Raising a Successful Batson *Challenge in Jury Selection*

by Michael A. Worel and David G. Wirtes, Jr.

INTRODUCTION

Litigants are allowed to use peremptory strikes to control the composition of their juries, but the Equal Protection Clause of the Fourteenth Amendment prevents them from eliminating potential jurors based solely on race, and more recently gender. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality"). A party can raise a "*Batson* challenge" to contest a peremptory strike that it suspects is motivated solely on the basis of one of these characteristics. A *Batson* challenge is the product of the criminal context and was traditionally used by defendants to object to the prosecutor's mode of jury selection. *See, e.g., Powers v. Ohio*, 499 U.S. 400 (1991). This changed in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), when the Supreme Court explained that private litigants are prohibited from making racially discriminatory strikes as well. *See id.* at 630. While Utah courts have yet to review a civil case involving a *Batson* challenge, plaintiffs commonly use them in federal court, and a few state courts have addressed them as well. *See, e.g., Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1215 (10th Cir. 2002); *accord Felder v. Physiotherapy Assoc.*, 158 P.3d 877, 891 (Ariz. Ct. App. 2007); *Donelson v. Fritz*, 70 P.3d 539, 541 (Colo. Ct. App. 2002); *Jacox v. Pegler*, 665 N.W.2d 607, 612-13 (Neb. 2003); *Zakour v. UT Med. Grp.*, 215 S.W.3d 763, 767 (Tenn. 2007). *Batson* challenges are an effective means for parties to prevent improper manipulation of their juries and thereby ensure a level playing field. While the focus here is on the plaintiff, the following principles are equally applicable to civil defendants. This article describes the steps required to raise a *Batson* challenge and highlights the factual circumstances under which they have been most successful, both in civil cases and in Utah criminal cases.

MICHAEL A. WOREL is a shareholder at Parsons Behle & Latimer and concentrates his practice on actions involving complex litigation including medical negligence, severe personal injury, and products liability. He is a fellow in the International Society of Barristers, the Litigation Counsel of America, and the American Board of Trial Advocates.

THE *BATSON* ANALYSIS

A *Batson* analysis involves three steps: first, the party opposing a peremptory strike must establish a *prima facie* case of discrimination ("step one"). *See Purkett v. Elem*, 514 U.S. 765, 767 (1995). Then, the proponent of the strike is required to provide a neutral explanation for the strike ("step two"). *See id.* Finally, the trial court evaluates whether the strike constituted purposeful discrimination ("step three"). *See id.* The ultimate burden of persuasion lies with the party opposing the peremptory strike. *See id.* at 768. Therefore, if the strike proponent offers a sufficiently neutral explanation at step two, then the party opposing the strike must convince the trial court at step three that the explanation is a pretext for purposeful discrimination. *See id.* As such, a party seeking to challenge discrimination in the jury selection process must be prepared to satisfy both step one and step three of the *Batson* analysis.

STEP ONE: ESTABLISH A PRIMA FACIE CASE

Proper Standard: Inference of Discrimination

To establish a prima facie case, the party opposing the strike must produce sufficient evidence to support an inference that discrimination has occurred. The Utah Supreme Court applied this standard for the first time in *State v. Cantu*, 750 P.2d 591, 595 (Utah 1988) ("*Cantu I*"). One year later, however, the court employed a different test requiring the defendant to establish a "strong likelihood" that the juror was struck because of her association with the group. *See State v. Cantu*, 778 P.2d 517, 518 (Utah 1989) (citing *People v. Wheeler*, 583 P.2d 748, 764 (Cal. 1978)) ("*Cantu II*"). The court returned to the inference standard without explanation in *State v. Colwell*, 2000 UT 8, ¶ 18, 994 P.2d 177, and the Supreme Court verified the standard five years later in *Johnson v. California*, 545 U.S. 162, 170-72 (2005) (explaining that the challenger was not required to prove his case at step one, but simply raise an inference that

DAVID G. WIRTES, JR. practices in Mobile, Alabama at Cunningham Bounds LLC. Mr. Wirtes represents plaintiffs in medical negligence, personal injury, admiralty, and business matters. He frequently writes and teaches on topics of interest to attorneys.

discrimination "may have infected the jury selection process"). The inference standard applies to the civil context as well. *See U.S. Xpress Enter., Inc. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 812-13 (8th Cir. 2003); *Davis v. Baltimore Gas & Elec. Co.*, 160 F.3d 1023, 1026-27 (4th Cir. 1998); *Donelson*, 70 P.3d at 542; *Jacox*, 665 N.W.2d at 612-13. Cases applying the strong likelihood standard should still be helpful for factual comparison, since it is the more difficult test.

Evidence that Raises an Inference of Discrimination

A trial judge must ultimately consider all relevant circumstances before drawing an inference of discriminatory intent. *See State v. Valdez*, 2006 UT 39, ¶ 15 n.9, 140 P.3d 1219 ("The Supreme Court has consistently declined to specify what type of evidence the challenging party must offer to establish a prima facie case, and instead has relied on trial judges to determine whether 'all relevant circumstances...give rise to an inference of discrimination.'" (quoting *Batson*, 476 U.S. at 96-97) (omission in original)). Even so, Utah courts have either found or indicated in dicta that certain evidence is particularly compelling. Other jurisdictions find this evidence equally convincing in civil cases.

Numerical Evidence

Numerical evidence that demonstrates a discriminatory pattern of peremptory strikes supports a *prima facie* case. *See State v. Alvarez*, 872 P.2d 450, 457 (Utah 1994). To raise suspicion, numerical evidence must demonstrate that the striking party either (1) excluded "most or all" minorities from jury selection or (2) used a disproportionate number of challenges on minority venire members. *See id.*

Most or All:

- Seventy-five percent reduction of minority jurors "might raise an inference of intentional discrimination," but a twenty-seven percent reduction (three out of eleven) did not meet the "most or all" threshold. *State v. Rosa-Re*, 2008 UT App 472, ¶ 4 n.1, 200 P.3d 670 ("*Rosa-Re II*").
- Fifty-percent reduction of minority jurors (two out of four) was not "most or all." *Alvarez*, 872 P.2d at 458.

Disproportionate Number:

- Seventeen percent (two out of twelve) of peremptory challenges used on minority jurors was not a disproportionate number of challenges. *See id.*
- Seventy-five percent (three out of four) of peremptory challenges used on minority jurors was disproportionate and thus supported strike opponent's *prima facie* case. *See State v. Pharrus*, 846 P.2d 454, 463 (Utah Ct. App. 1993); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, Case No. 04 Civ. 10014, 2009 WL 3321047, at *2 (S.D.N.Y. Oct. 9, 2009) (same for civil case).
- Sixty-six percent reduction of minority jurors (two out of three) was sufficient to establish a *prima facie* claim in *Jaquith v. S. Orangetown Cent. Sch. Dist.*, 349 Fed. Appx. 653 (2d Cir. 2009), a civil case. *See id.* at 654.

While numerical data can help demonstrate discriminatory intent, it is unclear whether this evidence alone can support a *prima facie* case. *See Pharrus*, 846 P.2d at 462. Numerical data complemented by evidence of suspicious questioning by the strike opponent, however, has proved sufficient. *See id.* at 463 (finding a prima facie case where the strike opponent demonstrated both a discriminatory pattern of strikes and deficient questioning by strike proponent).

Line of Questioning by Strike Proponent

Courts consider the strike proponent's questions and statements during the *voir dire* as important potential evidence of discrimination. *See State v. Alvarez*, 872 P.2d at 450, 458 (Utah 1994) (upholding a finding that defendant failed to make a *prima facie* case, in part, because he did not point to any discriminatory questions or statements made by prosecutor). Unless the discrimination is blatant, the most obvious initial evidence of improper motive is

a complete lack of questioning. *See Cantu II*, 778 P.2d at 519 (holding that the strike proponent's "desultory voir dire, uninvolved demeanor, and failure to pursue a studied or deliberate course of questioning regarding specific [juror] bias" supported a showing of purposeful discrimination).

Lack of Questioning:

- Strike proponent neglected to question one of the three excluded minority jurors entirely, which indicated that he made his decision solely on the basis of race and supported a *prima facie* case. *See Pharrus*, 846 P.2d at 463.
- Court would have considered the argument that the prosecutor's *voir dire* was "suspiciously sparse" had the challenger made it to the trial court. *State v. Harrison*, 805 P.2d 769, 777 (Utah Ct. App. 1991).
- Civil defendant used first three strikes on minority jurors, but trial court found a *prima facie* case for only one of them because the juror "hardly spoke throughout voir dire." Arizona appellate court upheld the finding. *See Felder v. Physiotherapy Assoc.*, 158 P.3d 877, 891 (Ariz. Ct. App 2007).

Once the proponent articulates a reason for the strike, the challenging party can evaluate facially neutral questions to determine whether the proponent's line of questioning reflected her alleged concern with the juror. Although an analysis of the proponent's explanation is technically part of step three, the Eighth Circuit has considered this as evidence in reviewing a *prima facie* claim.

Questioning is Inconsistent with Stated Explanation:

- Civil defendant claimed he excluded a potential juror based on his medical background; because the defendant neglected to ask the juror questions related to his experience in the field or whether his occupation would affect his view the case, the court found a *prima facie* case of racial discrimination. *See U.S. Xpress Enter., Inc. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 813 (8th Cir. 2003).

Similar Characteristics

Courts will often look to evidence of similarities between the stricken minority juror and various litigation participants to evaluate whether the strike raises an inference of discrimination. While this evidence is not conclusive, it can be supportive. *See Cantu I*, 750 P.2d at 597 (warning that strike opponents may not merely point to racial similarities between the prospective juror and the defendant, but concluding that the defendant did establish a *prima facie* case in light of all the facts and circumstances).

Between Excluded Juror and Party Opposing Strike:

The law initially required an excluded juror to be the same race as the strike opponent. *See Batson*, 476 U.S. at 89; *Cantu I*, 750 P.2d at 595. In the wake of *Powers v. Ohio*, 499 U.S. 400 (1991), racial parity is no longer required, but courts still consider it as evidence tending to show discrimination. *See State v. Alvarez*, 872 P.2d 450, 458 (Utah 1994) ("[R]acial or ethnic 'idenitity between the [strike opponent] and excused prospective jurors' may make it easier to prove a prima facie case." (citation omitted)).

Between Excluded Juror and Victim:

Victim's gender was relevant to establishing an inference of discrimination because "the 'potential for cynicism is particularly acute in cases where gender-related issues are prominent.'" *Rosa-Re II*, 2008 UT App 472, ¶ 6 n.2 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994)). The holding was limited, however, to "typical" cases where the victim was female: in a case involving a male victim, the incentive to remove jurors of the same gender arguably did not exist (or there may have even been a reverse incentive for the prosecutor to retain male jurors). *See id.*

The Eighth Circuit considered plaintiff's experience as a rape victim to be a relevant circumstance where defendant struck three female jurors and ultimately upheld a district court finding of *prima facie* discrimination. *See Kahle v. Leonard*, 563 F.3d 736, 740 (8th Cir. 2009).

Between Excluded Juror and Empanelled Juror:

- In *Cantu I*, the strike opponent argued that because an excluded juror had a "pro-prosecution" background and lived within a few blocks of an empanelled juror, the only plausible explanation for the strike was the juror's race. *See Cantu I*, 750 P.2d at 597. The court posited several potential reasons for this exclusion, but ultimately concluded that the challenger had presented sufficient evidence to meet his initial burden of establishing a *prima facie* case. *See id.*

Evidence that Counterbalances an Inference of Discrimination

Because courts are required to look at the "totality of the relevant facts" in a *Batson* analysis, evidence leaning toward an inference of discrimination may be counterbalanced by other factors. *See Rosa-Re II*, 2008 UT App 472, ¶ 6.

Minority Status of Strike Proponent's Witnesses:

- Evidence that the strike proponent intended to call witnesses from the same minority group as the excluded juror weighed against an inference of discrimination. *See State v. Alvarez*, 872 P.2d 450, 458 (Utah 1994). The court reasoned that this was because minority jurors might be "prone to find credibility" in minority witnesses, giving the strike proponent a neutralizing incentive to keep them on. *See id.*

Strike Opponent's Own Use of Peremptory Strikes:

- The fact that both parties struck three men and one woman was relevant with regard to the strength of the strike opponent's prima facie claim of gender discrimination. *See Rosa-Re II*, 2008 UT App 472, ¶ 6.

Minority Jurors on Final Jury:

- Evidence that two individuals with a minority background ultimately served on the jury detracted from the strike opponent's argument that opposing counsel's pattern of strikes raised an inference of discriminatory intent. *See State v. Harrison*, 805 P.2d 769, 777 (Utah Ct. App. 1991).

- Presence of jurors of the pertinent minority group on the final panel goes against a *prima facie* case, but only when the strike proponent has had an opportunity to eliminate them. *See Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1216 (10th Cir. 2002).

Waiver of Step One: *Prima Facie* Case Assumed

A *prima facie* case of discrimination is assumed if the strike proponent fails to challenge it. *See State v. Higginbotham*, 917 P.2d 545, 547 (Utah 1996). Generally, a strike proponent will waive an analysis of step one by jumping straight to step two and offering a neutral explanation for the strike. *See id.* ("Where the proponent of the peremptory challenge fails to contest the sufficiency of the *prima facie* case at trial and merely provides a rebuttal explanation for the challenge, the issue of whether a *prima facie* case was established is waived." (emphasis added)); *accord Davey*, 301 F.3d at 1215; *Davis v. Baltimore Gas & Elec. Co.*, 160 F.3d 1023, 1027 (4th Cir. 1998); *Jacox v. Pegler*, 665 N.W.2d 607, 612-13 (Neb. 2003). Thus, it may be very easy for a plaintiff to establish a *prima facie* case. Nevertheless, there is still reason to introduce *prima facie* evidence, as courts often consider it in evaluating the allegedly neutral explanation at step three of the analysis. In fact, the strength of a prima facie case can be influential in a court's decision as to whether the strike opponent ultimately proved purposeful discrimination. *See Rosa-Re II*, 2008 UT App 472, ¶ 6.

STEP THREE: PROVE PURPOSEFUL DISCRIMINATION

Once a plaintiff establishes a *prima facie* case and the defendant offers a facially neutral explanation for the strike, the goal at step three is to convince the trial court that this explanation is a pretext for purposeful discrimination. This evaluation largely depends on the credibility of the strike proponent's explanation and is only overturned if it is clearly erroneous. *See Higginbotham*, 917 P.2d at 548. But, "[t]o promote comprehensive analysis, trial courts must allow [strike opponents] an opportunity to attack the justifications offered by the [strike proponent] for striking prospective jurors." *State v. Cannon*, 2002 UT App 18, ¶ 11, 41 P.3d 1153. It is important for plaintiffs to take advantage of this opportunity, not only because they have the ultimate burden of persuasion as the opponent of the strike, but also to develop the record for appeal. *See State v. Valdez*, 2006 UT 39, ¶ 15 n.10, 140 P.3d 1219; *see also Johnson v. Gibson*, 169 F.3d 1239, 1248 (10th Cir. 1999) (refusing to address pretext argument made on appeal because trial court had no independent duty to "pore over the record...searching for evidence of pretext, absent any pretext argument or evidence presented by counsel"); *Davis*, 160 F.3d at 1027 ("[Plaintiff's] failure to respond to [defendant's] explanation for its strikes could have been reasonably construed by the trial judge as Plaintiff's agreement that the expressed reasons were racially neutral.").

Utah courts have developed a list of circumstantial factors that cast doubt on the legitimacy of a strike proponent's explanation which include:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) [strike proponent's] reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.

Cantu II, 778 P.2d at 518-19 (internal quotation marks omitted); *See also Cannon*, 2002 UT App 18, ¶ 9. Arguments made at step three with regard to the strike proponent's questioning and similar characteristics between excluded and empanelled jurors will often overlap with the arguments made to establish a *prima facie* case. The difference is that, at this stage, the plaintiff can examine this evidence in light of the defendant's explanations.

CONCLUSION

Understanding the factual circumstances under which *Batson* challenges have been successful is essential for plaintiffs to recognize potential discrimination and prevent it from manipulating the composition of their juries. In other words, this doctrine adds an additional arrow to a plaintiff's quiver at trial. Utah has embraced the *Batson* framework in the criminal setting and it is firmly established that the framework applies to civil litigation as well. Fixing a keen eye on the jury selection process is critical in order for plaintiffs (and defendants) to maintain their share of control over the process and ensure its integrity throughout.

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