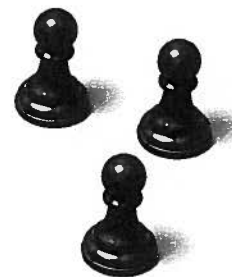


# ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION IN JURY SELECTION



by David G. Wirtes, Jr.

## 1. Introduction

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that a prosecutor cannot strike a prospective African-American juror from an African-American defendant's jury for reasons based solely on race. The Supreme Court extended its holding in *Batson* to apply to white defendants in *Powers v. Ohio*, 499 U.S. 400 (1991); to civil cases in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); and to gender-based peremptory challenges in *J.B. v. Alabama*, 511 U.S. 127 (1994). The Alabama Supreme Court embraced the *Batson* principles and methodology in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987).<sup>1</sup>

A *Batson* challenge involves a three-step process: 1) establishing a prima facie case of racial or gender-based discrimination; 2) providing a sufficiently race- or gender-neutral reason for each questionable strike; and 3) showing that the explanations are pretextual or a sham.<sup>2</sup>

This article addresses the first step of the *Batson* framework; primarily, issues concerning the development of a prima facie case and the determination of whether such a case has been sufficiently established. The party alleging that a *Batson* violation has occurred bears the initial burden of establishing a prima facie case.<sup>3</sup> In order to establish a prima facie case of purposeful discrimination, the objecting party must show: (1) "that he is a member of a cognizable racial group"; (2) "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race"; and (3) "that these facts and any other relevant circumstances raised an inference" that the prosecu-

tor used that practice [peremptory challenges] to exclude veniremen from the petit jury on account of their race."<sup>4</sup> More recently, courts have held that the moving party need NOT be a member of the same racial group as the excluded jurors in order to raise a *Batson* objection.<sup>5</sup>

\* In order to establish a prima facie case, the objecting party is NOT required to show an inference of discriminatory intent with regard to each questionable challenge. An inference that only ONE potential juror was removed solely on account of race will be sufficient.<sup>6</sup>

## 2. Objecting Party Need Establish ONLY an "Inference" of Discrimination

Importantly, in *Johnson v. California*, 545 U.S. 162 (2005), the Supreme Court held that the state courts of California were erroneously applying *Batson* by requiring an objecting party to show "that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias."<sup>7</sup> The Supreme Court used *Johnson* to explain that an objecting party need support only an inference of discrimination in order to require the striking party to give race-neutral reasons for his strikes.<sup>8</sup>

## 3. Courts Should Consider All Relevant Evidence

"In determining whether there is a prima facie case, the court is to consider 'all relevant circumstances' which could lead to an inference of discrimination." *Ex parte Branch*, 526 So.2d at 622, citing *Batson*, 476 U.S. at 93 (emphasis added); *Bird*, 594 So.2d at 679; *Lewis v. State*, 2006 WL 1120648 (Ala.Crim.App. 2006) ("A

defendant makes out a prima facie case of discriminatory jury selection by 'the totality of the relevant facts' surrounding a prosecutor's conduct during the trial."). Cf. *Mines v. State*, 671 So.2d 121, 123 (Ala.Crim.App. 1995) ("Even if the prosecution uses all of its peremptory strikes to exclude black jurors, a trial court is not required to rule that a prima facie case of discrimination has been made if other relevant evidence sheds light upon the issue.").

## 4. Illustrative Types of Evidence That Can Be Used to Raise the Inference of Discrimination

In *Ex parte Bird*, 594 So.2d 676, 679-80 (Ala. 1991), the Alabama Supreme Court provided a non-exhaustive list of evidence that can be used to establish a prima facie case of discrimination:

- (1) "Evidence that the jurors in question share only this one characteristic - their membership in the group - and that in all other respects they were as heterogeneous as the community as a whole. . . . For instance 'it may be significant that the persons challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions,' [thereby] indicating that race was the deciding factor."<sup>9</sup>
- (2) "A pattern of strikes against black [substitute 'white,' 'male,' or 'female'] jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors."<sup>10</sup>
- (3) "The past conduct of the attorney in using peremptory challenges to strike all blacks from the jury venire."<sup>11</sup>



# ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION IN JURY SELECTION

- (4) "The type and manner of the striking attorney's questions and statements during voir dire, including nothing more than desultory voir dire."<sup>12</sup>
- (5) "The type and manner of questions directed to the challenged juror, including a lack of questions or lack of meaningful questions."<sup>13</sup>

[T]he failure . . . to engage in any meaningful voir dire on a subject of alleged concern is evidence that the explanation is a sham and a pretext for discrimination. *Branch*, 526 So.2d at 623; see also *People v. Wheeler*, 22 Cal.3d 258, 281, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905 (1978); *Slappy v. State*, 503 So.2d 350, 355 (Fla. Dist.Ct.App. 1987). Thus, if the [striking party] thinks that a venire member may be related to a former defendant, she must ask the venire member. . . . [S]ee also *Floyd v. State*, 539 So.2d 357, 363 (Ala.Crim.App. 1987) (Mere suspicion of a relationship insufficient).

Here, a simple question directed to the venire member could have dispelled any doubt about a possible relationship. However, neither the State nor the court engaged in any voir dire on this subject. In the absence of any examination, the trial judge had nothing on which to make the required "sincere and reasonable effort to evaluate the evidence and explanations based on the circumstances as he [knew] them." *Branch*, 526 So.2d at 624. In reality, he had nothing on which to base an evaluation of the proffered rationale except the averment of the prosecutrix, which, in substance, amounted to a "mere general assertion" of non-discrimination. See *Batson*, 476

U.S. at 94.<sup>14</sup>

- (6) "Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same manner; e.g., in *Slappy*, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary school teacher was not challenged."<sup>15</sup>
- (7) "Disparate examination of members of the venire; e.g., in *Slappy*, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors."<sup>16</sup>
- (8) "Circumstantial evidence of intent must be proven by disparate impact where all or most of the challenges were used to strike blacks (or whites, or males or females) from the venire."<sup>17</sup>
- (9) "The [party making the challenged strikes] used peremptory challenges to dismiss all or most black [or other] jurors." Insufficiency of proof with regard to any of the above factors will NOT preclude a finding of prima facie discrimination. The Alabama Criminal Court of Appeals explains: We hold that the trial court erred in finding that in order to prove a prima facie case of racial discrimination in the striking of jurors, the defendant must establish a history of discriminatory striking of jurors by the prosecution. . . . One of the factors that can be considered by the court is "past conduct of the state's attorney in using peremptory challenges to strike all blacks from the jury venire." *Ex parte Branch*, 526 So.2d at 623. However, a defendant is not required to show that particular factor, or any other particular factor from the list of illustrative

evidence, before the trial court can proceed with the *Batson* hearing.

*Bishop v. State*, 690 So.2d 496, 497 (Ala.Crim.App. 1995).<sup>18</sup>

## 5. Even a Weak Prima Facie Case May Require a Response

Courts evaluate the strength of prima facie case relative to the number of *Bird* factors present.<sup>19</sup> The Alabama Supreme Court explains:

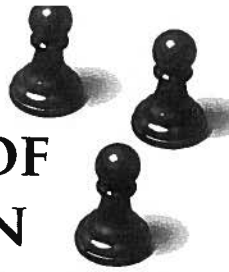
Although a prima facie case is always rebuttable, the existence of a number of suspicious factors requires a more cogent explanation in rebuttal. Consequently, the burden of production, which shifts to the State once a prima facie case has been presented, increases in proportion to the strength of the defendant's prima facie case. In other words, a "weak prima facie case may be rebutted more readily than a strong one."<sup>20</sup>

The Alabama Court of Civil Appeals' holding in *Gennie v. VanHorne*, 707 So.2d 266 (Ala.Civ.App. 1997), illustrates the court's acceptance of "weak" evidence as sufficient proof of prima facie discrimination. In *Gennie*, the moving party objected to his opponent's use of 5 of 11 peremptory strikes to remove African-American jurors from the venire. The appellate court affirmed the trial judge's determination that this evidence alone, although "weak," was sufficient to establish a prima facie case of discrimination.<sup>21</sup> As such, the ruling implies that a moving party can establish a prima facie case solely on the basis that his opponent "used peremptory challenges to dismiss all or most black jurors."<sup>22</sup>

## 6. Objecting Party is NOT Required to Prove Disproportionality

Alabama courts do not require an objecting party to show that the percentage of jurors from the class allegedly discriminated against is proportionately less than members of

# ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION IN JURY SELECTION



that class on the venire and/or within the county. There had been some historical confusion as to the application of this rule. The Alabama Supreme Court explained in *Ex parte Thomas*, 659 So.2d 3, 5-8 (Ala. 1994), that prior to its decision in *Thomas* courts had incorrectly denied Batson motions where the percentage of African-American [or "white," or "female"] jurors on the panel exceeded the percentage on the original venire. The Court attributed these denials to misinterpretation of certain language in *Harrell v. State*, 571 So.2d 1270 (Ala. 1990) (*Harrell II*)<sup>23</sup> to suggest that "if statistics can be used to show the presence of a discriminatory impact, then they can also be used to show the absence of such an impact."<sup>24</sup> This interpretation "had the inappropriate effect of preventing a finding of prima facie showing of discrimination, even where . . . the prosecutor used a significant number of his strikes to remove blacks from the venire."<sup>25</sup> The Court of Criminal Appeals, relying on this interpretation in several cases following *Harrell II*, erroneously refused to address whether a prima facie case had been established where the record did not show disproportionality.<sup>26</sup>

In *Ex Parte Thomas*, the Supreme Court rejected this line of reasoning and held that statistics showing lack of disproportionality alone do NOT preclude a finding of prima facie discrimination.<sup>27</sup> The Court stated:

We disapprove this statement in *Harrell II* as it has been applied in these instances, because such applications prevent a defendant from using a factor indicating discrimination that was approved in both *Branch* and *Batson*. Such an application was not the Court's intent.

....

We emphasize that our disapproval of the construction that has been given *Harrell II* does not mean that an increased percentage of blacks on the jury can never be a circumstance to be

considered in ruling whether a discriminatory use of peremptory strikes has been shown. In a proper case, the fact that the percentage of blacks on the jury is higher than the percentage of blacks on the venire may be a factor to be considered in deciding whether a prima facie case of discrimination has been made or rebutted. However, where, as here, the prosecutor has used such a large portion of his strikes against blacks as to indicate a pattern of striking blacks from the venire, the fact that the jury has a higher percentage of blacks than the venire had does not mean that no prima facie case of discrimination has been made.<sup>28</sup>

Since *Thomas*, appellate courts have consistently reversed trial court findings of no prima facie case of discrimination when the record implies that the determination was based solely on lack of disproportionality.<sup>29</sup> For example, in *Nix v. Chilton County Commission*, 667 So.2d 719, 721 (Ala. 1995), the Supreme Court explained:

[T]he reversible error occurred when the trial court held that the Commission was not required to give a race-neutral reason until *Nix* had affirmatively shown that the venire was a disproportionate venire." (emphasis in original). The trial court never reached the *Batson* hearing stage, and consequently, no initial determination was made as to whether *Nix* had made a prima facie showing of discrimination. Therefore, we must reverse the judgement of the trial court and remand this case for a *Batson* hearing.

Similarly, the Alabama Court of Criminal Appeals explained:

[E]vidence that a greater percentage of blacks sat on the jury than were on the venire does not relieve the trial court from determining whether the defendant has established a prima facie case of discrimination. This case is similar to *Ex parte Thomas* in that the trial court's denial of *Bishop's*

*Batson* motion was based, at least in part, on the dicta in *Harrell* that the Alabama Supreme Court has now disapproved. The trial court cannot base its determination of whether *Bishop* has established a prima facie case of discrimination solely on a comparison of the percentage of blacks on the jury as to the percentage of blacks on the venire in determining.

*Bishop v. State*, 690 So.2d 496, 497 (Ala.Crim.App. 1995) (citing *Ex parte Thomas*, supra).<sup>30</sup>

## 7. Illustrative Cases Where Prima Facie Proof of Discrimination Deemed Insufficient

The following evidence was held to be insufficient proof of a prima facie case of discrimination in jury selection:

- (1) *Williford v. Emerton*, 935 So. 2d 1150 (Ala. 2004).
  - (1) Evidence that the final jury consisted of 1 white juror and 11 African-American jurors.
  - (2) "This Court has repeatedly listed the different ways a party can establish a prima facie case of discrimination for purposes of a *Batson* claim; however, the [moving party] instead relied upon 'numbers alone.' For that reason, the trial court properly determined that the [moving party] had not established a prima facie case and denied their *Batson* motion without requiring the [striking party] to provide race-neutral reasons for their strikes." *Id.* at 1157. (emphasis added).
- (2) *Sharrief v. Gerlach*, 798 So. 2d 646 (Ala. 2001).
  - (1) Evidence that the striking party used 7 of 10 peremptory challenges to remove female jurors from the venire; 3 remained on the final panel.
  - (2) "The plaintiffs' only objection regarding the defendant's strikes of women . . . was to the fact that



# ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION IN JURY SELECTION

only three women were left on the jury." *Id.* at 655. (emphasis added). "Based on the record, we conclude that the [moving party] did not present a prima facie case of improper strikes on the basis of gender." *Id.*

(3) *Ex Parte Pressley*, 770 So. 2d 143 (Ala. 2000).

- (1) Evidence that the striking party used its peremptory challenges to remove 4 of 6 African-American jurors from the venire.
- (2) The moving party objected on the basis that such action constituted a "pattern of discriminatory striking." *Id.* at 146.
- (3) The moving party "failed to show 'any additional information' as evidence of a 'pattern.'" *Id.* at 146. Numbers "standing alone" are insufficient proof of prima facie discrimination. *Id.* at 147. (emphasis added).

(4) *McElemore v. State*, 798 So.2d 693, 696 (Ala.Crim.App. 2000) (emphasis added).

- (1) "[I]t is important that the defendant come forward with facts, not just numbers alone, when asking the [trial] court to find a prima facie case of . . . discrimination."

(5) *Ex parte Trawick*, 698 So.2d 162 (Ala. 1997).

- (1) Evidence that the striking party used "many of its strikes to remove women from the venire." *Id.* at 168
- (2) "A showing that a party had used a high percentage of strikes against a minority group was not alone enough. *Id.* (emphasis added).

(6) *Mines v. State*, 671 So.2d 121 (Ala. Crim.App. 1995).

- (1) The striking party used either 4 or 5 of 6 peremptory challenges to remove African-American jurors

from the venire.

- (2) The appellant provided no other proof of discriminatory intent.

## 8. Illustrative Cases Where Prima Facie Proof of Discrimination Deemed Sufficient

(1) *Gennie v. VanHorne*, 707 So.2d 266, 270 (Ala.Civ.App. 1997).

- (1) The striking party used 5 of 11 peremptory challenges to remove African-American jurors from the venire.
- (2) Evidence established "weak," yet sufficient proof of prima facie racial discrimination.

(2) *Bell v. State*, 676 So.2d 1349, 1352 (Ala.Crim.App. 1995).

- (1) The striking party used 5 of 6 peremptory challenges to remove African-American jurors from the venire.
- (2) Evidence illustrated a "pattern of strikes," establishing a "rebuttable prima facie case of racial discrimination."

(3) *Bishop v. State*, 690 So.2d 498, 500 (Ala.Crim.App. 1995).

- (1) The striking party used 9 of 14 peremptory challenges to strike African-American veniremembers.
- (2) "Several of the black jurors who were struck shared characteristics with white jurors who were not struck and we can find no reason for striking these jurors other than their race." *Id.* For example,

- (i) Two of the African-American jurors challenged responded only to knowing the victim's family (a characteristic generally favorable to the State/striking party). Other jurors of different racial backgrounds providing similar

responses were not struck.

- (ii) One African-American juror struck responded ONLY to serving previously on a jury. The prosecutor did not inquire as to the outcome of the case. Other jurors of different racial backgrounds providing similar responses were not struck.

(3) One African-American juror struck did not respond to any questions during voir dire.

- (4) "[W]e hold that the appellant met his burden of making a prima facie showing of discrimination in this case."

(4) *Ex parte Bird*, 594 So.2d 676 (Ala. 1991).

- (1) The 52-member venire consisted of 19 (36%) African-American potential jurors, whereas the final panel contained only 1 (8%). "This fact alone reveals a disparate impact and immediately arouses suspicion of the existence of discriminatory intent." *Id.* at 680.

- (2) The striking party used 17 of 20 peremptory challenges (85%) to remove 89% of African-American veniremembers.

- (3) Jurors struck ranged between 19 and 78 years old and represented a variety of occupations, "thus raising the inference that race was the only shared characteristic." *Id.* at 681.

- (4) The striking party removed African-American jurors bearing the same characteristics as white jurors not struck.

- (i) The prosecutor struck an African-American veniremember who stated that he had once served on a jury in a criminal case that had been dismissed, but did not strike a white veniremember who had served on a jury in a criminal

# ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION IN JURY SELECTION



case where the defendant had been acquitted.

(ii) The prosecutor struck a 73 year old African-American veniremember allegedly due to his age, but did not strike a 74 year old white veniremember.

(iii) "Such disparate treatment furnishes strong evidence of discriminatory intent." *Id.* at 681.

(5) "Also relevant is what appears to be a pattern in the use of peremptory strikes by the Montgomery County District Attorney's office." *Id.* at 681.

(i) Four criminal cases out of Montgomery County had been reversed for violation of Batson within the past three years.

(6) "[T]he prosecutors' proffered explanations for their strikes must be examined in light of a particularly strong prima facie case." *Id.* at 682 (emphasis added).

## 9. Recent Alabama Opinions

As noted above, in recent civil cases prior to *Johnson v. California*, the Alabama Supreme Court has required that the moving party present some evidence in addition to "numbers alone" in order to establish a prima facie case of discrimination.<sup>31</sup> These holdings are now subject to question in light of *Johnson v. California*.

Since *Johnson*, the Alabama Court of Criminal Appeals has remanded two capital murder cases for Batson hearings, finding that the record showed an "inference of racially-based discrimination." These opinions signal application of the lower *Johnson* threshold for a prima facie case.<sup>32</sup>

(1) *Lewis v. State*, 2006 WL 1120648 (Ala.Crim.App. 2006).

(1) The striking party used 4 of

its 21 peremptory challenges to remove 4 of 5 African-Americans jurors from the venire; the final panel consisted of 11 white jurors and 1 African-American juror; both alternate jurors were white.

(2) The moving party presented evidence that

(i) some of the African-American jurors struck had provided responses similar to those of white jurors not struck;

(ii) some of the African-American jurors struck had not respond to any questions during voir dire; and

(iii) some of the African-American jurors struck had provided responses favorable to the striking party. *Id.* at \*3.

(3) The striking party presented evidence that (i) meaningful voir dire was directed towards the jurors as a whole; (ii) both African-American and white jurors responded to questions during voir dire; and (iii) some of the African-American jurors struck had provided responses similar to white jurors also struck. *Id.* at \*3

(4) The Court found that a prima facie case of discrimination had been established, holding that "[t]he record here supplies an inference of discrimination on the part of the State." *Id.* at \*3. (emphasis added).

(5) The Court of Criminal Appeals addressed *Johnson v. California* as follows:

The United States Supreme Court reversed, holding that California's "more likely than not" standard was an incorrect standard by which to determine the sufficiency of a prima facie case of purposeful discrimination in jury selection. Given the California

Supreme Court's use of an incorrect standard, together with the fact that the prosecution removed of [sic] all 3 African-American jurors from the venire panel, the Supreme Court held that this evidence was sufficient to establish a permissible inference of discrimination to establish a prima facie case of discrimination under *Batson*.

*Id.* at \*2.

(2) *Floyd v. State*, WL 2811968 (Ala. Crim.App. 2007).

(1) The striking party used 10 of 18 peremptory challenges (55.5%) to remove all but 1 African-American juror from the venire (90.9%); final panel consisted of 12 white jurors and no African-American jurors; 1 alternate juror was African-American. Additionally, the striking party used 12 of 18 peremptory challenges to remove female jurors.

(2) The moving party presented evidence that (i) some of the African-American jurors struck had provided similar responses to white jurors not struck; (ii) some of the African-American jurors struck had not responded to any questions during voir dire; (iii) some of the African-American jurors struck had provided responses favorable to the striking party; and (iv) some females struck were similarly situated to males not struck. *Id.* at \*2.

(3) The Court rejected the striking party's argument that its opponent's allegations were only "bare assertions of discrimination and statistics," finding instead that the record raises "an inference of racially-based discrimination" and therefore establishes a prima facie case of both racial and gender discrimination. *Id.* at \*2.<sup>33</sup> The Court discusses its holding as



# ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION IN JURY SELECTION

follows:

However, as Floyd correctly argued, the State used 55.5% of its strikes to remove 90.9% of the African American venire members. Further, Floyd did not rely on statistics alone. Rather, Floyd correctly noted that four of the stricken venire members did not provide any response in voir dire that would provide a basis for being stricken from the panel. Floyd also argued that five of the African-American venire members struck by the State provided answers during voir dire which, according to Floyd were favorable to the State. Floyd's argument regarding the State's allegedly improper gender-based strikes is considerably less detailed than his race-based argument. However, he does aver that the State used 12 of 18 strikes to remove women from the venire. *Id.* at \*2 (footnote omitted).

## 10. Provision of Race-Neutral Justifications Moots Issue of Prima Facie Discrimination

If the trial court does not formally determine whether a prima facie case of discrimination has been established, but a striking party nevertheless provides explanations for his strikes (regardless of whether statements are offered independently or at the court's request), the appellate court may consider the merits of those explanations on appeal. See *Huntley v. State*, 627 So.2d 1013, 1015-16 (Ala. 1992) (holding that the appellate court "shall not be restricted by the mutable and often overlapping boundaries inherent within a Batson-analysis framework, but, rather, shall focus solely upon the 'propriety of the ultimate finding of discrimination' . . . This is true even where the trial judge has expressly determined that the de-

fendant failed to present a prima facie case."); *Miesner v. State*, 665 So.2d 978, 980 (Ala.Crim.App. 1995) (holding that "whether the court found that the defendant had established a prima facie case of racial discrimination is moot," and "[w]hen the reasons for striking prospective jurors are contained in the record, this court will review those reasons").<sup>34</sup>

The Alabama Criminal Court of Appeals' ruling in *Reese v. State*, 549 So.2d 148 (Ala.Crim.App. 1989) historically created some confusion as to the application of this rule. In *Reese*, the appellate court refused to consider the State's race-neutral justifications<sup>35</sup>; although it had done so in *Currin*, 535 So.2d 221 (Ala. 1988). The court distinguished the two cases as follows:

The distinction between this case and *Currin* lies in the fact that here the trial court specifically ruled, prior to any reasons having been given, that the defendant had not established a prima facie case. In *Currin*, no such ruling was made. Therefore, we could not tell from the judge's ultimate denial of the motion, in *Currin*, whether he found that the defendant failed to make a prima facie showing, or whether he found that the State's reasons were racially neutral. Here, we know the basis for the court's ruling and we hold that it was not 'clearly erroneous.'<sup>36</sup>


The Alabama Supreme Court has expressly rejected this line of reasoning. See *Huntley v. State*, 627 So.2d at 1015-16. The *Huntley* opinion clearly states that appellate courts should consider "all the evidence bearing on the issue of alleged discrimination." *Id.* (emphasis in original). Because evidence of race-neutral justification is "necessarily considered by the trial judge, it is ripe for review." *Id.* The Court further addressed this issue as follows:

Although each logical step within this procedural framework is theoretically severable, considerations

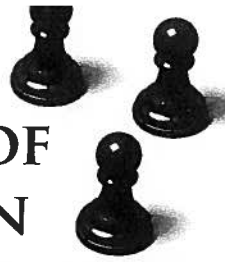
of justice, expediency, and judicial economy oppose a slavish adherence to the framework in practice. First, considerations of judicial economy require a record of all the evidence bearing on the issue of alleged discrimination. Although, technically, the State is under no compulsion to rebut an inference of discrimination until a prima facie case exists, this Court, if it determines that an inference clearly exists, will not hesitate to remand a cause to the trial court with directions to examine the State's explanations.

Moreover, many of the same factors are equally relevant at more than one logical step in a Batson analysis framework. For example, a defendant may both construct a prima facie case and rebut the State's proffered explanations by showing that the prosecution exercised (1) desultory voir dire, (2) "[d]isparate examination of members of the venire," (3) "disparate treatment" of veniremembers who shared certain characteristics other than race, and (4) a number of challenges to black veniremembers disproportionate to their representation on the venire. *Ex parte Branch*, 526 So.2d at 623 24. Thus, the evidence that was, or could have been, propounded by the defendant in rebuttal of the prosecution's explanations rests within the breast of the trial judge, and, necessarily, actuates his judgment as to whether the defendant has presented a prima facie case.

*Id.* at 1015. Recent Alabama Court of Civil Appeals opinions have considered a party's race-neutral justifications despite no formal finding of prima facie discrimination.<sup>37</sup>

Although a party may choose to provide race-neutral justifications where there has been no trial court determination of prima facie discrimination, Alabama courts have held that a judge cannot require justification absent this initial finding.<sup>38</sup> 

# ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION IN JURY SELECTION



- 1 See *Ex parte Branch*, 526 So.2d at 621 ("The Swain rule, which allowed prosecutors to use their peremptory challenges to exclude members of a cognizable racial group from jury service, has been changed.").
- 2 *Ex parte Branch*, 526 So.2d at 622-24.
- 3 *Ex parte Branch*, 526 So.2d at 622 ("The burden of persuasion is initially on the party alleging discriminatory use of peremptory challenges to establish a prima facie case of discrimination."). See also *Stokes v. State*, 648 So.2d 1179, 1180 (Ala.Crim.App. 1994) (The party claiming a Batson violation must first establish a prima facie case of discrimination before the other side is required to state its reasons for its peremptory strikes).
- 4 *Reese v. State*, 549 So.2d 148 (Ala.Crim.App. 1989); *Swain v. State*, 504 So.2d 347 (Ala.Crim.App. 1986) (emphasis in original) (quoting *Batson*, 476 U.S. 79 at 96). See also *Thomas v. Diversified Contractors, Inc.*, 551 So.2d 343, 345-46 (Ala. 1989) (holding that in order to "[make] out a prima facie case of purposeful discrimination," the objecting party must show that "he is a member of a cognizable racial group" and that the "relevant circumstances raised an inference" that his opponent "has exercised peremptory challenges to remove from the venire members of [the objecting party's] race").
- 5 E.g., *Freeman v. State*, 651 So.2d 576, 578 (Ala.Crim.App. 1994) ("[A] defendant in a criminal case has standing to request a Batson hearing whenever the state has exercised peremptory challenges so as to exclude members of a distinct racial group regardless of whether the defendant is a member of that distinct group.")
- 6 See *Ex parte Thomas*, 659 So.2d 3, 7 (Ala. 1994) ("[A] prima facie case may be made where relevant circumstances indicate an inference of purposeful race discrimination no matter that one or more black persons may remain on the jury. . . . The striking of one venireperson for a racial reason violate[s] the Equal Protection Clause, even when valid reasons for striking some black jurors are shown.").
- 7 *Johnson v. California*, 545 U.S. at 168 (quoting the California standard) (emphasis added).
- 8 *Johnson*, 545 U.S. at 168-73. A survey of reported Alabama appellate opinions since *Johnson v. California* reveals only one opinion that applies the *Johnson v. California* standard: *Lewis v. State*, \_\_\_ So.2d \_\_\_, 2006 WL 1120648 [Ms. CR-03-0480, April 28, 2006] (Ala.Crim.App. 2006). No opinion from the Alabama Supreme Court or the Alabama Court of Civil Appeals cites *Johnson*. Of the United States District Courts for the three Alabama districts, only the Middle District has cited *Johnson*, and the opinion simply notes that the defendant "established a prima facie case of discrimination because the government struck all potential black jurors." *United States v. Grice*, 2008 WL 4163220, \*2 [No. 2:06-cr-271-WKW] (M.D.Ala. 2008). The Court of Appeals for the Eleventh Circuit has cited *Johnson* a number of times, but it has not directly and dispositively responded to the Supreme Court's admonition in *Johnson* that the standard for a prima facie case is a low one.
- 9 *Bird*, 594 So.2d at 679; *Branch*, 526 So.2d at 622.
- 10 *Bird*, 594 So.2d at 679; *Branch*, 526 So.2d at 623; *Batson*, 476 U.S. at 97. See also *Gennie v. VanHorne*, 707 So.2d 266 (Ala.Civ.App. 1997) (holding that evidence that the striking party used 5 of 11 peremptory challenges to remove black jurors established "weak," yet sufficient proof of prima facie discrimination); *Bell v. State*, 676 So.2d 1349, 1352 (Ala.Crim.App. 1995) ("Here, the prosecutor's use of 5 of 6 peremptory strikes indicated a 'pattern of strikes' against a minority, that according to *Branch* establishes a rebuttable prima facie case of racial discrimination."); *Ex parte Thomas*, 659 So.2d 3, 8 (Ala. 1994) (holding that 9 of 10 strikes constituted "such a large portion of [the prosecutor's] strikes against blacks as to indicate a pattern of striking blacks from the venire"); *Ex parte Williams*, 571 So.2d 987, 990 (Ala.Civ.App. 1990) ("[E]vidence that the State struck four of the five black venire members [80%] is sufficient evidence of discrimination to establish her prima facie case for discrimination.").
- 11 *Bird*, 594 So.2d at 680; *Branch*, 526 So.2d at 623; *Swain v. Alabama*, 380 U.S. 202 (1965). See also *Freeman v. State*, 651 So.2d 573, 575 (Ala.Crim.App. 1992) ("We cannot ignore the past conduct of the State's attorney in using peremptory challenges to strike all blacks from the jury venire."); *Carter v. State*, 603 So.2d 1137 (Ala.Crim.App. 1992) ("Significant pattern' of Batson violations arising from Mobile County District Attorney's offices"). Cf. *Ex parte Bird*, 594 So.2d 676, 680-81 (Ala. 1991) ("Also relevant is what appears to be a pattern in the use of peremptory strikes by the Montgomery County District Attorney's office; this issue has reached the appellate level in a number of cases from Montgomery County").
- 12 *Bird*, 594 So.2d at 680; *Branch*, 526 So.2d at 623; *Batson*, 476 U.S. at 97.
- 13 *Bird*, 594 So.2d at 680; *Branch*, 526 So.2d at 623.
- 14 *Bird*, 594 So.2d 676 at 683 (some internal citations omitted).
- 15 *Bird*, 594 So.2d 676 at 680; *Branch*, 526 So.2d at 623, citing *Slappy v. State*, 403 So.2d 350, 352 and 355 (Fla. Dist. Ct. App. 1987).
- 16 *Bird*, 594 So.2d at 680; *Branch*, 526 So.2d at 623, citing *Slappy*, 503 So.2d at 355.
- 17 *Bird*, 594 So.2d at 680; *Branch*, 526 So.2d at 623; *Batson*, 476 U.S. at 93; *Washington v. Davis*, 426 U.S. 229, 242 (1976). See also *Ex parte Floyd*, 571 So.2d 1234, 1236 (Ala. 1990) (basing decision on evidence that the striking party used its first 11 challenges to remove all 11 African-American jurors, "we find it clear that [the movant] made a prima facie showing that the district attorney used his peremptory strikes in a racially discriminatory manner"). But see *Mines v. State*, 671 So.2d 121 (Ala.Crim.App. 1995) ("When considered alone, evidence of the prosecution's use of a large number of its peremptory strikes to exclude black jurors would allow, but would not compel, a finding of prima facie discrimination.").
- 18 *Bird*, 594 So.2d at 680; *Branch*, 526 So.2d at 623; see also *Slappy*, 503 So.2d at 354. Cf. *Bird*, 594 So.2d at 680-81 ("[T]he fact that a larger percentage of black veniremembers eventually is seated on a jury raises less suspicion that if a smaller representation is seated and affords less support for a prima facie case of discrimination. . . a large representation might afford the defendant no support at all and could even weaken his prima facie case should he be able to establish one on other grounds.").
- 19 *Ex parte Bird*, 594 So.2d at 680. See factors supra Part 4.
- 20 *Ex parte Bird*, 594 So. 2d at 680 (emphasis in original) (quoting *Gamble v. State*, 357 S.E.2d 792, 795 (Ga. 1987)).
- 21 *Gennie*, 707 So.2d at 270.
- 22 *Gennie*, 707 So.2d at 270. But see cases cited infra Part 7 (holding that "numbers alone" provide insufficient proof of prima facie discrimination).
- 23 "When the evidence shows only that blacks were struck and that a greater percentage of blacks sat on the jury than sat on the lawfully established venire, an inference of discrimination has not been created." 571 So.2d at 1271.
- 24 *Ex parte Thomas*, 659 So.2d at 5-6.
- 25 See note 26.
- 26 See *McPherson v. State*, 634 So.2d 1048 (Ala. Crim.App. 1993) (affirming denial of the appellant's Batson motion, where African-Americans composed 68% of the venire, and 83% of the final panel); *Bush v. State*, 611 So.2d 503, 504 (Ala. Crim.App. 1992) ("greater percentage of blacks on the jury than on the venire created 'a strong presumption that there was no discrimination in the selection of the jury'"); *Edwards v. State*, 628 So.2d 1021, 1024 (Ala.Crim.App. 1993) (affirming denial of the appellant's Batson motion where African-Americans composed only 15-17% of the venire, but 25% of the final jury).
- 27 *Id.* at 7-8. Cf. *Vanderslice v. State*, 671 So.2d 766 (Ala.Crim.App. 1995) ("Because the trial court's finding was based on his observations during voir dire and therefore was based on more than 'mere numbers,' his ruling that the appellant had failed to prove a prima facie case of racial discrimination was correct.").
- 28 *Id.* at 8. (emphasis added). Cf. *Curran v. State*, 535 So.2d 221, 224 (Ala. 1988) ("It is significant, and a highly 'relevant circumstance' that blacks were represented on the trial jury in virtually the same and in even a somewhat greater proportion (71%) as they were represented in the county population (70%).").
- 29 See note 30.
- 30 See also *Bell v. State*, 676 So.2d 1349, 1351 (Ala. Crim.App. 1995) (remanding for Batson hearing where [t]he record indicates that the trial court based its ruling that the appellant failed to establish a prima facie case of discrimination solely on a comparison of the percentage of blacks on the venire with the percentage of blacks selected to serve on the jury"); *Grimsley v. State*, 678 So.2d



# ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION IN JURY SELECTION

1194, 1197 (Ala.Crim.App. 1995) ("The fact that the jury is composed of a high percentage of the group that is alleged to have been excluded is only one factor that the court should consider when determining whether a prima facie case of discrimination has been established."); *Arnold v. State*, 668 So.2d 109, 110 (Ala.Crim.App. 1995) ("Because the court in this case based its ruling solely on a practice condemned in *Thomas*, we must remand this cause to the Circuit Court for Mobile County so that that court can conduct a new *Batson* hearing."); *Gafford v. State*, 666 So.2d 860 (Ala.Crim.App. 1995) (reversing the trial court's refusal to hear the appellant's motion due to the fact that the determination was based solely "on the racial makeup of the jury venire"); *Hodges v. State*, 673 So.2d 783, 786 (Ala.Crim.App. 1995) ("Because it appears that the trial court considered only the racial composition of the jury in determining that the defense failed to establish a prima facie case of discrimination, we must remand this cause to the trial court so that the trial judge . . . can conduct a hearing to determine whether, considering factors in addition to the racial composition of the jury, the appellant established a prima facie case of racial discrimination."); *Folsom v. State*, 668 So.2d 113 (Ala.Crim.App. 1995) ("Finding no prima facie case of discrimination based solely on the composition of the jury was specifically condemned by the Alabama Supreme Court in *Thomas*"); *Woods v. State*, 675 So.2d 47, 49 (Ala.Crim.App. 1995) (reversing trial court's refusal to hear appellant's *Batson* motion, holding that "it appears that the trial court relied on this court's previous decision in *Harrell v. State* when it ruled that no prima facie case of discrimination was shown"); *Cf. Stokes v. State*, 648 So.2d 1179, 1181 (Ala.Crim.App. 1994) (affirming the trial court's refusal to hear the appellant's *Batson* motion, stating: "[t]here is no indication in the record that the court denied the *Batson* motion solely because a greater percentage of black jurors sat on the jury than on the venire").

31 See e.g., *Williford v. Emerton*, 935 So. 2d 1150 (Ala. 2004) (holding that evidence of final jury composition (11 African-Americans and 1 white), in the absence of other proof, failed to establish a prima facie case of discrimination); *Sharrif v. Gerlach*, 798 So. 2d 646 (Ala. 2001) (holding that evidence that the striking party used 7 of 10 strikes to remove female jurors, in the absence of other proof, failed to establish a prima facie case of discrimination).

32 See *Johnson*, 545 U.S. at 170 ("We did not intend the first step to be so onerous that a defendant would have to persuade the judge - on the basis of all facts, some of which are impossible for the defendant to know with certainty - that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the judge to draw an inference that discrimination has occurred.") (emphasis added).

33 Although the Criminal Court of Appeals in *Floyd* does not directly cite *Johnson v. California*, the Court applies the *Johnson* standard that an "inference" of discrimination establishes a prima facie case. See *Id.*

34 See also *Douglas v. State*, 740 So.2d 485, 487 (Ala.Crim.App. 1999) (holding that "because the trial court required the prosecution to give its reasons for striking juror number 23, we will review that reason and the trial court's ruling on the appellant's *Batson* motion); *Norfolk Southern Railway Company, Inc. v. Gideon*, 676 So.2d 310 (Ala. 1996) ("Where, as in this case, the trial court requires the opposing counsel to state reasons for the peremptory strikes, without first requiring that a prima facie case of discrimination be shown, this Court will review the reasons given and the trial court's ultimate decision on the *Batson* motion without any determination of whether the moving party met its burden of proving a prima facie case of discrimination."); *Currin v. State*, 535 So.2d 221, 223 (Ala. 1988), quoting *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987) ("[A]ppellate review should not become bogged down on the question of whether the defendant made a prima facie showing in cases where the [trial] court has required an explanation. Taking our cue from *Batson*'s repeated analogies to Title VII jurisprudence, [*Batson v. Kentucky*, 476 U.S. 79] 106 S.Ct. 1721 n. 18, 1722 n. 19, 1724 n. 21 [(1986)], we hold that when the prosecution's explanation is of record, we will review only the [trial] court's finding of discrimination vel non.").

35 *Id.* at 152.

36 *Reese* 549 So.2d at 152.

37 See e.g., *Waters v. Williams*, 821 So.2d 1000, 1006 (Ala.Civ.App. 2001) (basing its ruling on the striking party's race-neutral justifications, where the court made no express determination as to whether a prima facie case of discrimination had been established).

38 See *McPherson v. State*, 634 So.2d 1048, 1050 (Ala.Crim.App. 1993) (holding that the striking party never bore the burden of providing race-neutral justification for strikes, where the trial court never determined whether a prima facie case of discrimination had been established); *Insley v. State*, 600 So.2d 448, 449 (Ala.Crim.App. 1992) (holding that the striking party was not required to provide race-neutral justifications where trial court never determined whether a prima facie case of discrimination had been established).



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