Batson— Aging Well or In Need of Revision?

BY LYNN NOESNER

This article discusses the history and current state of the Batson v. Kentucky *test for assessing purposeful discrimination in peremptory challenges.*

Over 35 years ago in *Batson v. Kentucky*, the US Supreme Court held that purposeful racial discrimination during jury selection violates a defendant's right to equal protection, and it set forth a test for assessing such discrimination.[1] This article takes a closer look at *Batson*'s purpose, the logistics of its application, some of its flaws, and other evolving tests for determining whether a party engaged in purposeful discrimination when using a peremptory challenge.

Batson's Framework and Purpose

The *Batson* Court established a three-step framework for determining whether a party engaged in purposeful discrimination by using a peremptory challenge to excuse a member of a protected group from a jury.[2] The Court intended this test to be easier to satisfy than its predecessor test, enunciated in *Swain v. Alabama*, under which defendants had a "crippling burden" to show evidence of systemic or repeated exclusion of minority jurors.[3]

During the first step, the defendant (or the party raising the *Batson* objection;[4] for ease of reference, this article refers to the defendant as the party raising the challenge) must establish a prima facie case of purposeful discrimination. "The prima facie standard is not a high one."[5] The defendant meets this burden by showing that the prosecution struck a member of a protected group from the jury and the totality of relevant facts gives rise to an inference of discrimination.[6] At the first step, the defendant need not prove discrimination by a preponderance of the evidence but may rely on the undisputed fact that peremptory challenges "permit those to discriminate who are of a mind to discriminate."[7] Further, the defendant need not show a pattern of discrimination, though such evidence would be relevant; rather, the prosecution's actions against a single juror can satisfy *Batson*.[8]

Second, the prosecution must provide a facially valid, race-neutral reason for the strike.[9] The explanation need not rise to the level justifying an exercise of a challenge for cause, but the prosecution cannot satisfy step two by merely denying a discriminatory motive or by pointing to other jurors of color whom the prosecution did not strike.[10] And the court may not fulfill the prosecution's obligation by sua sponte offering its own reasons for striking a juror.[11] After the prosecution offers its race-neutral reasons, the defendant must have the opportunity to rebut the explanation.[12]

Lastly, the court must assess the persuasiveness of the prosecutor's justification for the peremptory strike in light of all the evidence and determine whether the defense established by a preponderance of the evidence that the prosecution excluded a prospective juror because of race or another protected class membership.[13]

The *Batson* Court focused on protecting the defendant's equal protection rights in light of the prosecution's actions in that case. But the Court noted other broader, relevant interests: "In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."[14] Subsequently, the Court explicitly expanded *Batson*'s purpose to include protecting excluded jurors' rights and the

integrity of the entire system.[15] And the Court has repeatedly emphasized the importance of jury service to democracy, stating that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[16]

Batson Expands and Colorado Follows Suit

In the years following *Batson*, the US Supreme Court expanded the doctrine by removing the requirement for shared racial identity between the defendant and the excluded juror,[17] extending the doctrine to civil trials and to defense counsel in criminal trials,[18] and including gender as a protected classification or group.[19]

In addition to these safeguards, Colorado jurors are further protected by CRS § 13-71-104(3)(a), which provides: "No person shall be exempted or excluded from serving as a trial or grand juror because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, economic status, or occupation." *Batson*'s three-step framework is also the governing test applicable to alleged violations of this statute or when evaluating a juror's exclusion from service based on a protected status recognized only in the Colorado statute.[20]

Satisfying *Batson* in Real Time

"The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process."[21] But how does it operate in real time? How do parties meet their burden? And does the framework achieve the desired end?

Before a party raises a *Batson* objection or challenge, the party must be aware of which jurors are included in protected groups. This may not be obvious, so it may make sense to solicit information about prospective jurors' identities in jury questionnaires.

After the prosecution strikes a protected prospective juror, the defendant must raise *Batson* and point to any relevant circumstances that support the minimal prima facie showing at the first step, which may include:

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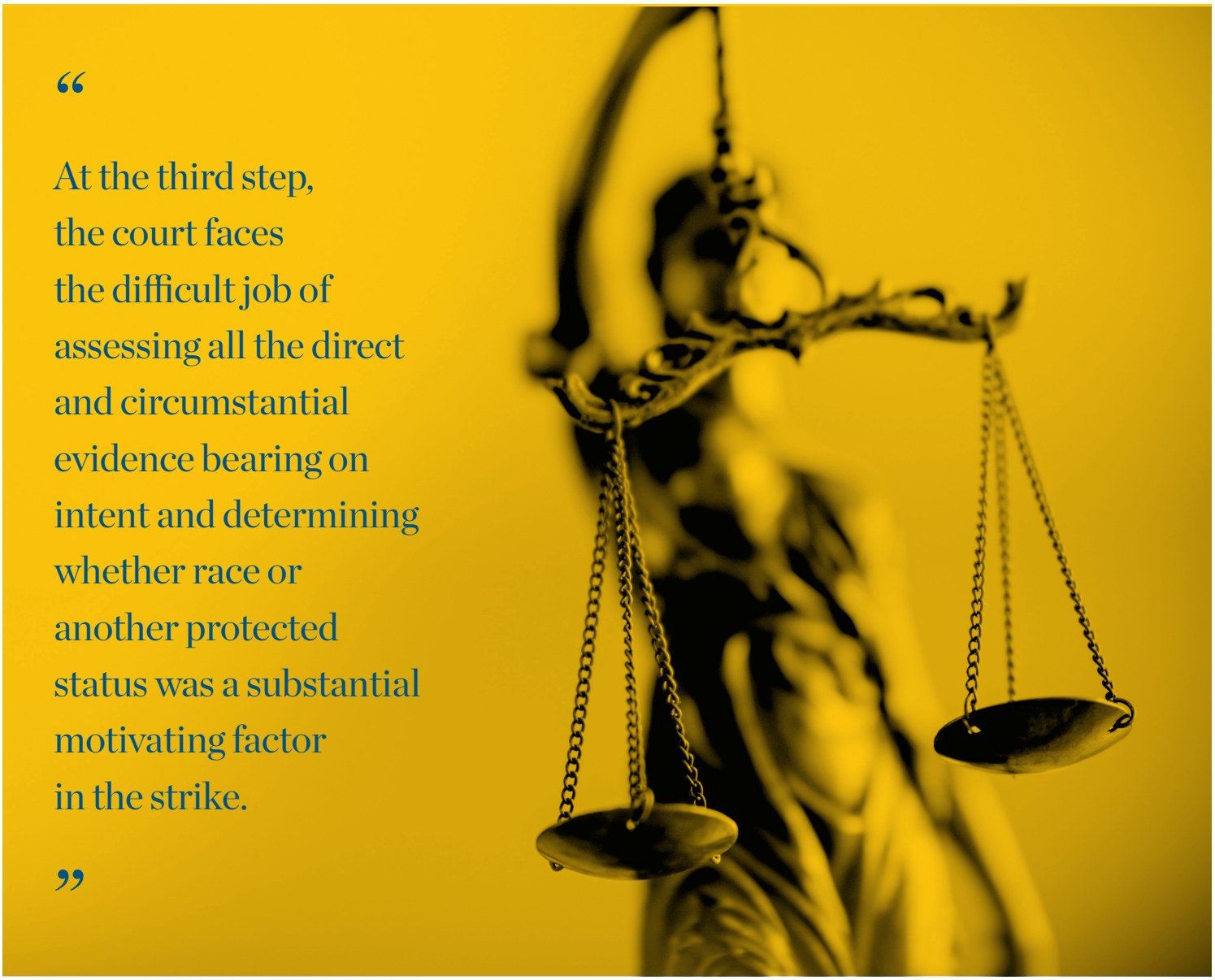
- how many other members of the protected class exist in the panel;
- whether the prosecution has challenged other prospective jurors in protected classes, and if so, what percentage was removed;[22]
- how much time the prosecution spent questioning the challenged juror;[23]
- whether the juror answered appropriately;[24]
- whether the prosecution acted differently toward jurors in protected groups or made any race-related comments;[25] and
- the presumption established in *Batson* that peremptory challenges allow for discrimination.[26]

At this step, numbers and names may be important; to preserve an adequate record for appeal, defense counsel should endeavor to include information regarding the race, ethnicity, and/or gender of any relevant prospective jurors.

At the second step, the prosecution must offer a race-neutral justification for the strike, which has to be "based on something other than the race of the juror."[27] Thus, the prosecution cannot rely on justifications that implicitly involve the juror's race or protected status or any assumptions about race or protected status, including race-related code words or proxies for race.[28] For example, the Colorado Supreme Court recently held that the prosecution failed to meet its burden where it offered several justifications for striking a Hispanic juror, including that he rated the legal system poorly, he experienced racial-profiling, and they feared he would "steer the jury" toward a "race-based reason" why the defendant (also "a Latino male") was charged.[29] The Court reasoned that because part of the prosecution's rationale was "overtly race-based," it had not satisfied *Batson*'s second step.[30]

After the prosecution offers its justifications, the defense must be allowed to present rebuttal evidence. At this point, the defense should try to point to evidence that challenges the validity of the prosecution's asserted justification. For example, evidence of pretext or discriminatory intent may be shown where the prosecution

- did not question the juror about any of the prosecution's purported concerns,[31]



> “At the third step, the court faces the difficult job of assessing all the direct and circumstantial evidence bearing on intent and determining whether race or another protected status was a substantial motivating factor in the strike.”

- allowed similarly situated non-minority juror(s) to remain,[32]
- misstated the record,[33] or
- offered shifting explanations for the prosecution’s actions.[34]

This evidence can be challenging to gather on the fly, so to prepare a well-founded rebuttal argument, the defense should consider asking for a recess to review jury questionnaires and notes. It is also a good idea to ask for a real-time transcript, if available.

At the third step, the court faces the difficult job of assessing all the direct and circumstantial evidence bearing on intent and determining whether race or another protected status was a substantial motivating factor in the strike.[35] This requires the court to scrutinize and make findings regarding the plausibility of the prosecutor’s proffered rationales, the prosecutor’s demeanor, and the juror’s demeanor (if the prosecutor relied on demeanor-based rationales).[36]

Counsel should make sure that the court does not excuse the juror until the court has completed all steps of the *Batson* analysis.

Does *Batson* Work?

Over the years, scholars, practitioners, and judges have criticized *Batson* as being ineffectual for several reasons.[37] First, a party can offer any number of generic or demeanor-based rationales for a strike at the second step, and such rationales will likely be sufficient to overcome the *Batson* challenge.[38]

Second, the ultimate finding of *purposeful* discrimination is difficult to establish, and the reality is a trial judge may feel uncomfortable finding that the prosecutor (who may be a frequent colleague) intentionally excluded a juror based on race or other protected status.[39] In *People v. Ojeda*, the Colorado Supreme Court recognized this reality and sought to clarify the “mistaken assumption” that a successful

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Batson challenge amounts to “a declaration that the proponent of the strike” is a “racist” and “also a liar.”[40] The Court emphasized that sustaining a *Batson* challenge should not be viewed as a moral referendum on the party striking the juror.[41]

Finally, commentators argue that in targeting only explicit or intentional racism, *Batson* fails to acknowledge how racism operates in implicit and unconscious ways.[42] In his concurrence to *Batson*, written decades before the concept of implicit bias was widely accepted, Justice Marshall recognized:

> A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror had acted identically. A judge’s own conscious or unconscious racism may lead him to accept such an explanation as well supported.[43]

Justice Marshall cautioned that the *Batson* framework might only provide illusory protections and would not end “the racial discrimination that peremptories inject into the jury-selection process.”[44] Some commentators and courts have affirmed the continuing validity of these concerns.[45]

However, at least one commentator has argued that *Batson* remains a “meaningful doctrine for fighting discrimination in the jury-selection process and in the criminal justice system more generally.”[46]

New Tests on the Horizon

In light of the above critiques and growing evidence regarding implicit bias, some jurisdictions have begun rethinking and tailoring their *Batson* analyses.[47] Most radically, in 2018, Washington passed General Rule 37, which replaced *Batson*’s third step with an objective test.[48]

The Washington rule provides that if “an objective observer” who is “aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors” and “could view race or ethnicity as a factor,” the court must deny the peremptory strike.[49] The rule also specifies relevant circumstances that the court should consider in its determination and lists rationales that are presumptively invalid, such as expressing distrust in law enforcement, having prior contact with law enforcement, living in high-crime neighborhoods, having children outside marriage, receiving state benefits, and not being a native English speaker.[50] Finally, the rule provides special notice requirements if a party intends to rely on certain demeanor-based rationales that “have historically been associated with improper discrimination in jury selection,” including “allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers.”[51]

Colorado’s Criminal Rules Committee recently debated making similar changes to Crim. P. 24(d). In January 2021, the Rules Committee voted on the proposal, and after it passed 7-5, the Committee sent the recommended rule change to the Colorado Supreme Court. The Court declined to accept the recommendation based on the lack of consensus.[52] Thus, *Batson* remains our governing test.

Conclusion

The *Batson* framework remains the standard in Colorado for determining whether a party engaged in purposeful discrimination by using a peremptory challenge to excuse a member of a protected group from a jury. But practitioners should be aware of new tests for addressing such peremptory challenges that are developing nationwide. Change in this area may yet arrive in Colorado. CL

Lynn Noesner is a lead deputy state public defender in the Colorado State Public Defender’s Appellate Division—lynn.noesner@coloradodefenders.us.

Coordinating Editor: Judge Adam Espinosa, adam.espinosa@judicial.state.co.us

NOTES

1. *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986).

2. *Id.* at 97–98.

3. *See id.* at 92–95; *Swain v. Ala.*, 380 U.S. 202 (1965). *See also Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) ("the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net").

4. The prosecution may raise a *Batson* challenge to the defense's use of peremptories. *See Georgia v. McCollum*, 505 U.S. 42 (1992). *Batson* also applies in civil cases. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991). For consistency, this article refers to the defense as the party raising the *Batson* challenge and the prosecution as the party who exercised the challenged peremptory challenge.

5. *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998).

6. *Batson*, 476 U.S. at 93–97; *Valdez*, 966 P.2d at 590.

7. *Batson*, 476 U.S. at 96 (citing *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

8. *See id.* at 95–96 (recognizing that it is not necessary for several to "suffer discrimination before one could object" and "[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions") (internal quotations and citations omitted); *People v. Ojeda*, 2022 CO 7, ¶ 22 (Colo. 2021) ("a pattern is not essential to making a prima facie showing").

9. *Batson*, 476 U.S. at 97–98; *Snyder v. La.*, 552 U.S. 472, 478 (2008); *Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Valdez*, 966 P.2d at 590.

10. *Valdez*, 966 P.2d at 590.

11. *See Miller-El*, 545 U.S. at 251–52 (court must rely only on the prosecutor's stated reasons for striking a juror, not on any possible reason conceived of by the judge); *Valdez*, 966 P.2d at 592 n.11 (it is the prosecution's responsibility, not the court's, to provide explanations for their strike); *accord Ojeda*, 2022 CO 7, ¶ 29.

12. *Valdez*, 966 P.2d at 590; *People v. Mendoza*, 876 P.2d 98, 101–2 (Colo.App. 1994); *People v. Cerrone*, 854 P.2d 178, 191 n.22 (Colo. 1993).

13. *Miller-El v. Cockrell*, 537 U.S. 322, 338–39 (2003); *Valdez*, 966 P.2d at 590; *Cerrone*, 854 P.2d at 191.

14. *Batson*, 476 U.S. at 99.

15. *See Powers v. Ohio*, 499 U.S. 400 (1991). The Colorado Supreme Court has echoed this sentiment, noting "[t]he harm from discriminatory jury selection reaches beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Ojeda*, 2022 CO 7, ¶ 20.

16. *Powers*, 499 U.S. at 407; *accord Flowers v. Miss.*, 139 S.Ct. 2228, 2238 (2019).

17. *Powers*, 499 U.S. at 415–16.

18. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991); *McCollum*, 505 U.S. 42.

19. *J.E.B. v. Ala.*, 511 U.S. 127 (1994). *See also Craig v. Carlson*, 161 P.3d 648 (Colo. 2007); Colo. Const. art. II, § 23 ("the right of any person to serve on any jury shall not be denied or abridged on account of sex").

20. *Cerrone v. People,* 900 P.2d 45, 52–53 (Colo. 1995) (holding that *Batson* applies to alleged statutory violations and the prosecution's exclusion of hourly wage-earners from grand jury service was discriminatory).

21. *Johnson v. Cal.*, 545 U.S. 162, 172 (2005).

22. *Valdez*, 966 P.2d at 593 ("a party objecting to a peremptory challenge can use statistical evidence to substantiate a prima facie case under *Batson*"). *See also United States v. Joe*, 8 F.3d 1488 (10th Cir. 1993) (peremptory strike against the only Native American juror on the venire established prima facie case).

23. *People v. Gabler*, 958 P.2d 505, 508 (Colo. App. 1997) ("The record reveals that the prosecutor did not question either prospective juror at all during voir dire, which raises the inference of purposeful discrimination").

24. *See Sanchez v. Roden*, 753 F.3d 279, 303 (1st Cir. 2014) ("we do find it significant that the record fails to disclose any obvious infirmity in [the juror's] background or voir dire answers that would translate to an apparent reason for the Commonwealth's peremptory challenge").

25. *Miller-El*, 545 U.S. at 255 (prosecution used "graphic script" when questioning minority jurors about their views on the death penalty but used a "bland" explanation of the death penalty when inquiring about white jurors' views on capital punishment); *Valdez*, 966 P.2d at 596 (prosecutor's references to racial bias during voir dire, coupled with the prosecutor's pattern of peremptory strikes, established a prima face case).

26. *Batson*, 476 U.S. at 96.

27. *Hernandez v. N.Y.*, 500 U.S. 352, 360 (1991).

28. *Payton v. Kearse*, 495 S.E.2d 205, 208 (S.C. 1998) (where counsel sought to strike a juror because she was a "redneck," counsel's explanation was "facially discriminatory" and violated *Batson* without the third step being addressed); *United States v. Greene*, 36 M.J. 274, 279 (C.M.A. 1993) (excluded juror's "purported Latin macho attitude towards sexual offenses was not a race-neutral justification within the meaning of *Batson*"); *State v. Lucas*, 18 P.3d 160, 163 (Ariz.App. 2001) (justification based on assumptions about males from the South was not race-neutral); *McCrea v. Gheraibeh*, 669 S.E.2d 333, 334–35 (S.C. 2008) (unease with juror's appearance and dreadlocks, "a religious and social symbol of historically black cultures," was not race-neutral); *Clayton v. State*, 797 S.E.2d 639, 644–45 (Ga.App. 2017) (strike based on juror's gold teeth was inherently discriminatory at step two); *People v. Morant*, 136 N.Y.S. 3d 685, 690 (N.Y.Sup. 2020) (strikes based on neighborhood were not race-neutral where rationale acts as "a surrogate for racial stereotypes") (quoting *United States v. Bishop*, 959 F.2d 820, 826 (9th Cir. 1992)).

29. *Ojeda*, 2022 CO 7, ¶¶46–49.

30. *Id.*

31. *See Miller-El*, 545 U.S. at 246, 250, n.8 (lack of questions about "errant relative" supports pretext); *People v. Collins*, 187 P.3d 1178, 1183 (Colo.App. 2008) ("We also observe that the prosecutor did not ask Ms. S. any questions concerning the details of her husband's domestic violence case, a fact which suggests pretext as it undermines the persuasiveness of the claimed concern.") (internal quotation marks and citation omitted); *United States v. Atkins*, 843 F.3d 625, 638 (6th Cir. 2016) ("The government's disinterest in probing [juror's] supposed lack of attentiveness during voir dire strongly suggests that the government was not actually concerned with [juror's] ability to focus during trial.").

32. *See Flowers*, 139 S.Ct. at 2249 (where prosecution indicated they struck a Black juror because she worked with the defendant's father, the fact that the prosecution didn't strike two white prospective jurors who knew members of the defendant's family provided evidence of racial discrimination); *Foster v. Chatman*, 136 S.Ct 1737, 1751–52 (2016) (prosecutor's explanation that he struck a Black juror because he had a son about the same age of the defendant was pretextual where he didn't strike two white jurors who also had similarly aged sons).

33. *Flowers*, 139 S.Ct. at 2250 ("When a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent."); *Foster*, 136 S.Ct. at 1749, 1753 ("the record persuades us that [the juror's] race . . . was [the prosecutor]'s true motivation. The first indication to that effect is [the prosecutor]'s mischaracterization of the record"); *Collins*, 187 P.3d at 1183.

34. *Foster*, 136 S.Ct at 1751 (where "the prosecution's principal reasons for the strike shifted over time," it suggested "those reasons may be pretextual"); *Miller-El*, 545 U.S. at 246 (where a prosecutor provided a "substitute reason" for striking a juror after being challenged on his original rationale, this new explanation was "difficult to credit," and "reek[ed] of afterthought" and "pretextual timing").

35. *See Currie v. McDowell*, 825 F.3d 603, 605–6 (9th Cir. 2016) ("defendant must demonstrate that race was a substantial motivating factor," but defendant need not establish that "the racial motivation was determinative") (internal quotations omitted); *Ojeda*, 487 P.3d at 1123 (adopting the substantial motivating factor standard). *See also Hernandez*, 500 U.S. at 360 ("discriminatory purpose . . . implies that the decision maker . . . selected . . . a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group"); *Snyder*, 552 U.S. at 485 (peremptory strike "motivated in substantial part by discriminatory intent" violates *Batson*).

36. *Collins*, 187 P.3d at 1182.

37. *See, e.g.*, *Miller-El*, 545 U.S. at 268–69 (Breyer, J., concurring) ("Given the inevitably clumsy fit between any objectively measurable standard and the subjective decisionmaking at issue, I am not surprised to find studies

and anecdotal reports suggesting that, despite *Batson*, the discriminatory use of peremptory challenges remains a problem."); *State v. Jefferson*, 429 P.3d 467, 476 (Wash. 2018) (identifying "*Batson*'s main deficiencies," including "(1) *Batson* makes it very difficult for defendants to prove [purposeful] discrimination even where it almost certainly exists and (2) *Batson* fails to address peremptory strikes due to implicit or unconscious bias, as opposed to purposeful race discrimination.") (internal quotations omitted); Lafave et al., *Criminal Procedure* § 22.3(d) (West Academic Pub'g 4th ed. Nov. 2021 update) (because "experience . . . indicates it is ordinarily not difficult for prosecutors to come up with an acceptable group-neutral reason," some view "*Batson* procedures as less an obstacle to racial discrimination than a road map to disguised discrimination").

38. *Batson*, 476 U.S. at 106 (Marshall, J., concurring) ("If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory."); *accord Minetos v. City Univ. of N.Y.*, 925 F.Supp. 177, 185 (S.D.N.Y. 1996) ("lawyers can easily generate facially neutral reasons for striking jurors and trial courts are hard pressed to second-guess them, rendering *Batson* and *Purkett*'s protections illusory"); *People v. Randall*, 671 N.E.2d 60, 65 (Ill.App. 1996) (criticizing "the charade that has become the *Batson* process" and questioning whether "new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations'"); Bellin and Semitsu, "Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 *Cornell L. Rev.* 1075, 1090–106 (2011) (concluding, based on results from a large survey of *Batson* cases from 2001–09, that *Batson* "is unable to prevent the use of race in jury selection because its dictates are so easily avoided" through the articulation of purportedly race neutral justifications).

39. *See People v. Beauvais*, 393 P.3d 509, 532 (Colo. 2017) (Márquez, J., dissenting) ("To sustain a *Batson* objection places a trial court judge in the unenviable position of finding that an attorney standing before the court both intentionally excluded someone from the jury based on race or gender, and offered the court a pretextual reason for doing so"); *Coombs v. Diguglielmo*, 616 F.3d 255, 264 (3d Cir. 2010) ("No judge wants to be in the position of suggesting that a fellow professional—whom the judge may have known for years—is exercising peremptory challenges based on forbidden racial considerations"); *State v. Saintcalle*, 309 P.3d 326, 338 (Wash. 2013), *abrogated in part by City of Seattle v. Erickson*, 398 P.3d 1124 (2017) ("A requirement of conscious discrimination is especially disconcerting because it seemingly requires judges to accuse attorneys of deceit and racism in order to sustain a *Batson* challenge."); *State v. Holmes*, 221 A.3d 407, 429 (Conn. 2019) (discussing how *Batson*'s third step "require[s] the trial judge to make the highly unpalatable finding that the striking attorney has acted unethically by misleading the court and intentionally violating a juror's constitutional rights."); *People v. Ojeda*, 487 P.3d 1117, 1132–33 (Colo.App. 2019) (Harris, J., concurring) ("I suspect that trial judges hesitate to sustain *Batson* challenges, when they otherwise might and should, because such a ruling is seen as tantamount to calling the prosecutor a racist. Perpetuation of that misconception allows more, not fewer, race-based strikes to go unchecked.").

40. *Ojeda*, 2022 CO 7, ¶¶ 50–51.

41. *Id.* The Colorado Supreme Court's discussion parallels several of Judge Harris's comments in her concurrence: *See Ojeda*, 487 P.3d at 1132 (Harris, J., concurring) ("[d]iscriminatory purpose is not the same as discriminatory animus" and a "defendant need not show that the race-based strike was motivated by the lawyer's prejudice or animus."). She discussed how lawyers might rely on stereotypes to stack the jury in their favor without being inherently immoral or bigoted. *Id.*

42. *See, e.g.*, Page, "Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 *B.U. L. Rev.* 155 (2005); *Saintcalle*, 309 P.3d at 336 ("Unconscious stereotyping upends the Batson framework. Batson is equipped to root out only "purposeful" discrimination . . . . But discrimination in this day and age is frequently unconscious and less often consciously purposeful."); *Holmes*, 221 A.3d at 430 ("the purposeful discrimination requirement does nothing to address the adverse effects of implicit or unconscious bias on jury selection").

43. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

44. *Id.* at 102–3.

45. *See, e.g*, *Rice v. Collins*, 546 U.S. 333, 342–43 (2006) (Breyer, J., concurring) ("history has proved Justice Marshall right"); *Beauvais*, 393 P.3d at 532–33 (Márquez, J., dissenting) (discussing Justice Marshall's concerns); Sloane, "'What to do about Batson?': Using a Court Rule to Address Implicit Bias in Jury Selection, 108 *Calif. L. Rev.* 233, 238–39 (2020) (discussing how Justice Marshall's concerns "proved prescient").

46. Abel, "*Batson*'s Appellate Appeal and Trial Tribulations," 118 *Colum. L. Rev.* 713 (2018).

47. Wash. GR 37; *Jefferson*, 429 P.3d at 481; Cal.C.C.P. § 231.7. *See also* Connecticut Jury Selection Task Force, Report of the Jury Selection Task Force to Chief Justice Richard A. Robinson (Dec. 31, 2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf.

48. Wash. GR 37.

49. Wash. GR 37(e)–(f).

50. Wash. GR 37(h).

51. Wash. GR 37(i).

52. Vo, "Racial discrimination still exists in jury selection. Colorado's Supreme Court rejected a proposal meant to fix that." *Colo. Sun* (July 21, 2021), https://coloradosun.com/2021/07/21/racism-jury-selection-colorado-supreme court/?mc_cid=8d2ffdbd5b&mc_eid=8220b666b0.