**BATSON CHALLENGE**

1. Opponent must establish a prima facie showing of discrimination.
   (by inference – from recognized class & and suggestion of discrimination)

2. Proponent of the challenge must offer non-discriminatory reason.
   (unless discrimination is inherent, reason shall be deemed race neutral)

3. Opponent must carry the burden of proving purposeful discrimination.
   (even if proffered explanation is race-neutral, judge must determine whether
   offered justification was the actual plausible reason rather than a pretext for
   purposeful discrimination)

[Ultimate burden of proof rests on the party opposing the motion.]
I. Introduction

As early as Swain v. Alabama, 380 U.S. 202 (1965), the Court recognized the inappropriateness of discrimination in jury selection. In Batson v. Kentucky, 476 U.S. 79 (1986), Swain was modified to the extent that the Court held that a defendant may establish a prima facie case of discrimination in jury selection by inference if he or she is a member of a racial minority from which members have been excluded from the jury. Since Batson, the Court has expanded the right to allow defendants to object to race-based exercise of peremptory challenges even if the defendant is not a member of the same race as the excluded jurors, Powers v. Ohio, 499 U.S. 111 S.Ct. 1364 (1991); to apply the right to prosecutors as well as defendants, Georgia v. McCollum, 505 U.S. 112 S.Ct. 2348 (1992); and to apply to discrimination based on gender and nationality as well as race, J.E.B. v. Alabama ex. rel. T.B., 511 U.S. 114 S.Ct. 1419 (1994); Hernandez v. New York, 500 U.S. 352 (1991).

II. Batson in Georgia

The Georgia courts have faced the Batson issue frequently and have issued numerous opinions focusing on the appropriate inquiry. See e.g., Freeman v. State, 268 Ga. 181, 486 S.E.2d 161 (Ga. 1997); Turner v. State, 267 Ga. 149, 476 S.E.2d 252 (Ga. 1996); Whatley v. State, 266 Ga. 568, 468 S.E.2d 751 (Ga. 1996); Johnson v. State, 266 Ga. 775, 470 S.E.2d 637 (Ga. 1996); Chandler v. State, 266 Ga. 509, 467 S.E.2d

A. Batson Procedure: Three-step Process

1. Opponent must establish a prima facie showing of discrimination.
2. Proponent of the challenge must offer a non discriminatory reason.
3. Opponent must carry burden of proving purposeful discrimination.

The Batson challenge involves a three-step process. First, the opponent of the peremptory challenge must make a prima facie showing of discrimination. A prima facie showing may be made by inference as, for example, when the opponent demonstrates that the excluded juror is a member of a distinct recognized class, that the juror was struck, and that the relevant circumstances suggest that the strike was discriminatory. In Smith v. State, 1998 WL 128237 (Ga. App. 1998), for example, in which the defendant, an African American, challenged the strikes of African American jurors, the court explained step one as follows:

[T]o establish a prima facie case of racial discrimination as a result of the state's use of its strikes, [Smith] was required to show that [she] is black; that the prosecutor exercised peremptory strikes to remove blacks from the petit jury, and that these facts and other relevant circumstances, including relevant statistical data as to racial composition of the resulting jury, raise an inference that the prosecutor struck blacks from the petit jury on the basis of race. . . . Smith had the burden of completing the record
After the prima facie showing is made, the proponent of the challenge must offer a nondiscriminatory, neutral reason for the strike. It is insufficient to state that the excluded juror who is of the same race or gender as the defendant is presumably biased in favor of the defendant. Generally, however, unless a discriminatory intent is inherent in the explanation, the reason will be deemed race neutral. Furthermore, great deference is given to the trial court's evaluation of the explanation for the strike. See e.g., State v. Eppinger, 1998 WL 131242 (Ga. App. 1998) (accepting as explanation that excluded juror had a "close friend involved in a drug case").

In many Georgia cases the appellate courts have considered the reasons proffered and determined whether they are race-neutral and supported by the facts in the case. For example, in Whatley the court upheld age, lack of employment, and familiarity with the defendant as race-neutral reasons; in Chandler the court found that challenging jurors who are managers, supervisors, or have "authoritarian" personalities is race-neutral; in Freeman, the court affirmed concern over child care and previous experience as a crime victim as race-neutral reasons; in Johnson v. State, 1998 WL 128450 (Ga. App. 1998), the court upheld recent employment, unemployment, and pregnancy as race-neutral reasons; and in Griffin v. State, 230 Ga. App. 298, 496 S.E.2d 309 (Ga. App. 1998), the court upheld challenges to jurors who were stricken because they had relatives then being prosecuted by the district attorney's office or in juvenile court. Conversely, in Congdon v.

Interestingly, in Griffin the court accepted the prosecutor's statement that the strikes were exercised because of these reasons, notwithstanding the fact that the prosecutor did not question the jurors to establish that they were in fact related to individuals currently under prosecution or that this fact would bias them. "[The prosecutor] was not required to corroborate the truth of this information through questioning of the prospective jurors or, due to its nature, to explore whether it would affect their consideration of Griffin's case." Since there was "no contention that anything in the record would show that the proffered reasons did
State, 262 Ga. 683, 685, 424 S.E.2d 630 (1993), the court held that. "[m]ere place of residence or any other factor closely related to race, should not be regarded as a legitimate basis for exercising peremptory challenges without some corroboration on voir dire that the challenged venirepersons actually entertain the bias underlying the use of that factor."

Following the explanation in the third step, the court determines whether the opponent of the challenge has established purposeful discrimination. It should be noted that the ultimate burden of proof rests on the party opposing the challenge.

Although the trial judge must accept facially race-neutral explanations during step two, this does not bind the judge to this explanation at step three. "That is, while the judge may find that a proffered explanation is race-neutral [the judge] is not required, at stage three, to find that the proffered explanation was the actual reason for striking the juror. At stage three, the persuasiveness of the [proffered] justification becomes relevant [to] . . . and implausible or fantastic justifications may be found to be pretexts for purposeful discrimination." McKenzie v. State, 227 Ga. App. 778, 490 S.E.2d 522 (Ga. App. 1997) (quoting Purkett v. Elem, 514 U.S. 765, 767 (1995)).

The burden of proving purposeful discrimination may be satisfied by the trial court's disbelief of the explanation, the judge's knowledge of the community in relation to the explanation, the judge's knowledge of the one utilizing the challenge in relation to the explanation. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

B. Trial judge's responsibility

First, Georgia courts have repeatedly emphasized that the three-step analysis is mandatory. Not only must the judge use the analysis, the

not apply to each prospective juror," the court accepted the reason. This holding seems inconsistent with the opinion in Congdon disallowing the prosecutor to stereotype black jurors from a particular neighborhood as being prejudiced against the state's white witnesses.
judge should also “clearly state on the record its reasoning and conclusions as to each step of the inquiry.” Wilburn v. State, 1998 WL 61784 (Ga. App. 1998).

Under the current majority view in Georgia, it is the obligation of the trial judge, in step two, to accept the proffered reason “so long as it is not itself discriminatory. A trial court may not simply reject the explanation on grounds that it is not credible or that it is whimsical. Rather, it must accept the explanation if it is facially neutral, then determine whether the challenger can carry the burden of showing the given explanation is merely pretext for discrimination.” Leeks v. State, 226 Ga. App. 227, 483 S.E.2d 691, 693 (Ga. App. 1997) (holding that the trial court prematurely evaluated the persuasiveness of the proffer and thereby impermissibly placed the ultimate burden of persuasion on the proponent of the strike); but see Gardner v. State, 225 Ga. App. 427, 483 S.E.2d 912 (Ga. App. 1997) (emphasizing trial judge’s province to evaluate demeanor and credibility in race-neutral explanation scenario) & McGlohon v. State, 228 Ga. App. 726, 492 S.E.2d 715, 729 (Ga. App. 1997) (Eldridge, J., concurring). 2

2 In a recent Court of Appeals decision, for example, the court set out the appropriate inquiry as follows:

Once a prima facie case of racial discrimination in the use of peremptory strikes is shown, the proponent of those strikes is required to produce a reason for those strikes which is race-neutral, case-related, clear, and reasonably specific. At this second step of the Batson proceeding, the proffered reasons must be accepted by the trial court so long as they are not inherently discriminatory. The reasons given need not be persuasive or even plausible, so long as they are based on something other than the race of the juror. Once the proponent of the strikes gives race-neutral reasons for those strikes, the trial court must determine, under the totality of the circumstances, whether the challenger has that the proffered reasons were merely pretext, and the strike was actually exercised for a racially discriminatory purpose.

In evaluating whether the proffered reason is merely a pretext for purposeful discrimination, the trial judge must consider the totality of the circumstances. *Turner v. State*, 267 Ga. 149, 151, 476 S.E.2d 252 (1996). Parties will rarely admit to purposeful discrimination. Thus, it is the duty of the trial judge to consider circumstantial evidence of purposeful discrimination. Among the considerations are disbelief of the proffered reasons, consideration of treatment of similarly situated members of the jury, implausibility of explanation, and demeanor of the attorney exercising the challenges. In this determination, the trial judge is sitting as a fact finder; as such the judge’s determinations are entitled to great deference.

### QUESTIONS THAT ARISE FOR TRIAL JUDGES

If a trial judge disallows a peremptory on *Batson* grounds, can the judge simply reinstate the jurors to the existing panel? The United States Supreme Court has expressed no view on the propriety of reinstating improperly challenged jurors. “Consistent with *Batson’s* directive to fashion appropriate methods, [the Georgia courts] have at least implicitly conformed the practice of reinstating improperly challenged jurors. ... In the event that a *Batson* challenge is upheld, and ... the jurors remain unaware of the party who struck them, reinstating improperly challenged jurors does not require reversal.” *Eppinger v. State*, 1998 WL 131242 (Ga. App. 1998) (quoting *Brown v. State*, 218 Ga. App. 469, 472, 4632 S.E.2d 420 (Ga. 1995)).

If an appellate court remands a case raising *Batson* challenges to the trial judge for findings, must the court hold a hearing? In *McKenzie v. State*, 227 Ga. App. 778, 490 S.E.2d 522 (Ga. App. 1997), defendant challenged the trial court’s order based upon an existing record but entered

The debate largely centers around the disagreement as to whether this language arising in *Purkett v. Elem* was intended to be directed to the trial or appellate judge. Judge Eldridge has persistently insisted that the Purkett analysis does not apply to the trial court, but applies to appellate analysis. *Wilburn v. State*, supra (Eldridge, J., concurring). In contrast, the majority of the court deems the Georgia Supreme Court’s decision in Jackson to disallow Judge Eldridge’s view. Id. (Birdsong, J., concurring); *Joseph v. State*, supra (“as we are bound to follow Jackson, we cannot adopt Judge Eldridge’s views on this issue ...”).
without an evidentiary hearing. The appellate court upheld the procedure basing their decision primarily on the language of their directive: "this case is remanded solely to allow the trial court to enter written findings on the issue of racially discriminatory intent in the striking of [the juror]. The trial court may conduct a hearing if it deems one necessary or advisable."

C. Appellate Court's Review

The appellate court's role is to determine whether the trial court properly applied the three-step procedure and if so, to determine whether the trial court's conclusion was clearly erroneous. The trial court's factual findings are entitled to great deference. Consequently, it is not the role of the appellate court to reweigh the explanations given to the trial court. Rather, the trial judge's findings will be upheld unless it can be said that they are clearly erroneous.

The appellate decisions make it clear that it is incumbent upon the trial judge to create a record which unequivocally demonstrates consideration of each step of the analysis separately. This will require noting each side's challenges; clarifying, for the record, the basis for opposition (i.e., the race, gender, or ethnicity issue); calling on the proponent of the challenge to state the race-neutral reason for the challenge; allowing the opponent an opportunity to demonstrate that the reason is a pretext for discrimination; and finally, announcing the court's findings and rationale.

**PRACTICAL CONSIDERATIONS AND APPLICATIONS**

1. Assume that defense counsel who represents an African American client, strikes peremptorily a white male juror. The explanation given is that co-counsel observed another juror (white female, real estate agent) give a business card to the struck juror. Thus, the lawyer, proffered that s/he did not want two jurors with a business relationship on the same jury as it might affect their ability to deliberate impartially. Assume that counsel has used all ten strikes against white jurors. Is the proffered reason sufficiently race neutral? What factors would you consider in determining whether the
opponent has carried the burden of proving racial discrimination?

2. Assume a jury panel of three white men, five white women, one African American man, and two African American women. The prosecution strikes the African American male for these reasons: he was the foreperson of a former jury which the prosecutor had tried in which their was an acquittal. Assume that a white male juror was also on the previous jury. Has a race-neutral explanation been offered? Assume further that the previous foreperson, according to the prosecution, was not receptive during that trial, never made eye contact with the prosecutor, and fell asleep during her closing argument. Does this alter your analysis? 

3. Assume that a prosecutor strikes all male jurors in a case of a male defendant and offers the following justifications: one juror had been accused of, though not indicted, for a criminal offense; another juror was single with no children and police officers had said he would not be a "good" juror for the state; about the third male juror, law enforcement officers said that they had "had trouble" with him. Are these reasons race neutral? Assuming that they are, what factors could the defendant raise to persuade you that the race neutral reason was merely pretextual?

4. Assume that a defendant uses eleven of twelve peremptory strikes to eliminate white female jurors. By way of explanation for the strike of a particular juror, counsel says, "[s]he had two daughters, 28 year old, well, she had a 28 year old daughter, she had no grandchildren, she had a brother-in-law who had been arrested for drugs... She indicated she was a party to a lawsuit regarding money. She had a 28 year old daughter... I think the impetus there was she had a daughter." What facts would you consider in determining whether this explanation was neutral?
5. Assume that defendants, African-Americans, exercised eleven of their thirteen peremptory challenges to strike white members from the jury panel. The panel had originally been comprised of 19 whites and 11 African-Americans. By way of explanation for the removal of one juror, the defendants explained that the juror was a CPA, a partner in an accounting firm, had a negative response to the word "medicaid," had specific concerns about government waste and medicaid fraud, and had numerous family members in law enforcement. Additionally, the juror had prior jury service with the same judge. Defendants are charged with Medicaid fraud and conspiracy to defraud the state. Because they planned to blame their charges on their accountants, in their attorneys' words, "to have an accountant on the jury, to me, would just be devastating." Was the juror appropriately removed by the defendants under Batson?