

## **BATSON, BRANCH, AND THE ELIMINATION OF RACIAL DISCRIMINATION IN JURY SELECTION**

- Alabama has had a long and difficult and sometimes tragic and even painful history with discrimination.
- It is the law of this State, Ala. Code §§ 12-16-55, 56 and Alabama Constitution of 1901, Article I, Sections 1, 6, and 22 (equal protection), that discrimination in jury selection is unlawful and impermissible.

### **Ala. Code § 12-16-55 Declaration of policy**

It is the policy of this state that all persons selected for jury service be selected at random from a fair cross-section of the population of the area served by the court, and that all qualified citizens have the opportunity, in accordance with this article, to be considered for jury service in this state and in obligation to serve as jurors when summoned for that purpose.

Acts 1978, No. 594, p. 712 § 1.

### **Ala. Code § 12-16-56 Discrimination prohibited**

A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin or economic status.

Acts 1978, No. 594, p. 712 § 2.

- We, as attorneys, are duty bound to enforce the law and to serve justice whenever and wherever possible.
- Alabama's circuit judges have the duty pursuant to the clear language in the case law from the United States Supreme Court (*Batson*, 476 U.S. at 98) (*Branch*, 526 So.2d at 621) to determine whether discrimination has taken place and, if so, to do something about it.

The United States Supreme Court is "unceasing" in its efforts to eliminate discrimination in jury selection:

More than a century ago, the Court decided that the state denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder v. West Virginia*, 100 U.S. 303 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. ... Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

*Batson v. Kentucky*, 476 U.S. 79, 85.

The Alabama Supreme Court is likewise committed to ending any vestiges of discrimination in our citizens' participation in the civil and criminal justice systems:

The continued viability of our way of life depends, in large part, upon our ability to involve all segments of society in the fundamental institutions of the body politic, not the least of which is our judicial system. ... Therefore, when members of any racial group are arbitrarily excluded from jury service, that group is denied the fundamental right of participation in a vital organ of government. As a result, public confidence in the law and legal system is eroded and the judicial system itself is denied the benefits of the insight and inspiration provided by a truly "mosaic" commonwealth.

*Ex parte Bird*, 594 So.2d 676, 687 (Ala. 1991).

Use principles like these when addressing the court:

- William Pitt in 1770: “Where law ends, tyranny begins.”
- Theodore Roosevelt: “Obedience to the law is demanded, not asked as a favor.”
- Rev. Martin Luther King, Jr.: “Injustice anywhere is a threat to justice everywhere.”

## **A Single Invidious Act of Discrimination Is Enough to Warrant Relief under *Batson***

“... One unconstitutional peremptory strike requires reversal and a new trial.”

*Ex parte Bird*, 594 So.2d 676, 683 (Ala. 1991).

The United States Supreme Court and the Alabama Supreme Court teach that even one single act of discrimination in jury selection is enough to trigger *Batson*. Why? Because there are two critical interests whose constitutional and statutory rights are adversely affected when such discrimination occurs. Who are they? They are your client, number one, who is denied his or her constitutionally protected and statutorily provided right to a jury comprised of a fair and representative cross section from the community; but, also, the law protects the rights of the discriminated-against juror to serve and to participate in the civil and criminal justice system.

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Acts 1978, No. 594, p. 712 § 2.

In *Ex parte Branch*, 526 So.2d 609, 618-19 (1987), the Supreme Court stated:

We believe that the Legislature intended, in adopting this public policy, that our trial jury should be selected from a list which contains a fair cross-

section of the area served by the court, and that any form of discrimination against a particular juror on account of race, color, religion, sex, national origin, or economic status is prohibited, ...

Racial discrimination in selection of the jury venire is particularly obnoxious for two reasons. First, it denies the defendant the benefit of a constituency based upon diversity – a concept central to the American experience. By maximizing diversity, the “preconceptions” and “biases” of the representative factions, “to the extent they are antagonistic, will tend to cancel each other out.” ... Thus, it is unnecessary for the defendant to prove actual injury as a result of the discrimination. It is enough that discrimination “deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.”

Second, the continued viability of our way of life depends, in large part, upon our ability to involve all segments of society in the fundamental institutions of the body politic, not the least of which is our judicial system. ... Therefore, when members of any racial group are arbitrarily excluded from jury service, that group is denied the fundamental right of participation in a vital organ of government. As a result, public confidence in the law and legal system is eroded and the judicial system itself is denied the benefits of the insight and inspiration provided by a truly “mosaic” commonwealth.

*Ex parte Bird*, 594 So.2d 676, 687.

The United States Supreme Court recognizes this same principle:

For evidentiary requirements to dictate that “several must suffer discrimination” before one could object would be inconsistent with the promise of equal protection to all.”

*Batson*, 476 U.S. 79 at 95-96, quoting *McCray v. New York*, 461 U.S. 961, 965 (1983)

(Marshall, J., dissenting from the denial of certiorari).

## **I. BATSON/BRANCH PROCEDURES**

### **A. Plaintiff has the burden of establishing a prima facie case of discrimination in the use of peremptory challenges**

The burden of persuasion is initially on the party alleging discriminatory use of peremptory challenges to establish a prima facie case of discrimination.

*Ex parte Branch*, 526 So.2d 609, 622 (Ala. 1987).

### **B. What Constitutes a “Prima Facie Case?”**

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 v. Kentucky*, 476 U.S. at 93; *Washington v. Davis*, 426 U.S. 229, 239-42 (1976); *Ex parte Bird*, 594 So.2d 676, 679 (Ala. 1991).

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 “that it is more likely than not that the other party’s peremptory challenges, if unexplained, were based on impermissible group bias.” *Johnson*, 545 U.S. at 168. The Supreme Court in *Johnson* repeatedly emphasizes that an objecting party need only support an inference of discrimination in order to require the striking party to give race-neutral reasons for its strikes. 545 U.S. at 168-73. Only one reported Alabama appellate opinion has thus far cited *Johnson*. See *Lewis v. State*, \_\_\_ So.2d \_\_ 2006 WL 1120648 [Ms. CR-03-0480, Apr.28, 2006] (Ala. Crim. App. 2006).

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

- 1. Evidence that the “jurors in question share[d] only this one characteristic – that membership in the group – and that in all other respects they [were] as heterogenous 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.

*Branch*, 526 So.2d at 622; *Bird*, 594 So.2d at 679.

2. **A pattern of strikes against black jurors on the particular venire; e.g., four of six peremptory challenges were used to strike black jurors.**

*Branch*, 526 So.2d at 623; *Bird*, 594 So.2d at 679; *Batson*, 476 U.S. at 97.

3. **The past conduct of the State’s attorney in using peremptory challenges to strike all blacks from the juror venire.**

*Branch*, 526 So.2d at 623; *Bird*, 594 So.2d at 679-80; *Swain v. Alabama*, 380 U.S. 202 (1965); *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.”).

4. **The type and manner of the [defendant’s] attorney’s questions and statements during voir dire, including nothing more than desultory [inconsistent] voir dire.**

*Branch*, 526 So.2d at 623; *Bird*, 594 So.2d at 680; *Batson*, 476 U.S. at 97.

5. **The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions.**

*Branch*, 526 So.2d at 623. See, also, *Bird*, 594 So.2d 676 at 683 (Ala. 1991).

[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 [defendant] thinks that a venire member may be related to a former defendant, she must ask the venire member. ... *Floyd v. State*, 539 So.2d 357, 363 (Ala. Crim. App. 1987) (Mere suspicion of a relationship insufficient).

[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.

*Id.* (internal citations omitted).

6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar 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.

*Branch*, 526 So.2d at 623, citing *Slappy v. State*, 503 So.2d 350, 352, 355 (Fla. Dist. Ct. App. 1987); see, also, *Ex parte Bird*, 594 So.2d 676 at 680.

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.

*Branch*, 526 So.2d at 623, citing *Slappy*, 503 So.2d at 355; *see, also, Ex parte Bird*, 594 So.2d 676 at 680.

8. **Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury.**

*Branch*, 526 So.2d at 623; *Bird*, 594 So.2d at 680; *Batson*, 476 U.S. at 93; *Washington v. Davis*, 426 U.S. at 242.

## **II. THE DEFENDANT’S BURDEN OF PROOF ON REBUTTAL**

### **A. The Basic Burden of Proof**

After a prima facie case is established, there is a presumption that the peremptory challenges were used to discriminate against black jurors. *Batson*, 476 U.S. at 97. ... The [defendant] then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to the particular case to be tried and which is non-discriminatory. *Batson*, 476 U.S. at 97.

*Branch*, 526 So.2d at 623; *Bird*, 594 So.2d at 680.

[The defendant has the] burden to articulate justifications for its strikes that are clear, cogent, and pertinent to the facts of this particular case.

*Ex parte Bird*, 594 So.2d 676 at 682.

### **B. The Defendant’s Burden of Proof in Rebuttal Depends Upon the Strength of the Plaintiff’s Prima Facie Case**

In *Ex parte Bird*, 594 So.2d 676, the Supreme Court stated:

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 once a prima facie case has been presented, increases in proportion to the strength of the prima facie case. In other words, a “weak prima facie case may be rebutted more readily than a strong one.”

*Id.* at 680. If the evidence supporting the prima facie case of discrimination is “particularly strong,” the offender then must “articulate justifications for the strikes that are clear, cogent, and pertinent to the facts of this particular case.” *Id.* at 682.

The explanation offered for striking each black juror must be evaluated in light of the explanations offered for the other peremptory strikes, and as well, in light of the strength of the prima facie case. The persuasiveness of a proffered explanation may be magnified or diminished by the persuasiveness of companion explanations, and by the strength of the prima facie case.

*Id.* 594 So.2d at 683.

**C. Illustrative Types of Evidence That Can Be Used to Overcome the Presumption of Discrimination and Show Neutrality**

**1. The [defendant] challenged non-black jurors with the same or similar characteristics as the black jurors who were struck.**

*Ex parte Branch*, 526 So.2d 609 at 623.

**2. There is no evidence of a pattern of strikes used to challenge black jurors; e.g., having a total of six peremptory challenges, the State used two to strike black jurors and four to strike white jurors, and there were blacks remaining on the venire.**

*Branch*, 526 So.2d at 623.

**3. Involvement with criminal activity is a sufficiently race-neutral reason.**

*Tomlin v. State*, 909 So. 2d 213 (Ala. Crim. App. 2002), rev'd on other grounds, 909 So. 2d 283 (Ala. 2003).

**4. Striking veniremember because he/she has been represented by opposing counsel sufficiently race-neutral.**

*Tomlin v. State*, 909 So. 2d 213 (Ala. Crim. App. 2002), rev'd on other grounds, 909 So. 2d 283 (Ala. 2003).

**5. Asking fewer questions of black jurors who were struck than of white jurors who were struck does not raise inference of discriminatory intent.**

*Taylor v. State*, 808 So. 2d 1148 (Ala. Crim. App. 2000), affm'd, 808 So.2d 1215 (Ala. 2001).

**6. Striking veniremember who had family members who had been on probation or parole sufficiently race- neutral.**

*Moss v. City of Montgomery*, 588 So. 2d 520 (Ala.Crim.App.), cert. quashed, No. 1901379 (Ala. Oct. 18, 1991).

**7. Striking veniremember who recently was given citation by police was race-neutral reason for strike in criminal prosecution.**

*Moss v. City of Montgomery*, 588 So.2d 520 (Ala.Crim.App.), cert. quashed, No. 1901379 (Ala. Oct. 18, 1991).

**8. Striking veniremember because she was employed as a nurse deemed sufficiently race-neutral.**

*Millette v. O'Neal Steel, Inc.*, 613 So. 2d 1225, 1229-30 (Ala. 1992).

In *Millette*, the Alabama Supreme Court held that *Batson* had not been violated when a black nurse was struck, reasoning in part:

We first hold that with regard to veniremembers 258, the trial court's determination was not clearly erroneous. In *Bass v. State*, 585 So.2d 225, 237 (Ala.Crim.App.1991), the Court of Criminal Appeals held that the prosecutor presented a race-neutral reason where a black veniremembers was struck because she was a nurse and indicated that she had a relative who had had a nervous breakdown and insanity was a potential defense in the case being tried.

In this case, venire member 258 was employed by Carraway Methodist Hospital, and O'Neal's counsel had formerly been employed by the law firm that represents Carraway Methodist Hospital. O'Neal's counsel stated that he had had bad experiences with nurses on juries. Moreover, he said he was concerned that venire member 258 would be especially sympathetic toward Ted Millette because Ted Millette's voice box had been removed and he had to use a special device to talk. Accordingly, we hold that O'Neal's explanation for the challenge was a clear, specific, and legitimate reason that relates to this particular case and which is nondiscriminatory.

*Millette*, 613 So.2d at 1230.

**9. Striking veniremember who vocalizes his desire not to serve on the jury deemed sufficiently race-neutral.**

*Hall v. State*, 820 So. 2d 113, 129 (Ala.Crim.App. 1999), affm'd 820 So.2d 152 (Ala. 2001); *Lewis v. State*, 659 So.2d 183 (Ala.Crim.App. 1994).

**10. Striking veniremember on basis that venire member's employer had been sued by plaintiff's lawyer deemed sufficiently race neutral for plaintiff to strike white venire member.**

*Waters v. Williams*, 821 So. 2d 1000, 1006 (Ala. Civ. App.), cert. denied No. 1010094 (Ala. Dec. 14, 2001).

**D. Illustrative Types of Evidence That Do Not Overcome the Presumption of Discrimination and Show Neutrality**

**[E]ven explanations that would ordinarily pass muster become suspect where one or more of the explanations are particularly fanciful or whimsical.**

*Bird*, 594 So.2d at 683.

**a. The following reasons were held to be insufficient to rebut an opponent's prima facie case of discrimination:**

- (1) *Batson* makes it clear ... that “[t]he [defendant] cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties.” Rather, the [defendant] must demonstrate that “permissible racially neutral selection criteria and procedures have produced the monochromatic result.” *Batson*, 476 U.S. at 94 ... Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination. *Batson*, 476 U.S. at 97 ... [a defendant] cannot overcome the presumption “merely by denying any discriminatory motive or ‘affirming his good faith in individual selections.’” *Batson*, 476 U.S. at 98.

*Branch*, 526 So.2d at 623.

- (2) *Preachers v. State*, 963 So.2d 161 (Ala. Crim. App. Sept. 29, 2006), cert. denied Feb. 9, 2007, Ala. C.Ct. No. 1060467. Defendant was convicted of capital murder.
- (a) The proponent had been told that the veniremember had been arrested before. The court held that the proponent had failed to articulate a sufficient

race-neutral reason for excluding a black juror when that juror, who indicated on a questionnaire that he had not been arrested, accused of a crime, or taken to jail, was struck, but a white juror, who indicated on the questionnaire that he had been arrested, was not. The proponent did not ask any veniremembers any questions about whether they had been arrested, accused of a crime, or taken to jail for any reason, and the proponent did not ask the black juror, who was stricken, to confirm or deny that he had been in county jail before, even though he had indicated on questionnaire that he had not previously been arrested, accused of crime, or taken to jail. ***The failure of a proponent 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.

- (b) Veniremember had traffic offenses. *The court held that the proponent engaged in “disparate treatment” because seven members of the jury had traffic offenses equally as serious as those of the black venirepersons who were struck. White persons with the same or similar characteristics as the challenged black jurors were not struck. See Acres v. State*, 548 So.2d 459 (Ala. Cr. App. 1987) (on return to remand) (validity of prosecutor's reasons for striking two black venirepersons because they had had traffic citations did not “stand up under close scrutiny” when the record revealed that two white jurors who served on jury had similar traffic offenses).
- (3) *Smith v. Jackson*, 770 So.2d 1068 (Ala. 2000). Husband and wife filed suit against a building contractor corporation and its owner, alleging breach of express warranty and breach of contract in the construction of their home. Counsel had a **mere suspicion** that a veniremember, who was employed to sell baby accessories, likely came into contact with the contractor or that her former occupational experiences would somehow influence her to look upon the contractor more favorably. The Court noted that during voir dire examination there was no inquiry into whether the suspected relationship actually existed.
- (4) *Ex parte Nguyen*, 751 So.2d 1224 (Ala. 1999). Defendant was convicted of four counts of second degree assault.
  - (a) Veniremember was employed at a **church**. It was the attorney’s experience that members of that particular church often find it hard or are unwilling to sit in judgment of their fellow man.
  - (b) Veniremember worked for a **community organization** that was recently the subject of a number of indictments and a resulting investigation by the State. The prosecutor did not believe that the State would get a fair trial from somebody that it had previously targeted for prosecution.

- (c) Veniremember was **laughing and cutting up** with other jurors during the voir dire and did not appear to be taking the proceedings seriously.
  - (d) Veniremember worked for a company that the D.A.'s office had been asked to investigate.
- (5) *Looney v. Davis*, 721 So.2d 152 (Ala. 1998).
- (a) **Speculation** that prospective juror knew defendant or defendant's family.
  - (b) **Intuitive judgment** or suspicion.
  - (c) Prospective juror's **place of employment, without explanation of its relation to the case.**
  - (d) **Political activities or beliefs, without explanation of its relation to the case.**
- (6) *Brown v. Alabama*, 686 So.2d 409 (Ala. 1996).
- (a) Summary declaration that **age** was a factor in a decision to strike.
- (7) *Norfolk Southern Ry. Co. v. Gideon*, 676 So.2d 310 (Ala. 1996).
- (a) Belief that venireperson was probably a union member without asking any voir dire questions about unions.
- (8) *Maddox v. State*, 708 So.2d 220 (Ala. Crim. App. 1997).
- (a) "Kind of just a personal thing."
  - (b) **Any reason that is whimsical or fantastical.**

#### **b. Sufficiently Race-Neutral Reasons for Strikes**

A survey of reported Alabama opinions reveals a number of reasons deemed sufficiently "race-neutral" to justify the uses of peremptory challenges:

- (1) *Brown v. State*, 982 So.2d 565 (Ala. Crim. App. April 28, 2006), cert. denied Oct. 12, 2007, Ala. S. Ct. No. 1051687. Defendant was convicted of capital murder:

- (a) Veniremembers, who had criminal convictions, each failed to respond when questioned as to whether they had any prior convictions. **"A connection with or a founded suspicion of criminal activity** can constitute a sufficiently race-neutral reason for the exercise of a peremptory strike."
  - (b) Veniremember had a nephew and grandson who had **mental problems**. The court held that this was race-neutral because the proponent had exercised a peremptory strike against a white juror for the same reason. Also, because the defendant had been treated for a mental disease and all of the experts were in agreement that the defendant was suffering from some form of psychotic illness, a juror with a connection to mental illness might have had greater sympathy for the defendant.
- (2) *Blackmon v. State*, No. CR-01-2126, 2005 WL 1845273 (Ala. Crim. App. Aug. 5, 2005). Defendant was convicted of capital murder.
- (a) Veniremember had expressed reservations about imposing the death penalty and her son had been convicted of a felony.
  - (b) Veniremember's **son had been prosecuted** in the same county for burglary.
  - (c) Veniremember **knew the defendant's mother-in-law, who was expected to testify**.
  - (d) Veniremember's sister-in-law was in prison for a shooting.
  - (e) Veniremember knew the defendant's father-in-law, who was expected to testify.
  - (f) Veniremember opposed the death penalty.
- (3) *Wimberly v. State*, 934 So.2d 411 (Ala. Crim. App. 2005). Defendant was convicted of two counts of capital murder.
- (a) Veniremember **did not follow the trial court's instructions and could not read or write**.
- (4) *Williford v. Emerton*, 935 So.2d 1150 (Ala. 2004). Lessee-purchaser of mobile home on lease-to-purchase contract sued lessor-vendor alleging conversion, breach of contract, trespass, and tort of outrage, relating to termination of lease.
- (a) Veniremember **did not follow the circuit court's instructions**, i.e., he failed to stand and answer that he was present when the clerk called the roll. The court concluded that because the proponent also struck three white

prospective jurors for this same reason, this reason was sufficient to sustain a peremptory strike.

- (b) Veniremember **could not read or write and he failed to complete the juror questionnaire**. Courts have found illiteracy to be a race-neutral reason for a peremptory strike and have upheld a proponent's peremptory strike based on that reason. See *Acklin v. State*, 790 So.2d 975, 988-89 (Ala. Crim. App. 2000); *Wright v. State*, 601 So.2d 1095 (Ala. Crim. App. 1991); *Williams v. State*, 548 So.2d 501 (Ala. Crim. App. 1988); Section 12-16-60(a)(2), Ala. Code 1975, requires that a juror be able to "read ... instructions given by a judge in the English language."
- (5) *Turner v. State*, 924 So.2d 737 (Ala. Crim. App. 2002). Defendant was convicted of capital murder.
    - (a) Veniremember indicated during voir dire that she was opposed to the death penalty.
  - (6) *Waters v. Williams*, 821 So.2d 1000 (Ala. Crim. App. 2001). Motorist whose vehicle was rear-ended brought action against driver for negligence, wantonness, negligent entrustment, and loss of consortium.
    - (a) The trial court had actual knowledge of other lawsuits brought by the plaintiff's counsel in which the venirepersons or their employers were defendants, and assessed the likelihood of a venireperson's particular knowledge of these prior lawsuits.
  - (7) *Baker v. State*, 906 So.2d 210 (Ala. Crim. App. 2001). Defendant was convicted of capital murder and other offenses.
    - (a) Veniremember's brother had previously shot and killed another of his brothers.
  - (8) *Smith v. State*, 797 So.2d 503 (Ala. Crim. App. Dec. 22, 2000). Defendant was convicted of capital murder.
    - (a) Veniremember expressed possible bias against the prosecution's case because of his disapproval of the sexual preference of one of the victims.
    - (b) Veniremember was concerned that her views on the death penalty might be influenced by her husband, who was strongly opposed to the death penalty.
  - (9) *McGriff v. State*, 908 So.2d 961 (Ala. Crim. App. 2000). Defendant was convicted of capital murder.

- (a) Approximately seven years earlier, veniremember had entered a plea of guilty to a resisting arrest charge. The court held that this was not too remote in time to qualify as a legitimate, nondiscriminatory reason under Batson for the state's exercise of a peremptory challenge.
- (10) *Ex parte Dunaway*, 746 So.2d 1042 (Ala. 1999). Defendant was convicted of two counts of capital murder.
- (a) Veniremembers were **young and not responsive**.
  - (b) Veniremember had a relative who had been **convicted of a crime**.
  - (c) Veniremember **frequently had to see a physician**.
  - (d) Veniremember had a **hard time understanding what was said and could not read**.
  - (e) Veniremembers were **very negative about serving**.
  - (f) Veniremember had been prosecuted by the same prosecutor in the past.
  - (g) Veniremember was **previously represented by the defense counsel**.
  - (h) Veniremember **had difficulty reading and did not want to serve**.
- (11) *Maddox v. State*, 708 So.2d 220 (Ala. Crim. App. 1997).
- (a) **Grievance against a witness's employer**.
  - (b) **Friends** with veniremember properly stricken.
  - (c) **Untidy appearance or manner of dress**.
  - (d) **Inconsistent answers about whether employed**.
  - (e) **Confused** as to the difference between civil and criminal trials.
- (12) *Williams v. State*, 634 So.2d 1034 (Ala. Crim. App. 1993).
- (a) **Boredom and fidgeting**.
  - (b) **Inattentiveness**.
  - (c) **Talking during voir dire**.

- (d) **Unemployed.**
- (e) **Physical disability or discomfort that would impair jury service.**
- (f) Previously served on a jury that found for defendant.

(13) *Jelks v. Caputo*, 607 So.2d 177 (Ala. 1992).

- (a) **Has read newspaper article about case.**
- (b) Tired and uninterested.
- (c) **Professional employment.**

### III. OFFER OF EVIDENCE TO DEMONSTRATE PRETEXT

Once the [defendant] has articulated a non-discriminatory reason for challenging the black jurors, the other side can offer evidence showing that the reasons or explanations are merely a sham or pretext. *Wheeler*, 22 Cal. 3d at 282, 583 P.2d at 763-64, 148 Cal. Rptr. At 906.

*Ex parte Branch*, 526 So. 2d 609 at 624.

#### A. Illustrative Types of Evidence That Can Be Used to Show Sham or Pretext

Once the proponent has articulated a nondiscriminatory reason for challenging the juror(s), the opponent can offer evidence showing that the reasons or explanations are merely a sham or pretext. *Ex parte Branch*, 516 So.2d 609 at 623. Caselaw reveals examples of evidence of pretext:

- "1. **The reasons given are not related to the facts of the case.**
2. **There was a lack of questioning to the challenged juror, or a lack of meaningful questions.**
3. **Disparate treatment – persons with the same or similar characteristics as the challenged juror were not struck....**

4. **Disparate examination of members of the venire; e.g., a question designed to provoke a certain response that is likely to disqualify the juror was asked to black jurors, but not to white jurors....**
5. **The prosecutor, having 6 peremptory challenges, used 2 to remove the only 2 blacks remaining on the venire....**
6. **'[A]n explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically. For instance, an assumption that teachers as a class are too liberal, without any specific questions having been directed to the panel or the individual juror showing the potentially liberal nature of the challenged juror.'**

*Mashburn v. State*, 2007 WL 3226600 (Ala. Crim. App. 2007) at \* 5 - \* 6, quoting *Ex parte Branch*, 526 So.2d at 624.

**7. Side-by-side comparisons of jurors stricken with those not stricken.**

*Miller-El v. Dretke*, 545 U.S. 231, 241 (U.S. 2005) (“More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.). See, also, *Ex parte Bird*, 594 So.2d at 681; *Freeman v. State* 651 So. 2d 576 (Ala. Crim. App. 1994).

**8. “Gut reactions” and “bad” feelings about potential juror insufficient to overcome presumption of discriminatory intent.**

*Ex parte Bird*, 594 So.2d at 684; *Ex parte Bankhead*, 625 So. 2d 1146 (Ala. 1993). Indeed, “‘seat-of-the pants instincts’ may often be just another term for racial prejudice.” *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

**9. Failing to ask questions of the targeted veniremember(s) related to the “race-neutral” reason for exercising strikes may be evidence of discriminatory intent.**

*Ex parte Bird*, 594 So.2d at 683; *Ex parte Branch*, 526 So.2d at 623; *Jackson v. State*, 557 So. 2d 855 (Ala. 1990).

- 10. Striking juror based on membership in a political organization deemed insufficient as race-neutral reason where six of eight peremptory strikes had been used to strike same-race veniremembers from venire.**

*Parker v. State*, 568 So. 2d 335 (Ala. Crim. App. 1990).

- 11. Striking veniremembers on basis of poor communication skills *not supported by record* may constitute purposeful discrimination.**

*Millette v. O'Neal Steel, Inc.*, 613 So.2d 1225, 1230-31 (Ala. 1992); *Moss v. City of Montgomery*, 588 So. 2d 520 (Ala. Crim. App. 1991).

- 12. Strikes based on a sheer allegation that a veniremember lives in a “high crime area” are constitutionally deficient.**

*Ex parte Bird*, 594 So.2d at 682; *Williams v. State*, 548 So.2d 501, 506 (Ala.Crim.App. 1988).

- 13. Strikes predicated upon unemployment are “highly suspect” for Batson violations as unemployment is an area “especially subject to abuse.”**

*Carter v. State*, 603 So.2d 1137, 1139 (Ala.Crim.App. 1992).

- 14. Striking black venire member on basis that he did not understand “concepts” presented in voir dire insufficient race-neutral reason.**

*Neal v. State*, 612 So. 2d 1347 (Ala. Crim. App. 1992).

- 15. Striking veniremember on basis that he was “laughing and cutting up” during voir dire insufficient race-neutral reason.**

*Ex parte Nguyen*, 751 So. 2d 1224 (Ala. 1999).

- 16. Striking veniremember because her husband was a pastor insufficient race-neutral reason.**

*Lucy v. State*, 785 So. 2d 1174 (Ala. Crim. App. 2000).

- 17. Striking veniremember on basis of age insufficient race-neutral reason.**

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

*McElemore* notes that age *may* be an appropriate factor in certain circumstances, but that as a general principle it is a “highly suspect” basis for exercising peremptory strikes:

Based on the record before us, we cannot conclude that the prosecutor's assertion that age was the reason he struck juror 251 established a race-neutral reason.

“This Court has recognized that ‘the age rationale is highly suspect because of its inherent susceptibility to abuse. *Batson*, 476 U.S. at 106, 106 S.Ct. at 1728 \*699 (Marshall, J., concurring).’ *Ex parte Bird*, 594 So.2d 676, 683 (Ala.1991). In fact, ‘[a] mere summary declaration that age was a factor in the decision to strike is, therefore, constitutionally deficient and warrants reversal. *Owens v. State*, 531 So.2d 22, 26 (Ala.Crim.App.1987).’ *Bird*, at 683. Despite its susceptibility to misuse, however, this Court has also noted: “[W]e realize that in certain cases age may serve as a legitimate racially neutral reason for a peremptory strike.

*McElemore*, 798 So.2d 693 at 698-99.

**18. Statistical evidence indicating that higher percentage of strikes used for targeted group (e.g., blacks or women) raises “strong inference” of discriminatory intent.**

*Brown v. State*, 686 So. 2d 385 (Ala. Crim. App. 1995).

In *Brown*, the trial court held that the prosecutor violated *Batson* by using 87% of his strikes against blacks. The Alabama Court of Criminal Appeals affirmed the trial court’s holding, reasoning in part:

“Statistical evidence may be used to establish a prima facie case of discrimination. In both *Ex parte Bird*, 594 So.2d 676 (Ala.1991), and *Ex parte Yelder*, 630 So.2d 107 (Ala.1992), the prosecution struck substantial numbers of black veniremembers. In *Bird*, the venire was 36% black. The State used 17 of its 20 (85%) peremptory strikes to remove blacks, leaving a jury that was 8% black. In *Yelder*, the venire was 31% black. The State used 24 of its 32 (75%) strikes to remove blacks, leaving a jury that was 16% black. With reference to both cases, the Alabama Supreme Court stated: ‘[T]he sheer weight of statistics such as these raises a strong inference of racial discrimination requiring clear and cogent explanations by the State in rebuttal.’ *Ex parte Yelder*, 630 So.2d at 109.” *Kidd*

*v. State*, 649 So.2d 1304 (Ala.Crim.App.1994). See also *Ex parte Thomas*, 659 So.2d 3 (Ala.1994).

*Brown*, 686 So.2d at 390.

Further, while the fact that that the percentage of blacks on the jury is greater than the percentage from the venire can be considered, that fact alone is insufficient to prevent a party from establishing a *prima facie* case of discrimination under *Batson*. *Ex parte Thomas*, 653 So. 2d 3 (Ala. 1994).

**19. Evidence of recidivism, i.e., that a particular lawyer has violated *Batson* in the past can be considered as evidence of present, discriminatory intent in exercising peremptory challenges in the present case.**

*Ex parte Bankhead*, 625 So. 2d 1146 (Ala. 1993).

See *Freeman v. State*, 651 So. 2d 573, 575 (Ala. Crim. App. 1992) (“[W]e cannot ignore the past conduct of the state’s attorney in using peremptory challenges to strike all blacks from the jury venire.”). Also of interest – in *Carter v. State*, 603 So. 2d 1137 (Ala. Crim. App. 1992), the Alabama Court of Criminal Appeals noted the “significant pattern” of *Batson* violations arising out of Mobile County (“we find significant the pattern of jury strikes against black members arising from Mobile County meriting reversal”). Likewise, in *Ex parte Bird, supra*, the Alabama Supreme Court commented that “... also relevant is what appears to be a pattern in the use of peremptory strikes by the Montgomery County District Attorney’s Office. ... [t]his issue has reached the appellate level in a number of cases from Montgomery County.” *Id.* 594 So.2d at 681. *Cf.*, *Harrell v. State*, 571 So.2d 1270 (Ala.1990), cert. denied, 499 U.S. 984 (1991); *Jackson v. State*, 557 So.2d 855 (Ala.Crim.App.1990); *Madison v. State*, 545 So.2d 94 (Ala.Crim.App.1987).

#### **IV. THE TRIAL COURT’S DUTIES**

The trial court, in exercising the duties imposed upon it, must *give effect to the State policy expressed in Sections 1, 6, and 22 of the Alabama Constitution and Code 1975, § 12-16-55 and § 12-16-56*. Furthermore, the trial judge must make a sincere and reasonable effort to evaluate the evidence and explanations based on the circumstances as he knows them, his knowledge of trial techniques, and his observation of the manner in which the [defendant] examined the venire and the challenged jurors.

In evaluating the evidence and explanations presented, the trial judge must determine whether the explanations are sufficient to overcome the presumption of bias. Furthermore, the trial judge must be careful not to confuse a specific reason given by the [defense] attorney for his challenge, with a “specific bias” of the juror, which may justify the peremptory challenge.  
...

The trial judge cannot merely accept the specific reasons given by the prosecutor at face value. ...; the judge must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination. ... This evaluation by the trial judge is necessary because it is possible that an attorney, although intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding to strike the juror.

*Branch*, 526 So.2d 609 at 624 (some internal citations omitted) (italicized emphasis in original).

The trial judge should rule on any motion that attacks [a defendant’s] use of its peremptory strikes before the jury is sworn to try the case, unless, of course, the parties agree to allow the [defendant] to present race-neutral reasons at a later time.

*Branch*, 526 So.2d at 625.

## **V. REMEDY**

[I]f the trial judge determines that there was discriminatory use of peremptory challenges, an appropriate remedy may be to dismiss that jury pool and start over with a new pool. ... This remedy is not exclusive, however.

*Ex parte Branch*, 526 So.2d 609 at 624.

In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct those courts how best to implement our holding today.

*Batson*, 476 U.S. at 99-100.