *Adams*, a prospective juror stated she could disregard her friendship with the defendant's mother and would not allow that relationship to affect her deliberations. The court's holding implicitly establishes that the prosecutor was entitled to disbelieve the prospective juror, and the prospective juror's disclaimer did not establish that the attorney excusing the juror had unacceptable motives. The court held the exclusion was proper. *Id.* at 62. *See also* People v. Hope, 560 N.E.2d 849, 866 (Ill. 1990) (prospective juror stated unsolved crime might affect her impartiality, and was properly excluded despite quick self-correction), *vacated on other grounds*, 111 S. Ct. 2792 (1991).

142. People v. Murff, 574 N.E.2d 815, 819 (Ill. App. Ct. 1991) (juror's forceful demeanor and perceived hostility toward the State); People v. Harris, 544 N.E.2d 357, 380 (Ill. 1989) (meek and sleepy juror who did not answer questions in a forthright manner), *cert. denied*, 110 S. Ct. 1323 (1990); People v. Kindelan, 572 N.E.2d 1138, 1143-44 (Ill. App. Ct. 1991) (demeanor and tone of voice indicated juror considered jury duty an imposition); Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987) (juror's "Body English").

143. United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987) (juror failed to make eye contact with attorney); State v. Tubbs, 747 P.2d 1232, 1236-37 (Ariz. Ct. App. 1987) (lack of eye contact and possibility that juror had formerly worked for defendant's employer); *Mack*, 538 N.E.2d at 1111 (juror failed to make eye contact with attorney); People v. Baisten, 560 N.E.2d 1060 (Ill. App. Ct.) (juror continually looked at the defendant and avoided looking at the judge during voir dire), *appeal denied*, 564 N.E.2d 840 (Ill. 1990).

144. Barfield v. Orange County, 911 F.2d 644, 648 (11th Cir. 1990) (permitting exclusion based upon juror's hostile expression towards defendant and defense counsel), *cert. denied*, 111 S. Ct. 2263 (1991); United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987) (juror sat with arms crossed and appeared hostile).

145. People v. Hooper, 552 N.E.2d 684, 699 (Ill.) (prospective juror's hesitant and casual demeanor), *appeal denied*, 111 S. Ct. 284 (1990).

neutral explanation under *Batson*.[146] Several jurisdictions, while accepting peremptory challenges based upon "demeanor" and "body language," have also noted that these types of subjective explanations can serve as a pretext for racial discrimination and have warned trial courts to closely scrutinize them.[147]

Courts have accepted explanations which are based on a perceived lack of commitment by a given juror or a juror's inability to appreciate the seriousness of his role in the trial process.[148] Other decisions have also approved the exclusion of a juror who was perceived as lacking the necessary intellectual capacity for jury service.[149] Counsel who choose to justify a peremptory strike on these grounds should take care to adequately make the appropriate record and, if possible, should rely upon specific responses from the

146. *See* State v. Castillo, 731 P.2d 983, 985-86 (Ariz. Ct. App. 1987) (hesitancy and juror did not appear to understand the proceedings); *Hooper*, 552 N.E.2d at 699; People v. Jones, 541 N.E.2d 161, 167 (Ill. App. Ct. 1989), *appeal denied*, 548 N.E.2d 1074 (Ill. 1990). However, counsel should be aware that a court does not direct the "crucial inquiry" simply toward whether a juror hesitates in answering questions or toward the number of questions to which the juror hesitates, but instead directs the inquiry toward whether the juror displays a bias against one of the parties through the manner by which he answers questions. *Jones*, 541 N.E.2d at 167.

147. *See* People v. Charron, 238 Cal. Rptr. 660 (Ct. App. 1987) (the court stated, "prosecutors purporting to rely solely on their interpretation of body language, gestures, and glances, do so at their peril"). *See also* People v. Murff, 574 N.E.2d 815, 819 (Ill. App. Ct. 1991) (juror's "forceful demeanor" may constitute a racially neutral basis for exclusion; however, explanations focusing on demeanor must be closely scrutinized by trial court). *But see* People v. Talley, 504 N.E.2d 1318, 1327-28 (Ill. Ct. App. 1987) (finding that a prosecutor's explanation that he "was not too happy with [the prospective juror's] demeanor and how he answered questions" was a sufficient race-neutral explanation), *appeal denied*, 537 N.E.2d 817 (1989).

148. People v. Jackson, No. 68012, 1991 Ill. LEXIS 83, at *74 (Sept. 8, 1991) (prospective juror who "nodded off" during the reading of the charges was properly excluded); People v. Thomas, 559 N.E.2d 262, 266 (Ill. App. Ct.) (prospective juror was an "unwed mother" and thus, lacked the "moral fiber" necessary to be a juror in a criminal case), *appeal denied*, 564 N.E.2d 846 (Ill. 1990), *cert. denied*, No. 90-7173 1991 U.S. LEXIS 4573 (Oct. 7, 1991); Ivatury v. State, 792 S.W.2d 845, 847-48 (Tex. Ct. App. 1990) (juror validly excused who "dozed off" during voir dire). *See also* People v. Melchor, 535 N.E.2d 1082, 1085-86 (1989) (juror's youth and lack of sufficient education was such that he could not appreciate the seriousness of the crime). *Contra* State v. Butler, 731 S.W.2d 265, 272 (Mo. Ct. App. 1987) (juror's looking at floor and tardiness were held to be questionable explanations for excusing juror).

149. *See, e.g.*, People v. Jones, 559 N.E.2d 112, 115-17 (Ill. App. Ct.), *appeal denied*, 561 N.E.2d 700 (Ill. 1990); Allen v. State, 811 S.W.2d 673, 676-77 (Tex. Ct. App. 1991) (juror's difficulty with writing as evidenced by an inability to fill out a juror questionnaire card), Hastings v. State, 755 S.W.2d 183, 186 (Tex. Ct. App. 1988) (juror's low intelligence). *See also* United States v. Tucker, 836 F.2d 334, 337 (7th Cir. 1988) (prospective jurors could be validly excused in favor of those with "education and business experience"), *cert. denied*, Bell v. United States, 109 S. Ct. 143 (1989). *But see* People v. Turner, 726 P.2d 102, 108 (Cal. 1986) (finding explanation not bona fide that a truck driver was incapable of comprehending evidence in a complex case, when nothing indicated juror lacked the necessary intelligence).

juror during voir dire, or from the juror questionnaire form, that supports their perceptions about that given juror.[150] If the case will involve complex scientific or medical evidence, counsel should bring this information to the attention of the trial court, since it bolsters counsel's explanations based on the perceived intelligence level of an excused juror. Similarly, several opinions have held that parties may still validly exercise peremptory challenges against jurors who suffer from physical conditions that might impair their ability to perceive the evidence to serve on a jury.[151]

If counsel has a strategy or game plan for the selection of a particular jury or has an "ideal juror profile," he should be prepared to describe this for the court if its disclosure will not necessarily reveal his trial strategies.[152] Counsel should be prepared to furnish any past experiences that support his stated reasons for excluding a juror. If, however, the "game plan" for jury selection or the type of juror sought in the case on trial would tend to reveal trial strategies, counsel should request an *ex parte-in camera* hearing with the court.[153]

EXPLANATIONS HELD NOT TO BE RACIALLY NEUTRAL

Three criteria are generally utilized in determining whether a given explanation is deemed racially neutral. These criteria are: whether the reason given for the exclusion is specific; whether it is rationally related to juror bias or other characteristics affecting a

150. *See* People v. Baisten, 560 N.E.2d 1060, 1069 (Ill. App. Ct.) (juror omitted eight responses on juror information card), *appeal denied*, 564 N.E.2d 840 (Ill. 1990); People v. Jones, 559 N.E.2d 112, 115 (Ill. App. Ct.) (inconsistencies between a juror's voir dire statements and responses contained on jury information card permitted challenges), *appeal denied*, 561 N.E.2d 700 (Ill. 1990). *See also* Haynes v. State, 739 P.2d 497, 502 (Nev. 1987) (juror answered "unmarried" on information sheet but indicated during voir dire that she was married).

151. *See* United States v. Alston, 895 F.2d 1362, 1367 (11th Cir. 1990) (juror had difficulty hearing); People v. Harris, 544 N.E.2d 357, 380 (Ill. 1989) (juror was "sickly and disabled" and was therefore not able to pay attention throughout the trial), *cert. denied*, 110 S. Ct. 1323 (1990). *But see* People v. Green, 561 N.Y.S.2d 130, 131-33 (Civ. Ct. 1990) (peremptory challenge of deaf person solely on the basis of his disability violated juror's right to equal protection under the New York Constitution).

152. *See* People v. Mack, 538 N.E.2d 1107, 1113 (Ill. 1989) (state explained that its juror profile excluded "young jurors" who rented rather than owned their homes), *cert. denied*, 493 U.S. 1093 (1990); Townsend v. State, 730 S.W.2d 24, 26 (Tex. Ct. App. 1989) (prosecutor's attempts to strike all young people including blacks, in favor of those with stronger ties to the community is a racially neutral explanation). *See also* People v. Gregory, 527 N.Y.S.2d 873, 875 (1987) (minority jurors who failed to meet juror profile validly excused so long as non-minority jurors also challenged for same reason).

153. United States v. Tucker, 836 F.2d 334, 338-40 (7th Cir. 1988), *cert. denied*, Bell v. United States, 109 S. Ct. 143 (1989). *See also infra* notes 191-204 and accompanying text for a discussion of the potential disclosure of attorney's notes and the requirement of sworn testimony of attorneys in a *Batson* hearing.

juror's qualifications; and whether the reason is given in good faith or is bona fide.[154] If these criteria are fulfilled, a court will find that the reason justifying the exercise of the peremptory challenge is racially neutral.

An attorney's claims of good faith or absence of discriminatory purpose will not overcome a prima facie showing of *Batson* violation.[155] An explanation must refer to specific factors concerning the challenged juror's background.[156] Otherwise, the explanation will be insufficient to rebut a prima facie showing of discrimination.[157] For example, one attorney's explanation was found inadequate when he explained that "based upon [the juror's] background and other things in his questionnaire, I just elected to strike him."[158] The court held that the explanation failed to rebut his opponent's prima facie case because the record contained nothing specific about the contents of the questionnaire or the juror's background other than the juror was an Native American.[159]

Courts have held explanations that a particular juror might be sympathetic or more inclined to favor one party over another due to their shared "race" or ethnic heritage are not good faith justifications for excusing that juror.[160] Any suggestion that a particular juror or group of jurors would be biased toward one of the parties or his counsel also constitutes an impermissible explanation under *Batson*.[161] Similarly, a party may not rebut an assertion of discrimi-

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154. People v. Hall, 672 P.2d 854, 858 (Cal. 1983).

155. People v. Harris, 544 N.E.2d 357, 379 (Ill. 1989), *cert. denied*, 110 S. Ct. 1323 (1990); People v. Baisten, 560 N.E.2d 1060, 1068 (Ill. App. Ct.), *appeal denied*, 564 N.E.2d 840 (Ill. 1990).

156. *Baisten*, 560 N.E.2d at 1068; Roman v. Abrams, 822 F.2d 214, 228 (8th Cir. 1987) (general explanations such as a juror's "background" and "lifestyle" are inadequate, as is the notion that knowledge of "electronics," "bookkeeping" or "computers" might prevent a juror from accepting the standard of proof requirement). *But see* State v. Slappy, 522 So. 2d 18, 23 (Fla.), *cert. denied*, 487 U.S. 214 (1988) ("political liberals" more likely to be lenient to defendants than conservatives, and finding "liberalism" neutral and reasonable explanation).

157. *Harris*, 544 N.E.2d at 384. *See also* Clark v. City of Bridgeport, 645 F. Supp. 890, 893-94 (D. Conn. 1986).

158. United States v. Chalan, 812 F.2d 1302, 1312 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988).

159. *Chalan*, 812 F.2d at 1312. *See also* People v. Turner, 230 Cal. Rptr. 656 (1986) (statement to the effect by counsel that "it was something in [the juror's] work . . . that from [the State's] standpoint, that background . . . would not be good for [the State's] case" was held to be so lacking in content that it failed to rebut the defendant's prima facie case).

160. *See, e.g.*, Maloney v. Washington, 690 F. Supp. 687, 691 (N.D. Ill. 1988) (plaintiff suggested that black juror's membership in the Urban League of Chicago indicated the juror was interested in helping minorities and, therefore, would be partial to black defendants), *mandamus granted*, Maloney v. Plunkett, 854 F.2d 152 (7th Cir. 1988) (mandamus issued because trial court imposed improper remedy for *Batson* violation).

161. *See* Clark v. City of Bridgeport, 645 F. Supp. 890, 893-94 (D. Conn. 1986) In *Clark*, a city attorney explained that black jurors were excused because

nation on the ground that he "does not know why" he exercised the peremptory challenge.[162] An attorney cannot justify the exclusion of a class of jurors because his opponent intentionally struck another ethnic group from the panel.[163]

The trial court, in determining whether the explanations are sufficient to rebut a prima facie case, must make a "sincere and reasoned attempt to evaluate the attorney's explanation" based on the facts of the case, as well as the trial judge's experience and observation of the voir dire.[164] The issue is not necessarily whether the attorney's opinion about a given juror or ethnic group is correct. Rather, the issue in a *Batson* hearing is whether the attorney's good faith belief, rather than a racially discriminatory motive, was the actual motivation behind the exercise of the peremptory challenge.[165] This remains true even though the court may not necessarily agree with the attorney's subjective beliefs about the particular class of jurors.[166]

"they were biased," "they would show prejudice," "they would give him a fair trial," and "I don't have any empirical data. All I can tell you is I trust my instincts." *Id.* The court held that these reasons were not racially-neutral and were insufficient to overcome a prima facie showing of discriminatory intent in the exercise of peremptory challenges. *Id. See also* United States v. Brown, 817 F.2d. 674, 676 (10th Cir. 1987) (condemning presumption that a black attorney would have unfair advantage with black jurors).

162. *Batson*, 476 U.S. at 98. *See also* People v. Harris, 544 N.E.2d 357, 383 (Ill. 1989), *cert. denied*, 110 S. Ct. 1323 (1990). In *Harris*, however, the court approved a challenge when the attorney did not have sufficient information about the juror to feel comfortable with her remaining on the jury. *Id.*

163. People v. Pagel, 232 Cal. Rptr. 104, 107-09 (1986) (attorney's exclusion of blacks because opposing attorney was deliberately challenging white jurors was held to be an invalid justification for the challenges).

164. People v. Hall, 197 Cal. Rptr. 71, 75 (1983).

165. *See* People v. Thomas, 559 N.E.2d 262, 266 (Ill. App. Ct. 1990) *cert. denied*, No. 90-7173 1991 U.S. LEXIS 4573 (Oct. 7, 1991). In *Thomas*, the court characterized a statement about unwed mothers lacking the "moral fiber" necessary to serve on a jury as "an unfortunate and narrow-minded prejudice" but nevertheless affirmed the trial court's finding that the reason was not a mere pretext for racial discrimination. *Id. See also* United States v. Clemmons, 892 F.2d 1153, 1157 (3rd Cir. 1989), *cert. denied*, 110 S. Ct. 2623 (1991). In *Clemmons*, the prosecutor did not believe that the challenged juror was black, but rather Asian-Indian and excused him because of uncertainty about his Hindu religious beliefs. The court held that even if the juror was black there was no *Batson* violation since the explanation showed prosecutor did not discriminate against juror because of his race. *Id.*

166. *See* People v. Harris, 544 N.E.2d 357, 380-81 (Ill. 1989), *cert. denied* 110 S. Ct. 1323 (1990). In *Harris*, the prosecutor explained that he excused a juror because that juror resided in Hyde Park, an area whose residents are more scholarly and, therefore, more open to new ideas than other Chicagoans. The Illinois Supreme Court considered this explanation to be non-racial in nature. *Id.* The trial judge had attended law school and had worked for a number of years in the Hyde Park area and concluded on the record that there was some basis for the State's assumption about the neighborhood's residents. *Id.* Absent such a statement by the trial court, however, the *Harris* Court indicated that it may have found such an explanation to be a "mere pretext," since it did not

When a party seeks to justify the exclusion of a prospective juror due to that juror's membership in a particular "group," e.g., accountants, there are several important factors which the trial court should evaluate. One consideration is whether the court believes that the "group" as a whole possesses the trait that counsel has given as his justification for challenging a juror, e.g., accountants tend to be politically liberal. Another factor is whether the prospective juror himself actually possesses that undesirable trait.

If the trial court feels that the "group" as a whole does not exhibit the "claimed" trait, it would be justified in finding that the explanation was not bona fide.[167] Similarly, a trial court could properly find that the proffered explanation was a pretext for discrimination if the individual juror did not possess the undesirable trait, even though the group as a whole might exhibit that characteristic.[168] Whenever possible, trial counsel should obtain an affirmation or admission from opposing counsel or the trial judge concerning the characteristic or factor that justified a juror's exclusion. Such an acknowledgement might convince a reviewing court to accept the justification given when the record is weak or when the appellate court might be otherwise hesitant to do so.[169]

ANALYSIS FOLLOWING REBUTTAL OF A PRIMA FACIE CASE

Once an attorney has rebutted his opponent's prima facie case, the burden of proof shifts back to the party who initially raised the challenge.[170] At this stage of the proceedings, the party who initially raised the *Batson* challenge must demonstrate that the explanations justifying the removal of a juror were a "mere pretext" for racial discrimination. The trial court, at this point, must determine whether the party raising the challenge has established purposeful discrimination notwithstanding the asserted race-neutral explanation.[171]

Counsel may meet this burden by demonstrating that the challenged group of jurors included men and women who were of a variety of ages, occupations and educational backgrounds.[172]

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necessarily agree with the prosecutor's conclusions about the neighborhood's residents. *Id.*

167. *Id.*

168. *Id.*

169. *See, e.g., Clemmons*, 892 F.2d at 1160 (trial judge stated that the juror did not appear to be black, but rather [Asian-Indian); *Harris*, 544 N.E.2d at 380-81 (trial judge stated that there was some basis for the prosecutor's assumption about Hyde Park residents, and reviewing court accepted this analysis).

170. Batson v. Kentucky, 476 U.S. 79, 97 (1986); Salazar v. Texas, 795 S.W.2d 187, 192 (Tex. Crim. App. 1990).

171. *Batson*, 476 U.S. at 98.

172. *See* People v. Moss, 233 Cal. Rptr. 153, 157 (Cal. Ct. App. 1986) (two excluded jurors showed few characteristics other than their race); State v. Gil-

Typically, a party will compare the characteristics of the excluded jurors with those who were selected[173] in an attempt to prove that the jurors who were selected shared the same traits that were given as explanations for the exercise of peremptory challenges against those jurors who were excluded.[174]

The jury selection process, however, involves a multi-faceted analysis that requires a trial attorney to continually evaluate various factors and information concerning each potential juror. The attorney's ideal juror may vary widely from case to case depending upon the facts involved; the attorney's theory of liability or defense; and the characteristics of the parties. There are a number of decisions that recognize the complex nature of the process and acknowledge that a given characteristic or trait in one juror's makeup might be out-weighed by other factors in another juror's background.[175] Trial counsel should be prepared to discuss the multi-faceted nature of the decision making process involved in selecting a jury and steer the court away from point-by-point comparisons between the excluded and accepted jurors.[176]

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more, 511 A.2d 1150, 1168 (N.J. 1986) (only difference between excluded and accepted jurors was their race).

173. *See* State v. Butler, 731 S.W.2d 265, 269 (Mo. Ct. App. 1987) (trial court should first determine whether similarly situated white jurors were stricken on identical or comparable grounds).

174. *See* Ex parte Branch, 526 So. 2d 609, 621-26, 626 n.13 (Ala. 1987); People v. Hall, 672 P.2d 854, 858-59 (Cal. 1983) (comparing jurors rejected with those accepted); Gamble v. State, 357 S.E.2d 792, 795-96 (Ga. 1987) (rejected-accepted comparison appropriate); People v. Harris, 544 N.E.2d 357 (Ill. 1989) (comparison of rejected with accepted jurors should be given great weight); State v. Gilmore, 511 A.2d 1150 (N.J. 1986) (court expressed a preference for rejected-accepted comparison of jurors, rather than rejected-rejected comparison).

175. *See, e.g.*, People v. Hall, 197 Cal. Rptr. 71 (1983); People v. McDonald, 530 N.E.2d 1351, 1358-59 (Ill. 1988). For example, in People v. Young, 538 N.E.2d 453 (Ill. 1989), *cert. denied*, 110 S. Ct. 3290, the Illinois Supreme Court noted:

> Though a part of the prosecutor's explanations may have been applicable to white jurors who were not challenged, the white jurors may have, in some other respect, exhibited a trait which the prosecutor reasonably could have believed would have made him or her desirable as a juror.

Id. at 458-59. Similarly, in People v. Harris, 544 N.E.2d 357 (Ill. 1989), *cert. denied*, 110 S. Ct. 1323 (1990), the Illinois Supreme Court observed:

> Likewise, the converse is true as well. Though a minority venireperson may otherwise possess all the traits which the State is looking for in a juror, he may possess an additional trait which makes him undesirable.

Id. at 382.

176. The Illinois Supreme Court in People v. Hope, 560 N.E.2d 849 (Ill. 1990), *vacated on other grounds*, 111 S. Ct. 2792 (1991) noted that:

> A large number of factors can enter into decisions to exercise peremptory challenges that are not susceptible of point-for-point comparison with decisions not to exercise them. 'If a prosecutor excused one person and not another it does not follow that this in itself shows that the prosecutor's explanations were pretextual.'

Id. at 867 (quoting People v. Young, 538 N.E.2d 453, 458 (1989), *cert. denied*, 110 S. Ct. 3290 (1990)).

In addition, factors such as: the number of peremptory challenges available; the number of challenges that have been exhausted; and, the stage of the selection process at which the challenge was used are relevant considerations in determining whether there was a discriminatory motive behind a challenge.[177] An attorney may rebut a prima facia case of discrimination if he can demonstrate that he could have exercised available peremptory challenges against "minority jurors" and did not do so.[178] Likewise, an attorney should be able to overcome a prima facie case if counsel did not have enough peremptory challenges to remove "non-minority jurors" who had the same or similar background to the excluded jurors.[179]

The listing of multiple explanations justifying the exclusion of a given juror should increase the chances of defeating a *Batson* challenge. Multiple explanations make possible the argument that, while a challenged juror possessed some of the traits which a selected juror exhibited, there were additional factors which made the juror undesirable. For example, in one case,[180] the State based several peremptory challenges on the age of a particular juror *and* his or her status as a renter rather than a homeowner.[181] In response, the defense argued that the State did not exclude five white jurors who were of a similar age and did not exclude nine jurors who rented rather than owned their homes.[182] The prosecutors then pointed out that all of the minority jurors excluded on those bases were *both* young *and* rented their homes whereas only one of the white jurors possessed a similar combination of these factors.[183] The reviewing court felt that this lent credence to the State's claim that "it preferred persons who were older and who owned their homes to persons who were younger and rented their homes."[184] The furnishing of multiple explanations justifying a peremptory challenge is likely to expand trial counsel's ability to rebut his opponent's assertions of discrimination in the jury selection process.

177. *See, e.g.*, Barfield v. Orange County, 911 F.2d 644, 647-49 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2263 (1991); *Branch*, 526 So. 2d at 623..

178. People v. Hooper, 552 N.E.2d 684, 701 (Ill. 1989), *cert. denied*, 111 S. Ct. 284 (1990). *See also Barfield*, 911 F.2d at 647-49.

179. *See* People v. Harris, 544 N.E.2d 357, 382 (Ill. 1989), *cert. denied*, 110 S. Ct. 1323 (1990) (where the State had excluded black school teachers and their spouses and had no challenges left to exercise against white school teacher was held a valid race-neutral explanation). *See also Barfield*, 911 F.2d at 647-49.

180. People v. Mack, 538 N.E.2d 1107 (Ill. 1989), *cert. denied*, 493 U.S. 1093 (1990).

181. *Id.* at 1113.

182. *Id.*

183. *Id.*

184. *Id.*

STANDARD OF REVIEW

The trial court's determinations in a *Batson* hearing are findings of fact which turn largely on questions of credibility. Therefore, a state trial court's ruling in a *Batson* hearing will not be overturned unless it is "against the manifest weight of the evidence."[185] In federal courts, the trial judge's determinations in a *Batson* hearing will not be set aside unless they are "clearly erroneous."[186] These standards apply even when the judge holding the *Batson* hearing is different than the trial judge before whom voir dire was originally conducted.[187]

Since the trial judge participates in voir dire and has the opportunity to question the prospective jurors and observe their demeanor as well as the attorneys, the trial court's ruling in a *Batson* hearing is given "great deference" by reviewing courts.[188] Oftentimes, of a juror's idiosyncracies will be apparent to anyone observing the voir dire, but will not appear on the record for a reviewing court.[189] Therefore, a reviewing court should not substitute its judgment and reverse the trial court's findings, "even though it may be convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[190]

SWORN TESTIMONY NOT REQUIRED

A *Batson* hearing does not require trial-type procedures such as the introduction of sworn testimony and cross-examination of the attorneys involved in voir dire.[191] An attorney's unsworn statement as an officer of the court should be sufficient evidence to re-

185. People v. Hooper, 552 N.E.2d 684, 698 (Ill. 1989), *cert. denied*, 111 S. Ct. 284 (1990); People v. Harris, 544 N.E.2d 357 (Ill. 1989), *cert. denied*, 110 S. Ct. 1323 (1990); People v. McDonald, 530 N.E.2d 1351, 1358 (Ill. 1988).

186. United States v. Alston, 895 F.2d 1362, 1366 (11th Cir. 1990). *See also* United States v. Briscoe, 896 F.2d 1476, 1487 (7th Cir.), *cert. denied*, 111 S. Ct. 173 (1990) (appellants carry a heavy burden in challenging the findings of the lower courts).

187. People v. Mack, 538 N.E.2d 1107, 1111 (Ill. 1989) *cert. denied*, 493 U.S. 1093 (1990).

188. Batson v. Kentucky, 476 U.S. 76, 97-98 (1986). *See also* United States v. Grandison, 885 F.2d 143, 149 (4th Cir. 1989) (upholding the trial court's finding of no prima facie case of discrimination); People v. King, 241 Cal. Rptr. 189, 194-95 (Cal. Ct. App. 1989) (courts are especially likely to accord great deference to the trial court when the case is a "close one"); Bradley v. State, 562 So. 2d 1276, 1283 (Miss. 1990).

189. People v. Thompson, 435 N.Y.S.2d 739, (App. Div. 1981).

190. People v. Hooper, 552 N.E.2d 684 (Ill. 1990) (citing Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985)).

191. United States v. Tindle, 860 F.2d 125, 130 (4th Cir. 1988); United States v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988); People v. Young, 538 N.E.2d 453 (Ill. 1989).

but his opponent's prima facie case.[192] Justice O'Connor's concurring opinion in *Hernandez v. New York*[193] amplified the Court's concern that a *Batson* hearing should not be turned "into a full blown disparate impact trial, with statistical evidence and expert testimony" on issues involving the alleged discriminatory practices of one of the parties.[194]

If a prima facie violation is established, counsel should resist any suggestion that he be required to swear an oath before offering explanations to justify the use of his peremptory challenges. This might subject him to cross-examination by opposing counsel as well. Although a number of decisions have noted that the attorneys were sworn in before giving their explanations,[195] a number of courts have rejected proposals that would require an attorney be sworn and made subject to cross-examination during a *Batson* hearing.[196] Those courts have held that an attorney's representations are sufficient evidence for purposes of a *Batson* hearing as to why a peremptory challenge was exercised.

ATTORNEY NOTES

It is within the discretion of the trial court to order production of an attorney's notes that were made during voir dire.[197] However, the vast majority of jurisdictions that have addressed this issue have found that an attorney's notes are protected from disclosure under a "work product" doctrine.[198] This is especially true when a tran-

192. *Mack*, 538 N.E.2d at 1117.

193. 111 S. Ct. 1859, 1873 (1991) (O'Connor, J., concurring).

194. *Id.* at 1874 (O'Connor, J., concurring). Justice O'Connor added that such a procedure would be "antithetical to the nature and purpose of the peremptory challenge." *Id.*

195. *See, e.g.*, United States v. Biaggi, 673 F. Supp. 96, 98 (S.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir. 1988). *See also* People v. McDonald, 530 N.E.2d 1351, 1355 (Ill. 1988); Hawkins v. State, 793 S.W.2d 291 (Tex. Ct. App. 1990).

196. *See* State v. Jackson, 368 S.E.2d 838, 841-42 (N.C. 1988) (holding that a defendant does not have a right to cross examine a prosecutor and require him to explain his reasons for a peremptory challenge), *cert. denied*, 490 U.S. 1110 (1989). *See also* People v. Young, 538 N.E.2d 453, 459-60 (Ill. 1989), *cert. denied*, 110 S. Ct. 3290 (1990).

197. People v. Mack, 538 N.E.2d 1107, 1115 (Ill. 1989), *cert. denied*, 493 U.S. 1093 (1990); Guilder v. State, 794 S.W.2d 765 (Tex. Ct. App. 1990) (determination of what materials are discernable by a party raising a *Batson* challenge committed to the discretion of the trial court).

198. *Mack*, 538 N.E.2d at 1115-16. *See also* Foster v. State, 374 S.E.2d 188 (Ga. 1988), *cert. denied*, 490 U.S. 1085 (1989); State v. Antwine, 743 S.W.2d 51 (Mo. 1987) (en banc); Guilder v. State, 794 S.W.2d 765 (Tex. Ct. App. 1990). One of the few decisions that appears to have ordered production of an attorney's notes is Salazar v. State, 795 S.W.2d 1987 (Tex. Crim. App. 1990), which required their production under Tex. R. Crim. Evid. 611, after an attorney used his notes to refresh his recollection as to the reasons why he exercised a challenge. However, two later cases from that jurisdiction avoided the production issue by finding that the issue had been waived when the notes were not made a part of the

script of the voir dire is available, since any notation by counsel, other than a juror's voir dire answers, would constitute counsel's theories, opinions or conclusions.[199]

An attorney's notes can be used to rebut a defendant's prima facie showing of discrimination.[200] The disclosure of an attorney's notes will not necessarily be required even if the trial court relies on them in ruling on a *Batson* challenge.[201] In an appropriate case, the court may allow a party to rebut a prima facie showing of discrimination by providing an *in camera ex parte* explanation in the form of oral statements or written materials.[202] The use of *ex-parte* procedures are particularly appropriate where an attorney's justification for a given challenge would require disclosure of trial strategies or other information which might hinder his ability to fairly present his case.[203]

While the vast majority of decisions addressing this issue have not required the production of an attorney's notes, they are potentially discoverable and, more importantly, can be used to rebut an opponent's prima facie case. An attorney's notes could be of critical importance should an appellate court remand a matter, and counsel is forced to explain the reasons behind a peremptory challenge several years later. Therefore, counsel should consider taking notes during the jury selection. During voir dire, trial counsel should record specific factors about a particular juror's demeanor and manner of answering questions which might serve as a basis for challenging that juror.

There is a plethora of books and articles addressing non-verbal communication in the courtroom which trial counsel should be familiar. Any negative or unfriendly "indicators" exhibited by a juror during voir dire should be recorded in an attorney's notes so that he will be able to make an adequate record should he need to describe the aspect of a juror's demeanor caused him to exercise a perpemptory challenge.[204]

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record for their review. *See* Hawkins v. State, 793 S.W.2d 291 (Tex. Ct. App. 1990); Gaines v. Texas, 811 S.W.2d 24 (Tex. Ct. App. 1991).

199. *Mack*, 538 N.E.2d at 1115-16.

200. *Id.*

201. United States v. Tucker, 836 F.2d 334, 338-40 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3154 (1989).

202. United States v. Tindle, 860 F.2d 125, 131-32 (4th Cir. 1988) (*in camera* inspection of attorney's notes held justified where notes contained trial strategy), *cert. denied*, 490 U.S. 1114 (1989); United States v. Davis, 809 F.2d 1194, 1200-03 (6th Cir.) (*in camera* inspection held justified), *cert. denied*, 483 U.S. 1007 (1987). *But see* United States v. Thompson, 827 F.2d 1254, 1259-61 (9th Cir. 1987) (*in camera* inspection held to be an abuse of discretion).

203. *See* United States v. Tindle, 860 F.2d 125, 131-32 (4th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

204. Typical negative or unfriendly indicators include: eye contact of short duration or averted eyes; unpleasant facial expressions; rigid body position; a

WAIVER OF RIGHT TO CONTEST THE USE OF PEREMPTORY CHALLENGES

It is critical that motions addressing the discriminatory use of a peremptory challenge be made promptly.[205] Challenges to the composition of a jury must be raised before the jury is sworn.[206] If a party does not contest the exercise of a peremptory challenge until after a jury has been sworn, the party has waived the issue, and it may not be raised on appeal.[207] On the other hand, if an attorney defending a *Batson* claim fails to argue the waiver issue before the trial court, he will be estopped from arguing the untimeliness of his opponent's *Batson* challenge on appeal.[208]

MAKING THE RECORD

A party cannot challenge his opponent's peremptory strikes as being racially motivated unless there is evidence in the record establishing the race or ethnicity of the excluded juror.[209] Several courts have gone so far as to hold that a party waives its *Batson*

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closed body position such as arms folded, clenched fists, and indirect body orientation. For further information on non-verbal communication in the courtroom see, e.g., JUDEE K. BURGOON & THOMAS SAINE, THE UNSPOKEN DIALOGUE: AN INTRODUCTION TO NON-VERBAL COMMUNICATION (1978); PAUL EKMAN & WALLACE FRIESEN, UNMASKING THE FACE: A GUIDE TO RECOGNIZING EMOTIONS FROM FACIAL EXPRESSION (1975); GERALD NIERENBERG & CALERO, HOW TO READ A PERSON LIKE A BOOK (1973); THOMAS SANNITO & PETER MCGOVERN, COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS (1985).

205. Real v. Hogan, 828 F.2d 58, 62 (1st Cir. 1987) (plaintiff waved objection to the exclusion of male jurors in a civil action, by failing to make a contemporaneous objection before trial court). *See also* Weekly v. State, 496 N.E.2d 29, 31 (Ind. 1986) (party waived constitutional issue by making only an objection without stating the reasons or underlying basis).

206. People v. Evans, 530 N.E.2d 1360, 1364 (Ill. 1988), *cert. denied*, 490 U.S. 1113 (1989). *See also* United States v. Erwin, 793 F.2d 656, 667-68 (5th Cir.) (motion to strike was untimely when made before the jury was empaneled but more than one week after the peremptory challenges had been exercised and the remaining venire excused), *cert. denied*, 479 U.S. 991 (1986); Munn v. Alger, 730 F. Supp. 21, 29 (N.D. Miss. 1990) (court found that a party waived his *Batson* challenge when the issue was raised for the first time during post-trial motions), *aff'd*, 924 F.2d 568 (5th Cir. 1991), *cert. denied*, 1991 U.S. LEXIS 4951 (1991); Clark v. State, 562 So. 2d 620, 624 (Ala. Crim. App. 1990) (defendant waived *Batson* objection when motion was not made until after opening statements); State v. Harris, 754 P.2d 1139, 1140 (Ariz. 1988) (defendant waived *Batson* objection where motion was made after jury was sworn and stricken jurors were excused).

207. United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1987). *See also* State v. Peck, 719 S.W.2d 553, 555 (Tenn. Crim. App. 1986) (once a jury has been empaneled and accepted, a party will not be heard to complain of the make-up of its panel).

208. People v. Harris, 544 N.E.2d 357, 378 (Ill. 1989), *cert. denied*, 110 S. Ct. 1323 (1990); State v. Lee, 747 S.W.2d 57, 58-59 (Tex. Ct. App. 1988).

209. People v. Harris, 544 N.E.2d 357, 378 (Ill. 1989), *cert. denied*, 110 S. Ct. 1323 (1990); People v. Evans, 530 N.E.2d 1360, 1364-65 (Ill. 1988), *cert. denied*, 490 U.S. 1113 (1989). *See also* People v. Wheeler, 583 P.2d 748, 753 n.1 (Cal. 1978)

objection if it fails to obtain a transcript of the voir dire.[210] In one reported decision,[211] the parties stipulated that five jurors stricken by the State had been black. The defendant also claimed on appeal that the exclusion of a sixth juror was racially motivated.[212] The court held, however, that the defendant waived his claim concerning the sixth juror because there was no evidence in the record that identified that juror's race.[213]

It is error for a trial court to go beyond the record to determine the race of a disputed juror.[214] In another decision, it was noted that the trial court should have considered only the State's exclusion of those members of the venire that the parties had agreed were black in determining whether the defendant had established a prima facie case of discrimination.[215] However, a reviewing court is "plainly entitled" to consider an attorney's statements at a *Batson* hearing to determine the race of an excluded juror.[216]

Trial counsel wishing to raise a *Batson* challenge must be ready to establish the racial or ethnic composition of the venire, as well as the "race" of the excluded and selected jurors. In addition, counsel should be prepared to demonstrate common characteristics or traits between the excluded and selected jurors and if relevant, the racial or ethnic backgrounds of the parties, the witnesses and the attorneys involved.

Most of the necessary information can be established simply through juror questionnaire cards that can be introduced into the record. In addition, stipulations or agreements of counsel can establish a sufficient appellate record.[217]

One practical problem for trial counsel and the court is attempting to determine the particular ethnic group that a juror belongs to. A number of courts have relied upon the surnames of the

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(demonstrating how counsel may establish race of a juror to provide an adequate record).

210. *See, e.g.*, Jackson v. Housing Auth., 364 S.E.2d 416, 417 (N.C. 1988); Reed v. State, 751 S.W.2d 607, 610 (Tex. Ct. App. 1990) (*Batson* challenges cannot be reviewed in the absence of the complete voir dire examination).

211. *Evans*, 530 N.E.2d at 1364-65.

212. *Id.*

213. *Id.*

214. People v. Harris, 544 N.E.2d 357, 378-79 (Ill. 1989), *cert. denied*, 110 S. Ct. 1323 (1990).

215. *Id.* at 378-79.

216. *See* People v. Baisten, 560 N.E.2d 1060, 1069 (Ill. App. Ct. 1990), *appeal denied*, 564 N.E.2d 840 (Ill. 1990); Stanley v. State, 542 A.2d 1267, 1274 (Md. 1988), *appeal after remand*, 582 A.2d 532 (Md. Ct. Spec. App. 1990), *cert. denied*, 587 A.2d 247 (Md. 1991).

217. People v. Evans, 530 N.E.2d 1360, 1367 (Ill. 1988), *cert. denied*, 490 U.S. 1113 (1989). *See* People v. Baisten, 560 N.E.2d 1060 (Ill. App. Ct. 1990).

juror.[218] As noted earlier, the surname of a juror is not necessarily a true indicator of his ethnic heritage, and counsel opposing a *Batson* challenge should not presume simply on the basis of a jurors' surname that he or she belongs to a given ethnic group. Counsel should be ready to argue that without more information in the record his opponent has not demonstrated that the juror was a member of a given ethnic group and has not met his prima facie burden.[219] Furthermore, counsel should argue that excluded jurors should not be considered on a "collective" basis unless the petitioner demonstrates that those jurors share the same "ethnic characteristics" or "community of interests." Trial counsel should argue against the use of group descriptions, such as "Latino" or "Hispanic," which might improperly combine jurors with dissimilar cultural backgrounds.[220]

Another difficult issue that trial counsel will be left to grapple with is the growing trend among trial courts to conduct the entire voir dire. While a trial court's voir dire examination must be sufficient to enable the parties to remove prospective jurors who will not impartially follow the court's instructions or the evidence,[221] a trial judge has broad discretion in determining what questions may be asked during voir dire, and will not be reversed absent an abuse of that discretion.[222] Trial counsel may therefore lack the necessary information to properly raise a *Batson* challenge since the trial court need not necessarily inquire into the ethnic background of a prospective juror.[223]

CONSOLIDATED HEARING

A trial court may request an attorney to furnish explanations why he exercised a peremptory challenge as soon as opposing counsel raises the issue. While counsel may choose to furnish an expla-

218. Esquavel v. McCotter, 791 F.2d 350, 351 (5th Cir. 1986). *But see* United States v. Campiore, 942 F.2d 429, 433 (7th Cir. 1991) (surname alone is insufficient to show ethnicity).

219. *See, e.g.*, United States v. DiPasquale, 864 F.2d 271, 277 (3d Cir. 1988), *cert. denied sub. nom.*, Di Noiscio v. United States, 492 U.S. 906 (1989). United States v. Sgro, 816 F.2d 30 (1st Cir. 1987) (conclusory allegations that persons with Italian-American surnames belong to a "cognizable" ehnic group held insufficient to establish a prima facie showing), *cert. denied*, 484 U.S. 1063 (1988).

220. *See supra* notes 44-61 and accompanying text.

221. United States v. Hasting, 739 F.2d 1269, 1273 (7th Cir. 1984).

222. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

223. *See* United States v. Greer, 939 F.2d 1076, 1086 (5th Cir. 1991) (affirming the trial court's denial of a defense request to ask prospective Jewish jurors to identify themselves); United States v. McAnderson, 914 F.2d 934 (7th Cir. 1990) (affirming trial court's refusal to inquire about prejudice due to the evidence of the Black Muslim faith). *But see* People v. Harris, 544 N.E.2d 357, 383 (Ill. 1989) (court permitted *Batson* challenge when attorney did not have sufficient information about a juror to feel comfortable with her on the jury).

nation at this point in the proceedings, care must be taken so that the trial judge follows the analytical framework set down by the Supreme Court in *Batson*. While any statement an attorney makes at this stage of the proceedings can be considered by the trial court in determining whether a party has established a prima facie violation, counsel runs the risk that a reviewing court may remand the case for a full *Batson* hearing should it disagree with the trial court's ruling or with the manner in which the *Batson* hearing was held.[224]

A number of courts have cautioned against the practice of holding a consolidated hearing at the trial court level where attorneys contemporaneously explain their reasons for the exercise of a peremptory challenge.[225] Those reviewing courts have indicated a preference that trial courts follow the "clear delineation" of *Batson's* analytical steps.[226] For example, one reviewing court, after determining that the trial judge erred when he ruled that the defendant had not established a prima facie case of discrimination, noted that "[o]rdinarily, addressing the second question might require remand to the trial court for another *Batson* hearing in order to arrive at a new, procedurally correct finding on the ultimate issue of purposeful discrimination, followed by the deferential treatment that we should normally accord such a finding."[227]

While a plurality of the Court in *Hernandez* was not troubled by the consolidated hearing held at the trial court level, the divergence between the plurality and concurring opinions demonstrates the potential difficulties that a consolidated hearing can pose for a reviewing court.

In light of the Court's holding in *Hernandez* that a contemporaneous explanation "moots" the issue of whether a prima facie violation has been established,[228] trial counsel should insist that the court first determine whether a prima facie case of discrimination has been made before requiring an explanation from counsel. If counsel is forced to make a statement at this time, he should make

224. *See* People v. Hope, 560 N.E.2d 849 (Ill. 1990), *vacated on other grounds*, 111 S. Ct. 2792 (1991).

225. United States v. Hamilton, 850 F.2d 1038, 1040-41 (4th Cir. 1988); United States v. Love, 815 F.2d 53, 54-55 (8th Cir. 1988); United States v. Cartlidge, 808 F.2d 1064, 1070 (5th Cir. 1987); State v. Slappy, 522 So. 2d 18 (Fla. 1988); Gamble v. State, 357 S.E.2d 792 (Ga. 1987); Weekly v. State, 496 N.E.2d 29, 31 (Ind. 1986), State v. Barber, 539 A.2d 76, 77-78 (R.I. 1988).

226. *See* United States v. Johnson, 941 F.2d 1102, 1107-08 (19th Cir. 1991) (stressing the shifting of the burden of proof); People v. Celsarters, 284 Cal. Rptr. 410, 416 (Cal. Ct. App. 1991) (prima facie burden is a distinct step which should be treated as such); People v. Jackson, No. 68012, 1991 Ill. LEXIS 83 (Sept. 26, 1991).

227. People v. Hope, 560 N.E.2d 849 (Ill. 1990), *vacated on other grounds*, 111 S. Ct. 2792 (1991).

228. Hernandez v. New York, 111 S. Ct. 1859 (1991).

clear that his arguments are merely intended to address the issue of whether a prima facie showing of discrimination has been established.[229] Because the number of peremptory challenges available in a civil trial is generally less than the number available in a criminal case, the party raising a *Batson* challenge in a civil case should have a more difficult time establishing a prima facie violation. Trial counsel forced to defend a *Batson* challenge should initially direct their efforts at convincing the trial court that a prima facie showing has not been established.

CORPORATE PARTY'S RIGHT TO RAISE A BATSON CHALLENGE

In *Dias v. Sky Chefs, Inc.*,[230] the Ninth Circuit Court of Appeals held that a corporate defendant could not raise a *Batson* claim since nothing in equal protection jurisprudence suggests a corporation is considered a "suspect class."[231] The court also noted that a corporation cannot claim that members of its "race" were improperly excluded from jury service.[232] However, following *Powers v. Ohio*,[233] the party raising a *Batson* challenge no longer needs to be a member of the same race as the excluded juror. On June 10, 1991, the United States Supreme Court vacated the judgment in *Dias*[234] and remanded the case to the Ninth Circuit for further consideration in light of its decision in *Edmonson*.[235]

Since one of the reasons for allowing the third party equal protection claim in *Edmonson* was the Court's concern that a selection procedure that allowed the exclusion of a juror solely on the basis of a juror's race would undermine public confidence in our system of justice, it should not matter whether the party raising the *Batson* challenge is a individual or a corporation. Following *Powers*, any party in a civil action, irrespective of its status, should now have standing to raise the issue. Therefore, a corporate party should also be able to raise a *Batson* challenge.

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229. In State v. Antwine, 743 S.W.2d 51 (Mo. 1987), *cert. denied*, 486 U.S. 1017 (1988), the Missouri Supreme Court held that trial judges should consider explanations given as part of the process for determining whether a prima facie case of discrimination has been established. *Id.* at 64. However, in People v. Hope, 560 N.E.2d 849 (Ill. 1990), *vacated*, 111 S. Ct. 2792 (1991), the Illinois Supreme Court observed that Missouri appeared to be the only state approving this procedure. *Id.* at 861. In *Hope*, the Illinois Supreme Court determined that an explanation given at this point in the proceedings could be classified as an attorney's statement made during voir dire, which *Batson* permits to be considered. *Id.* at 866.

230. Dias v. Sky Chefs, Inc., 919 F.2d 1370 (9th Cir. 1990), *vacated*, 111 S. Ct. 2791 (1991).

231. *Id.* at 1378-79.

232. *Id.* at 1379.

233. 111 S. Ct. 1364 (1991).

234. Sky Chefs, Inc. v. Dias, 111 S. Ct. 2791 (1991).

235. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).

CONCLUSION

Peremptory challenges, like the governmental policies Lincoln spoke about in 1864, are not "wholly evil." They have played a vital role in our Anglo-American system of justice for over 300 years. The Supreme Court, recognizing their historical origins and the important role they serve in the trial process, appears unwilling to eliminate their use. In *Batson*, the Supreme Court attempted to limit the abuse of peremptory challenges, by prohibiting racially motivated challenges. The *Powers*, *Hernandez*, and *Edmonson* decisions laid out further guidelines to prevent their misuse. Those decisions represent, as Lincoln put it, the Supreme Court's best judgment between the unbridled use of peremptory challenges that trial attorneys have historically enjoyed and their total elimination that many have argued for. The *Batson-Edmonson* line of decisions complicate the work of the trial attorney in the jury selection process. No longer may attorneys base their decisions about a juror on "gut reactions." However, with a thorough working knowledge of the decisional law in the area and an attentive eye and ear, experienced trial counsel should be able to readily justify their actions.