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Notes

Branding Neutral Explanations Pretextual under *Batson v. Kentucky*: An Examination of the Role of the Trial Judge in Jury Selection

by

TRACY M.Y. CHOY

Famed defense attorney Clarence Darrow's jury selection methods were keenly influenced by racial, sexual, and religious stereotypes. He preferred Irishmen because he thought them to be "emotional, kindly and sympathetic." He also liked "Unitarians, Universalists, Congregationalists, Jews and other agnostics." But he distrusted women, having "formed a fixed opinion that they were absolutely dependable" and, therefore, unlikely to be sympathetic to the defense.¹

Introduction

In 1936, Darrow based his peremptory challenges on race and gender biases, and his jury selection methods were considered constitutionally acceptable by the United States Supreme Court. Today, however, strikes based solely on race² or gender³ are impermissible. Since 1790,⁴ American trial attorneys had used peremptory challenges to excuse jurors for any reason,⁵ without having to justify the dismis-

Attorneys freely used peremptory challenges to exclude minority jurors, subject to no restrictions.

After nearly two centuries of unfettered abuse, the Supreme Court ruled that allowing attorneys to dismiss jurors solely because of their race was repugnant under the Constitution. In *Batson v. Kentucky*, decided in 1986, the Court held that the exercise of racially-motivated peremptory challenges violated the Equal Protection Clause of the Fourteenth Amendment. The Court established a three-step, burden-shifting procedure to determine whether a peremptory challenge was race-based. Under this procedure, the challenging party is required first to make a prima facie showing that the attorney purposefully discriminated in exercising a peremptory challenge to dismiss a potential juror. After the prima facie showing has been made, the challenged party must articulate a race-neutral explanation for dismissing the juror. Finally, the trial court decides whether the challenging party has carried its burden of proving intentional discrimination.

Many articles on the constitutionality of peremptory challenges focus on *Batson*’s three-step analysis and the Court’s failure to give lower courts specific guidelines for implementing the second and third steps of *Batson* challenges. Recently, the Court provided guidelines for *Batson*’s second step, which requires the attorney who peremptorily dismissed a juror to provide a neutral explanation for the dismissal. In *Purkett v. Elem*, decided during the 1995 term, the Court held that step two of the *Batson* inquiry only requires an explanation that is facially valid, that is, free from overt discriminatory intent. The Court further elaborated that trial courts that had demanded that the facially neutral explanation be persuasive, or even plausible, were combining *Batson*’s second step, the neutral explanation requirement,
and the third step, the trial court's determination as to proof of purposeful discrimination. Because the Court in *Purkett* only articulated the requirements that an attorney must fulfill in order to meet her burden at step two, questions remain regarding the third step of the *Batson* inquiry. Trial courts need guidance in the determination of whether an attorney's neutral explanation should be branded pretextual in violation of the litigant or juror's equal protection rights.

Some authors have argued that heightened scrutiny at step one, where the opponent of the strike is required to establish a prima facie case that a peremptory challenge was exercised in a discriminatory manner, would eliminate some of the problems encountered at step three. If courts required attorneys to explain their challenges in cases where there is a strong inference of purposeful discrimination, courts might not feel compelled to accept flimsy explanations to rebut relatively weak inferences of discrimination. The integrity of the judicial system would undoubtedly benefit from an increased burden of proof at the prima facie stage; judges would no longer be seen as unwilling to eradicate racial discrimination by being easily satisfied with any excuse proffered by an attorney to justify her use of a peremptory challenge.

This Note focuses on the final step of the *Batson* inquiry, the trial court's factual determination of whether the proponent of the strike has purposefully discriminated on the basis of race, however, because the burdens at the prima facie stage and at the neutral explanation stage are easily met. Step three is the most important stage of the *Batson* proof structure because trial judges often skip over the prima facie requirement and focus their inquiry on the challenged attorney's proffered neutral reasons. Under *Purkett*, the persuasiveness of the articulated neutral explanation is only relevant at *Batson*'s final stage. Thus, at step two, any facially non-racial explanation is sufficient to successfully rebut the prima facie case. Clearly, *Purkett* has lowered the challenged party's burden at step two by holding that any plausible reason that is not overtly discriminatory will suffice.

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16. *Id.*


18. *Id.* at 905.

19. *Id.* at 889.

20. *Id.* at 904.


The importance of the prima facie showing is diminished further if the trial court proceeds "to the second step in the process, because the issue of whether the defendant established a prima facie case of the discriminatory use of a peremptory strike is moot."23 Step one may be skipped if the trial judge neglects to require the attorney objecting to the use of a peremptory challenge to establish a prima facie case. Frequently, the attorney defending her use of a peremptory challenge waives her right to force opposing counsel to meet her burden of a prima facie case of purposeful discrimination because many attorneys quickly defend themselves when they are faced with an accusation of racism. When the attorney defends her use of peremptories before the trial judge has ruled on step one, the inference of discrimination becomes moot and may not be subject to appeal. Since it is possible to reach step three without the trial court's ruling on step one, this Note will focus on the relevant factors to be weighed in a trial court's determination of whether the challenging attorney has carried his or her burden of proving purposeful discrimination. The Supreme Court recognized that Batson inquiries usually boil down to the credibility of the proponent of the peremptory challenge's race-neutral explanation.24 Thus, the outcomes of a significant number of Batson challenges are based solely on whether the trial judge believes that the proffered explanation is pretextual, and that race was the actual motivation for the strike.25

Under Batson, the challenging attorney often proves purposeful discrimination by establishing that the challenged attorney's proffered neutral explanation is pretextual.26 In other words, proof of pretext, a showing that the proffered facially neutral explanation is merely concealing the proponent of the strike's discriminatory intent, usually entitles the challenging party to "prevail as a matter of law."27 Thus, under the Batson three-step proof structure, the critical question is: When is a facially neutral explanation pretextual?

Some courts have identified relevant factors that should be considered in determining whether a challenged attorney's reasons for us-

23. State v. Gaitan, 536 N.W.2d 11, 15 (Minn. 1995). Also, under Hernandez v. New York, 500 U.S. 352 (1991), if the challenged attorney defends the exercise of a peremptory challenge before the attorney is required to by the trial court, the issue of whether the challenging attorney made a proper prima facie showing of intentional discrimination is no longer relevant. Id. at 359.
25. See Sutphen, supra note 9, at 501.
26. See Sutphen, supra note 9, at 489. Sutphen defines pretext, pretext evidence, and proof of pretext as "the circumstance in which [the party] raising a Batson objection offers evidence to prove or actually establishes that [the challenged attorney's explanation for a peremptory challenge, for whatever reason, is unworthy of credence." Id. at 490 n.12.
27. Id. at 490.
ing peremptories are pretextual. This Note argues that all courts should use these relevant factors in determining whether, under the totality of the circumstances, the challenging party has proved purposeful discrimination. Further, the use of these factors will ensure that the trial judge makes a finding that is supported by the record. The record is extremely important at the appellate court level because the judge's findings of fact are entitled to great deference and will not be disturbed unless there is clear error.

Part I of this Note traces the history of the peremptory challenge through Batson and its progeny. Part II focuses on Batson's three-step analysis and demonstrates how Purkett clarified the proper stage for the pretext analysis. Part III presents the advantages of the multifactor approach to the pretext analysis outlined above. In conclusion, this Note will argue that it is appropriate for all trial courts to utilize a multi-factor approach at Batson's third stage to ensure the equal protection of all litigants and potential jurors.

I. Peremptory Challenges: History

The history of the peremptory challenge spans over two hundred years of English common law. Although peremptory challenges in the United States "date[] as far back as the founding of the Republic[,] . . . no constitutional right to a peremptory challenge exists . . . ." Peremptory challenges are guaranteed by statute in federal and state jury trials. Historically, peremptory challenges did "not have to be defended by an attorney or approved by a judge." Thus, they were often abused.

In Swain v. Alabama, the Supreme Court first visited the issue of a prosecutor's use of peremptory challenges for discriminatory purposes. The defendant in Swain was a black man accused of raping a

28. See, e.g., Ex parte Branch, 526 So. 2d 609, 622-24 (Ala. 1987) (listing factors relevant to finding an inference of discrimination and the types of evidence tending to prove pretext). See also infra note 149.
30. See id. at 369.
32. Id.
35. Id. at 147.
young white woman. An all-white jury convicted him of the rape. Following the jury’s guilty verdict, the Alabama circuit court sentenced Robert Swain to death. Of the eight black men in the venire, i.e., the panel of potential jurors from which a jury is selected, six were peremptorily challenged by the prosecutor. Despite this fact, the Supreme Court held that the defendant failed to meet his burden of proving that the prosecutor had systematically and deliberately excluded black jurors. Further, the Court “presumed that the prosecutor’s goal was the seating of a fair and impartial jury.” The challenging party could rebut this presumption only by showing that the prosecutor consistently used “peremptory challenges to prevent blacks from serving on a jury, ‘whatever the circumstances, whatever the crime, and whoever the defendant or the victim.’” While the Swain Court recognized that a State’s deliberate exercise of peremptory challenges to discriminate against a potential black juror because of his or her race violates the Equal Protection Clause, the Court required that a defendant prove purposeful discrimination over a series of cases. Thus, to show systematic exclusion, a defendant could not rely solely on the peremptory challenges exercised in the defendant’s individual case. Despite the unfairness of a nearly insurmountable burden, Swain remained the law for over twenty years.

In Batson v. Kentucky, the Supreme Court sought to remove the “crippling burden of proof” placed on defendants by Swain. Petitioner in Batson, a black man, had been convicted by an all-white Kentucky jury of second-degree burglary and receipt of stolen goods. Following a judge-conducted voir dire, the prosecutor exercised his peremptory challenges to exclude all of the blacks on the venire from serving on the jury. The Supreme Court held that the prosecutor’s use of peremptory challenges to strike jurors solely on

38. Swain, 380 U.S. at 231.
39. Id.
40. Id.
42. Swain, 380 U.S. at 205.
43. Id. at 226.
44. GOBERT & JORDAN, supra note 5, at 278.
45. Id. at 279 (citing Swain, 380 U.S. at 223). “The difficulty of rebuttal . . . is reflected by the facts of Swain: the Supreme Court found no constitutional violation despite the undisputed fact that no black had served on a jury in Tallegada County in fifteen years.” Id.
46. See Swain, 380 U.S. at 203-04, 228.
47. Id. at 227-28.
49. Id. at 92.
50. Id. at 82-83.
51. Id. at 83.
the basis of their race "or on the assumption that black jurors as a
group will be unable impartially to consider the State’s case against a
black defendant" violated the Equal Protection Clause.

The Court adopted the burden-shifting proof structure used in
Title VII employment discrimination cases to determine whether the
prosecutor discriminated in selecting the jury. First, the defendant
must establish a prima facie case that the prosecutor purposefully dis-
criminated in peremptorily challenging certain jurors. Once the de-
fendant has made that prima facie showing, "the burden shifts to the
State to explain adequately the racial exclusion." This second step
in the Batson framework requires the State to provide a race-neutral
reason for excluding the challenged juror. Finally, after the State
articulates a neutral explanation for its decision, the trial court deter-
mires whether the defendant has carried the burden of proving the
reason provided was pretextual.

Batson's holding only applied to criminal cases where the defend-
ant challenged the prosecutor's race-based exercise of peremptory
challenges on equal protection grounds. Since Batson, the Supreme
Court has extended Batson principles to criminal cases where the de-
fendant and the excluded juror do not share the same race, to civil
cases, and to gender-based peremptory challenges. Thus, every litigant in
every jury trial has the right to bring a Batson challenge against an
attorney's exercise of peremptory challenges based on either race or
gender.

52. Id. at 89.
53. Id.
54. See id. at 94 n.18; see also Sutphen, supra note 9, at 490.
55. See Batson, 476 U.S. at 93-94.
56. Id. at 94.
57. Id.
58. Id. at 96.
59. Sutphen, supra note 9, at 489 n.11.
cases regardless of whether the defendant and the excluded juror were of the same race).
to civil cases).
now applies in all cases to every litigant for both race and gender-based peremptory chal-
changes, this Note will focus on the traditional Batson situation. Thus, "the prosecutor" or
"the State" may be read interchangeably with "the challenged attorney," while "the de-
fendant" may be read as "the challenging party." Furthermore, assertions based on ra-
cially-motivated strikes likewise apply to gender-based discrimination.
II. *Batson’s Three-Step Analysis*

*Batson’s* burden-shifting framework is comprised of three steps. The challenging party acts at step one, the challenged attorney acts at step two, and the judge acts at step-three. In practice, however, the judge plays a role at every step, and both the challenging and challenged attorneys may need to act further at step three. Furthermore, as discussed in this section, each step may contain other components.

A. **Establishing a Prima Facie Case**

The challenging party must establish a prima facie case to raise an inference of purposeful discrimination. Under a *Batson* analysis, the prima facie case requires that the challenging party first show that he or she is a member of a protected group and that the prosecutor has exercised peremptory challenges to remove jurors of that group. Second, the challenging party is entitled to rely on the fact, about which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” Finally, the challenging party must show that these facts, as well as any other relevant circumstance, raise an inference that the challenged attorney used peremptory challenges to exclude jurors from the venire on account of their race or gender.

As mentioned earlier, during step one of the *Batson* inquiry, the trial court should consider any relevant circumstance in determining whether the challenging party has established a prima facie case of purposeful discrimination. The Supreme Court has noted that a prosecutor’s pattern of using strikes against black jurors is a relevant circumstance that may raise an inference of discriminatory purpose. The Court, however, did not provide further guidance in this area and instead stated: “We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances con-

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64. *The prima facie case may be established “solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant's trial.”* Batson v. Kentucky, 476 U.S. 79, 96 (1986).


67. *Id.*


70. *Id.*
cerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.\textsuperscript{77}\textsuperscript{1}

Whether trial courts properly apply the above three factors, especially the factor incorporating any relevant circumstances, in determining prima facie cases in \textit{Batson} challenges has been debated.\textsuperscript{72}\textsuperscript{1} One author has argued that judges often do not require the showing of a prima facie case at all or that they accept very weak inferences of discrimination.\textsuperscript{73}\textsuperscript{1} Another problem results when attorneys defend challenges to their use of peremptories before the trial court has ruled on the prima facie issue.\textsuperscript{74}\textsuperscript{1} Once a challenged peremptory strike is defended, the challenging party is deemed to have raised an inference of purposeful discrimination.\textsuperscript{75}\textsuperscript{1} Although it may seem odd that an attorney would prematurely defend her peremptory challenge, and thereby raise the inference of intentional discrimination, many attorneys have a natural tendency to react quickly to an accusation of racism or gender discrimination by defending their strikes before the judge requires them to justify the dismissals.

In both federal and state courts, some judges skip over the prima facie stage entirely and immediately demand an explanation from the proponent of the strike.\textsuperscript{76}\textsuperscript{1} One theory suggests that judges have equated proof of pretext with intentional discrimination to such a large extent that they attempt to expedite the process by "ask[ing] prosecutors to offer a race-neutral explanation for their challenges even before a prima facie case is established."\textsuperscript{77}\textsuperscript{1} Because some judges hastily deal, or do not deal at all, with prima facie evidence of intentional discrimination, practitioners' guides emphasize the importance of challenging parties' waiting for or insisting on a ruling from the judge on the prima facie issue before providing a race-neutral explanation for their strikes.\textsuperscript{78}\textsuperscript{1} Practitioners are reminded to establish a clear record to ensure that none of their actions or inactions result in a waiver of rights on appeal.\textsuperscript{79}\textsuperscript{1}

A few courts have identified elaborate factors that should be taken into account in considering all of the relevant circumstances bearing on the prima facie issue. In 1987, the Alabama Supreme Court used statistical decision theory to analyze the numeric evidence of discrimination at the prima facie stage.\textsuperscript{71}\textsuperscript{1} See generally \textit{DiPrima}, supra note 17; \textit{Sutphen}, supra note 9.\textsuperscript{77}\textsuperscript{1} See \textit{DiPrima}, supra note 17, at 890 (proposing that "judges use statistical decision theory to analyze the numeric evidence of discrimination at the prima facie stage").\textsuperscript{73}\textsuperscript{1} See \textit{supra} notes 17-20 and accompanying text.\textsuperscript{74}\textsuperscript{1} See \textit{id.}.\textsuperscript{75}\textsuperscript{1} See \textit{supra} note 9, at 501.

\textsuperscript{76}\textsuperscript{1} \textit{Sutphen}, supra note 9, at 501 (citing Jeffrey S. Brand, \textit{The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters}, 1994 Wis. L. Rev. 511, 583 n.380 (listing circuit court cases that have skipped \textit{Batson}'s prima facie stage)).

\textsuperscript{77}\textsuperscript{1} \textit{Sutphen}, \textit{supra} note 9, at 501.

\textsuperscript{78}\textsuperscript{1} \textit{Slusser et al.}, \textit{supra} note 65, at 144.

\textsuperscript{79}\textsuperscript{1} \textit{See id.} at 137-38.
Court provided its trial and appellate courts with an exhaustive list of the types of evidence that may raise the inference of discrimination.\(^{80}\) The types of evidence included: (1) statistics showing that race is the only common characteristic amongst the excluded jurors; (2) "[a] pattern of strikes against black jurors on the particular venire;" (3) "[t]he past conduct of the state's attorney;" (4) "[t]he type and manner of the state's attorney's questions and statements;" (5) "[t]he type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions;" (6) "[d]isparate treatment of the jury venire with the same characteristics, or who answer a question in the same or similar manner;" (7) "[d]isparate examination of members of the venire;" (8) disparate impact statistics that demonstrate that most of the challenges were used to strike blacks from the jury; and (9) the state's use of peremptory challenges to remove all or most black jurors.\(^{81}\)

The factor approach at the prima facie stage has many of the same advantages as a factor approach at the pretext analysis discussed in Part III. Employing a factor approach to analyze the challenging party's prima facie basis for believing purposeful discrimination reminds the judge that sufficient evidence is required to raise an inference of discrimination. Challenges that fail to demonstrate a prima facie level of discrimination should be rejected in order to preserve the time-honored tradition of peremptory challenges, as well as the integrity of the jury selection process.

Respecting the history and purpose of the peremptory strike necessitates that challenges that do not raise a sufficient inference of discrimination be dismissed for failure to make out a prima facie claim. Likewise, if an explanation is required in instances where an inference is slight, the acceptance of a weak explanation to rebut a weak inference only harms the judicial system and its commitment to eliminating racial and gender discrimination in the jury selection process.\(^{82}\) Whether or not a trial court uses the types of factors employed by the Alabama Supreme Court, once the judge finds that the challenging

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80. *Ex parte* Branch, 526 So. 2d 609, 622-23 (Ala. 1987).

81. *Id.* The court also provided examples of these types of evidence: (1) "'[I]t 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,' . . . indicating that race was the deciding factor;" (2) "4 of 6 peremptory challenges used to strike black jurors;" (6) "[I]n 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;" and (7) "[I]n 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." *Id.* (citing *Slappy v. State*, 503 So. 2d 350, 354-55 (Fla. Dist. Ct. App. 1987)).

82. See DiPrima, *supra* note 17, at 889.
party has failed to establish a prima facie case, the Batson inquiry ends.83

B. Facial Neutral Explanations

Once the trial court finds that the challenging party has established a prima facie case of discrimination, the burden of production shifts to the challenged attorney to rebut the prima facie claim.84 Although the Batson Court failed to give specific guidelines regarding what is required at this stage, the Court noted that the neutral explanation "need not rise to the level justifying exercise of a challenge for cause."85 The Court also ruled that the prosecutor is precluded from rebutting the defendant's prima facie claim "by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race."86 The prosecutor is also barred from rebutting an inference of discrimination merely by denying that he had a discriminatory motive or by affirming his good faith.87

Recently, in Purkett v. Elem,88 the Supreme Court ended the controversy surrounding what was meant by Batson's requirement of a "neutral explanation." Respondent in Purkett, a black male,89 was convicted of second-degree robbery in Missouri.90 During voir dire, his counsel made Batson objections to the prosecutor's peremptory challenges against two black males.91 The victim was a black woman, and the prosecutor did not strike the only black female from the venire.92 The prosecutor explained that he struck the black male jurors because they were "the only two people on the jury . . . with facial hair. . . . And I [did]n't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look[ed] suspicious to me."93 The court overruled Respondent's objection without explanation; the appellate court affirmed that decision.94 Respondent

83. DiPrima, supra note 17, at 904 ("Yet the consequence of a finding that a prima facie case has not been established is that the judge refuses to ask the challenged party for an explanation, despite the possibility that the challenged party will offer an explanation that reveals discriminatory intent.").
84. See Gobert & Jordan, supra note 5, at 290.
86. Id.
87. Id. at 98.
89. Donald A. Dripps, "I Didn't Like the Way He Looked," TRIAL, July 1995, at 94, 96 (citing State v. Elem, 747 S.W.2d 772 (Mo. Ct. App. 1988)).
90. Purkett, 115 S. Ct. at 1770.
91. Id.
92. Dripps, supra note 89, at 94, 96.
93. Purkett, 115 S. Ct. at 1770.
94. Id.
then filed a petition for habeas corpus, and the district court denied his claim. The Eighth Circuit Court of Appeals reversed and remanded. Finding the prosecutor's proffered explanation pretextual, the Eighth Circuit concluded that the trial court committed clear error by not finding intentional discrimination. The Eighth Circuit, instructing the district court to grant the habeas corpus writ, stated that the prosecutor must "at least articulate some plausible race-neutral reason for believing that [the] factors [given] will somehow affect the person's ability to perform his or her duties as a juror."  

The Supreme Court reversed and held that the prosecutor had met his burden of rebutting the defendant's prima facie case because the proffered explanation was race-neutral. The Court found that the Eighth Circuit improperly combined Batson's second and third steps by requiring a persuasive or plausible explanation. Noting that the persuasiveness of the justification only becomes relevant at the third step, the Court stated that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." In response to the dissent's claim that the majority was overruling Batson's mandate that neutral explanations be related to the case at issue, the majority simply stated that what is meant "by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection.

All that is required at Batson's second step is an explanation that is facially valid; the literal meaning of the words used in the challenged party's explanation must be free from discriminatory intent. Many authors, siding with the dissent, have claimed that Purkett makes it more difficult for challenging parties to prevail on Batson grounds. However, this view overlooks the fact that the majority's ruling only gets the challenged attorney past Batson's second step. The persuasiveness of the justification is extremely important at Batson's third step, where "implausible or fantastic justifications may

95. Id.
96. Id.
97. Purkett, 115 S. Ct. at 1770.
98. Id. (quoting Elem v. Purkett, 25 F.3d 679, 683 (8th Cir. 1994)).
99. Id. at 1771.
100. Id.
101. Id. (citing St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2748-49 (1993)).
102. Id. at 1772 (Stevens J., dissenting).
103. Id. at 1771.
104. Id.
105. See, e.g., Dripps, supra note 89, at 96 ("If 'I didn't like the way he looked' is an acceptable race-neutral justification for peremptories, only a very stupid prosecutor will ever again lose a Batson claim."); Fahringer, supra note 31, at 410 ("This decision is a major disappointment to those who defend criminal cases and will inevitably reduce Batson claims.").
(and probably will) be found to be pretexts for purposeful discrimination.” Thus, explanations like “I didn’t like the way he looked” may still be found pretextual as a matter of law under Batson’s third step. Purkett only alters the law in the limited sense of requiring that judges make the determination that the proffered explanation is pretextual at the third step of the inquiry.

Of course, if the challenged attorney’s explanation violates the Equal Protection Clause and is discriminatory on its face, the trial court does not proceed to step three. For example, if the attorney admits that she dismissed a black juror solely because the juror is black, the inquiry ends at step two. Here, step three is rendered unnecessary since, under Batson, peremptory challenges based on race violate the juror’s equal protection rights. On the other hand, if the attorney states a facially nondiscriminatory explanation for dismissing the juror, that neutral explanation must be examined for pretext at step three. For instance, if the attorney claims that she dismissed the juror because the juror is uneducated, the trial judge must proceed to step three to determine whether other jurors who are also uneducated were similarly dismissed and if there are other relevant circumstances that have the tendency to show pretext.

C. Batson’s Final Step

At Batson’s final step, the trial court must decide whether the challenging party carried its burden of proving purposeful discrimination. Since Purkett explained exactly what a neutral explanation must contain to be sufficient, step three remains the only Batson step that the Supreme Court has provided absolutely no guidance for a trial court’s determination of purposeful discrimination. The Court has defined Batson’s third step interchangeably as: (1) the trial court’s duty to determine whether the opponent to the strike has established purposeful discrimination, and (2) the step where the court must decide whether the proffered explanation is pretextual. In other words, if the opponent to the strike can convince the judge that the proffered reasons are pretextual, the opponent will be deemed to have proven purposeful discrimination as a matter of law. Thus, the critical question at stage three is: When should a facially neutral explanation be branded pretextual?

106. Purkett, 115 S. Ct. at 1771.
108. See Purkett, 115 S. Ct. at 1772 (Stevens, J., dissenting) (citing Batson, 476 U.S. at 96-98).
109. Sutphen, supra note 9, at 500.
Recently, in *People v. Richie*\(^{111}\), the appellate division of the Supreme Court of New York squarely ruled on this issue. The court held that the determination of whether an explanation is pretextual depends on a variety of factors, including: (1) "whether the reason proffered by the party exercising the peremptory challenge relates at all to the facts of the case;" (2) "[t]he extent to which the party exercising the peremptory challenge actually questioned the proposed juror;" (3) "[w]hether particular questions were asked of only one group of jurors, and not of others;" (4) "[w]hether a particular reason was applied to only one group of jurors, and not to others;" or (5) "[w]hether the reason proffered was based upon ‘hard data’ or was purely intuitive."\(^{112}\)

The *Richie* multi-factor approach gives trial courts the essential guidelines needed to effectuate *Batson*’s mandate of eradicating invidious racial discrimination in jury selection. *Richie*’s first factor requires that the articulated neutral explanation be related to the facts of the instant case, reinstating a key element of *Batson*. Originally, *Batson* required that a legitimate race-neutral explanation must be reasonably specific and related to the case at hand.\(^{113}\) However, under *Purkett*, any facially valid explanation free from overt discriminatory intent satisfies the neutral explanation requirement.\(^{114}\) Requiring that a neutral explanation be related to the current case in the pretext analysis of *Batson*’s third stage addresses the concerns of the *Purkett* dissent while remaining within the framework established by the majority.

Further, minorities are increasingly struck based on their appearance, their place of residence, or their social relationships, without a showing that any of these reasons are related to the current case.\(^{115}\) Requiring judges to verify that the proffered explanation is relevant to the case to be tried ensures the active judicial role envisioned by the *Batson* Court at the final stage of the inquiry.\(^{116}\) Judges need to distinguish between legitimate reasons that may be valid in one case, but invalid in another. For instance, if an attorney justifies her strike by asserting that because the stricken juror lives in a low income, predominately black neighborhood, the attorney believes that the juror

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111. Id.
112. Id. at 266-67.
114. See supra notes 99-104 and accompanying text.
115. See Raphael & Ungvarskey, supra note 33, at 274.
116. See Joshua E. Swift, Note, *Batson’s Invidious Legacy: Discriminatory Juror Exclusion and the “Intuitive” Peremptory Challenge*, 78 CORNELL L. REV. 336, 365 (1993) (advocating the elimination of subjective neutral explanations and the acceptance of objective explanations only if a substantial nexus is established between the explanation and the case to be tried).
may have a negative attitude toward law enforcement, the judge
should hold this reason pretextual when it is unrelated to the facts
of the case.\footnote{See id. at 364-65.} On the other hand, residence in the same neighborhood
as the defendant or the crime scene should not be branded pretextual
when such reason is substantially relevant to the case.\footnote{See id. at 365.}

Attorneys who cannot articulate a specific case-relevant reason
for peremptorily challenging certain jurors must be forced to empanel
those jurors.\footnote{Id.} Moreover, in the search for justification for a strike,
attorneys necessarily will be compelled to confront their own subcon-
scious assumptions about race.\footnote{Id. (arguing that attorneys will have to ask themselves and answer the question:
"Why am I striking this juror?").}

Richie's second factor, the extent to which the proponent of a
strike asked questions of the stricken juror, is significant because a
lack of meaningful questioning often masks discriminatory motives.\footnote{See Raphael & Ungvarsky, supra note 33, at 270-72.}
Cursory questioning of minority jurors may be an attempt to ensure
that a common trait among the jurors does not surface as proof that
the attorney's strike was racially motivated.\footnote{Id.} Further, the extent to
which a potential juror is questioned before being stricken may mask
discriminatory motives when an attorney claims to have dismissed a
juror because the juror belongs to a group not identified by race which
may render the juror more likely to be biased against her case.\footnote{See id. at 272.}
Limited questioning often indicates pretext because, for example, it is
easier for an attorney to assert that she is excusing a teacher because
she believes that teachers are too liberal,\footnote{See id. at 244.} than for the attorney to
establish that the juror actually possesses liberal views. In this situa-
tion, attorneys who do not take the opportunity to sufficiently ex-
amine jurors to determine whether they maintain the undesired views
associated with their profession should be held suspect during pretext
determination.\footnote{See Raphael & Ungvarsky, supra note 33, at 270-72.}

Disparate questioning, Richie's third factor, tends to indicate pre-
text because it suggests that the attorney is asking different questions
to elicit the different answers needed to justify a peremptory strike.\footnote{See Sutphen, supra note 9, at 500 (listing "[d]isparate examination of members of
the venire, i.e., questioning a challenged juror so as to evoke a certain response without
asking the same question of other panel members" as a factor tending to prove pretext).}
in search of any reason to excuse the juror. In other words, if an attorney bases a strike on the answer elicited from a question that was not asked of all potential jurors, the basis of the strike is most likely pretextual. If the attorney had found the basis to be so significant, she would have asked the same question of every juror. For example, if a juror’s potential fluency in Spanish is important enough to be the basis for the juror’s exclusion, every juror should be examined for his or her fluency in Spanish because it is possible that non-Latinos may also be proficient in the Spanish language. In addition, it would be difficult for an attorney to claim that the proffered basis was related to the facts of the case if she did not evenly examine each juror.

Richie’s fourth factor alerts the court and parties to keep in mind the traits of the empaneled jurors as well as to keep an eye out for the traits of jurors who have yet to be empaneled. In making its factual determination of whether intentional discrimination has been proven, the court must take into account whether a proffered explanation is applied to one group of jurors and not to another. Richie’s third and fourth factors are closely linked. While the third factor focuses on uneven examination, the fourth factor focuses on uneven application. Although the Richie court stated that uniformity is not required, since uneven application may have non-discriminatory, legitimate reasons, uneven application requires scrutiny because it may indicate that discrimination was more likely than not the rationale behind the strike. An example of uneven application is the peremptory challenge of a sixty-five year-old minority juror for being too old, after a seventy year-old white juror had already been empaneled.

One author has suggested that attorneys be held to a standard of “comparability” when exercising their peremptory challenges. The comparability theory requires that once an attorney peremptorily challenges a juror for possessing a certain trait, all other jurors who share the same trait must be similarly excluded. Thus, an attorney aware of the comparability requirement must weigh the consequences of having “to seat one unfavorable juror... [against having] to exclude several favorable jurors.”

127. See Raphael & Ungvarsky, supra note 33, at 270.
129. See id.
130. See id.
131. See id.
132. Richie, 635 N.Y.S.2d at 89.
134. See id. at 366.
135. Id.
Richie’s final factor considers the extent to which the articulated reason relies on objectively verifiable data.\textsuperscript{136} Objective data is sometimes referred to as “hard data” and encompasses any written or oral answers a juror gives to jury questionnaires and voir dire.\textsuperscript{137} Hard data also includes any subjective data, such as a juror’s body language, that can be verified by the judge.\textsuperscript{138} An example of subjective hard data includes inattentiveness on the part of a juror who constantly looks at her watch during questioning, which is actually observed by the judge.\textsuperscript{139} Challenges based solely on hard data may rely only on specific facts within the trial judge’s actual knowledge.\textsuperscript{140} Because challenges based on hard data can be verified by the judge, they are the easiest types of evidence for judges to analyze as possible misuses of peremptories.

It is essential that an attorney’s reliance on soft data, as opposed to hard data, be scrutinized, because exclusive reliance on soft data easily masks racial discrimination.\textsuperscript{141} Soft data challenges are based on reasons that may include intuition or race-related traits, as well as unverifiable courtroom demeanor.\textsuperscript{142} Soft data explanations for challenges are frequently criticized because their subjective nature renders them impossible to be analyzed or verified by a judge.\textsuperscript{143} An example of unimpeachable soft data exclusion includes a juror dismissed for failing to maintain eye-contact with an attorney where that failure cannot be confirmed by the judge.\textsuperscript{144} Challenges based on soft data reasons must be highly scrutinized because they often “mask overt and covert discrimination.”\textsuperscript{145} Courts that accept soft data-based dismissals allow attorneys the wriggle room they need to craft neutral explanations allowing them to dismiss jurors in bad faith. Finally, by accepting soft data explanations, a court sends the message that it “is not serious about its commitment to the eradication of racism from the courtroom.”\textsuperscript{146}

\textsuperscript{136.} See id. at 337 (defining “hard data” as explanations based on objectively verifiable information supplied by the juror).
\textsuperscript{137.} See id. at 363.
\textsuperscript{138.} See Raphael & Ungvarsky, supra note 33, at 269.
\textsuperscript{139.} See id. (explaining that an acceptable and verifiable, subjective explanation could be a decision to exclude a juror because she fell asleep during voir dire if the trial judge makes a record of the juror’s behavior).
\textsuperscript{140.} See Swift, supra note 116, at 364.
\textsuperscript{141.} See id. at 361.
\textsuperscript{142.} See id. at 359.
\textsuperscript{143.} See id. at 362.
\textsuperscript{144.} See id. at 338 (including “body language, dress, hairstyle, speech dialect or tone of voice” as well as “an attorney’s ‘intuition’” in his definition of soft data).
\textsuperscript{145.} Id.
\textsuperscript{146.} Id. at 363.
In addition to the New York Supreme Court Appellate Division's decision in *Richie*, the Alabama Supreme Court,\textsuperscript{147} the Texas Criminal Appellate Court,\textsuperscript{148} and the Florida District Court of Appeals\textsuperscript{149} have employed multi-factor approaches to determining pretext at *Batson's* final step. These cases signify that courts are still struggling with the type of standards that should apply at step three of their *Batson* analyses. The *Richie* court and other courts\textsuperscript{150} employing a similar multifactor approach have incorporated flexibility into their analyses of the various factors indicating pretext. Based on a list of factors relevant to finding pretext, which is similar to the list from *Richie*, one author remarked, "under the *Batson* proof structure, if the defendant is successful in proving pretext by establishing one of these factors, he is entitled to judgment as a matter of law."\textsuperscript{151}

The *Richie* court attempted to take the pretextual analysis one step further by categorizing certain factors as presumptively pretextual and other factors as presumptively nonpretextual.\textsuperscript{152} For example, a proffered explanation based on a juror's employment or profession should be considered presumptively pretextual if it is unrelated to the facts of the case.\textsuperscript{153} However, an explanation premised on the fact that the juror had previously been the victim of a crime should

\textsuperscript{147} See, for example, *Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987), which sets forth the types of evidence that can be used to show pretext:

1. The reasons given [by the challenged attorney] 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.

\textsuperscript{148} *Keeton v. State*, 749 S.W.2d 861, 866 (Tex. Crim. App. 1988) (listing the same factors as *Ex parte Branch* with the exception of number five).

\textsuperscript{149} *Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987) (citing the same factors as *Keeton*).


\textsuperscript{151} *Sutphen*, supra note 9, at 500.


\textsuperscript{153} *See id.*
be considered presumptively nonpretextual. In addition, the court found that proffered explanations based on a juror’s familial relationship to a corrections officer or prior jury service are not facially pretextual. Noting the riskiness of these types of categorizations, the Richie court ruled that the categories were useful, but not determinative, and it subjected them to rebuttable presumptions of pretext or nonpretext. In addition, the court noted that the uneven application of certain factors does not necessarily render those factors pretextual. The court relied on the fact that incomplete uniformity “of neutral factors may not always indicate pretext, [ ] but simply an incomplete understanding of the full reasons for the prosecutor’s decision to seat some jurors while challenging others.”

Further, in South Carolina v. Gill, the South Carolina Court of Appeals found that when a challenged attorney offers more than one reason for striking a juror, the fact that one reason may be pretextual does not amount to a Batson violation as a matter of law. Since the trial court’s determination at step three must be based on the totality of the relevant circumstances, the Gill court held that one pretextual reason among other nonpretextual reasons will not constitute a per se Batson violation unless the invalid reason is deemed the controlling reason for the strike.

Given that the Supreme Court has never indicated the standards a trial court should use in determining when a challenging party has proven purposeful discrimination, some courts have established lists of relevant factors to be weighed in determining whether a proffered explanation is pretextual. Many of these factors echo the relevant circumstances considered in the determination of whether the opponent to the strike has established an inference of discrimination at the prima facie stage.

### III. Adopting the Richie Approach

This Note recommends that trial courts adopt the Richie approach for Batson’s step three determination of whether a neutral ex-

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154. See id.
155. See id. at 267.
156. Id. (“There may be cases in which crime-victim status is properly found to have been used as a pretext and there may be other cases in which employment status is properly found to have been used legitimately as an explanation for a peremptory strike.”) (citation omitted).
157. See id. (citing People v. Allen, 629 N.Y.S.2d 1003 (N.Y. 1995)).
158. Allen, 629 N.Y.S.2d at 1008.
160. See id. at 416.
161. See id. at 417.
162. See, e.g., Allen, 629 N.Y.S.2d at 1008.
planation is pretextual. This approach allows courts to make Batson rulings that ensure the equal protection of both the challenging party\textsuperscript{163} and the excluded juror,\textsuperscript{164} while preserving the integrity of the judicial system.\textsuperscript{165}

The Richie approach, listing the various factors that a trial court should consider when ruling on whether an explanation is pretextual, is advantageous because it gives trial courts guidance in determining whether there is intentional race or gender discrimination in an attorney's use of peremptory challenges. The list of relevant factors highlights what the Richie court found important in analyzing possible racially-motivated peremptory challenges and warns trial courts about the types of factors that appellate courts will review on appeal.

With a relevant factor approach, regardless of whether the trial court finds the explanation pretextual or nonpretextual, the court will be able to bolster its ruling by pointing to the factors that led to its determination. Judges will need to make a specific finding of these factors on the record. Thus, a better record will be established in case of an appeal. A better record is also generated when a trial court is forced to explain why it did not find pretext despite evidence of the uneven application of a certain factor. Likewise, this Note proposes that when the court is required to show why a presumptively pretextual explanation, such as one based on employment, is found not to be pretextual, or when a presumptively nonpretextual explanation, such as one based on a juror's familial relationship to one of the attorneys, is found to be pretextual, the court will produce a better record and will be required to justify its conclusions.

Consideration of the various factors relevant to determining pretext is also advantageous because it provides for flexibility in trial court decision-making. Each of the relevant factors tends to indicate pretext. For example, if the explanation is not related to the facts of the case, it is likely that the explanation is merely an excuse used to mask a discriminatory purpose.\textsuperscript{166} However, while failure to meet the standard of one of the factors creates a presumption of pretext, that presumption is rebuttable.\textsuperscript{167} The factors are not hard and fast rules. They are simply intended to give trial courts guidance. The Richie court realized the risks involved in categorizing certain factors as

\textsuperscript{165} See Batson, 476 U.S. at 87.
\textsuperscript{166} See Raphael & Ungvarsky, supra note 33, at 273 ("[A]n explanation with an unusually attenuated connection to the case at bar justifies the court in concluding that the prosecutor has likely invented a post hoc rationale for a race-based strike.").
\textsuperscript{167} See People v. Richie, 635 N.Y.S.2d 263, 266 (N.Y. App. Div. 1995) (emphasizing that presumptively pretextual or nonpretextual categories are helpful, but not determinative).
either presumptively pretextual or presumptively nonpretextual. In response, the court stated, "[w]hile we recognize that the lack of clear-cut rules in the area may lead to disparate results, the necessity of determining whether a peremptory challenge is pretextual requires that we employ such methodology as results in a seemingly fair resolution." On appeal, a complete record of a Batson hearing is essential because the standard of review for the trial court's finding on the issue of purposeful discrimination is one of great deference. Since the determination of pretext is a factual finding that depends on the trial court's evaluation of credibility, the trial court's findings are entitled to a presumption of correctness and will not be upset unless they are found to be clearly erroneous. In situations in which an explanation is based on evidence not reflected in the record, such as the juror's appearance or demeanor during questioning, it is appropriate for reviewing courts to give a trial court's finding great deference. However, where an explanation is based on a juror's background or profession that is established on the record, the trial court's findings should be reviewed against the factors used to find pretext, since many of the credibility issues unique to the trial court would be eliminated.

Another advantage of the Richie factor approach is that it dispels the fear that Batson challenges have been reduced to nothing in the wake of Purkett. Whether a facially neutral explanation should be branded pretextual is a serious question to be determined at Batson's third step. In People v. Jones, the Appellate Division of the New York Supreme Court found that an attorney's challenges based on a juror's employment status, residence, and marital status were pretextual. The Jones court noted that, although these factors are race-neutral and may be used to properly exclude jurors in certain cases, these "factors must somehow be related to the factual circumstances of the case and the qualifications of the juror to serve on that case." Thus, use of a factor approach to pretext rebuts the argument that

168. Id. (The risk involved the fear that "as these categories proliferate, Batson jurisprudence [may] become unacceptably complex and cumbersome. We emphasize that, while such categories may be useful, they [will not be] determinative.".).
169. Id. at 267.
171. See id. at 365.
172. See id. at 366-67.
173. See Richie, 635 N.Y.S.2d at 266.
175. See id. at 117.
Purkett makes it easier for attorneys to get away with race and gender-based peremptory challenges.

Conclusion

Research shows that racially-motivated peremptory challenges frequently occur despite Batson's mandates. Many trial courts refrain from finding a prosecutor's neutral explanation pretextual despite the fact that many proffered explanations are based on age, occupation, unemployment, religion, demeanor, relationship with a trial participant, lack of intelligence, socioeconomic status, residence, marital status, previous involvement with the criminal justice system, or jury experience. When they are unrelated to the case at hand, many of these "neutral explanations" "permit a lawyer to discriminate against both the opposing party and the venire person." An approach that lists the factors relevant to finding pretext utilizes Batson's third step to eliminate purposeful discrimination in jury selection. By categorizing the above factors as presumptively pretextual when they are unrelated to the facts of the case, the trial court makes it much more difficult for challenged attorneys to discriminate against potential jurors on the basis of their race or gender.

Trial courts employing a relevant factor approach will make better determinations of purposeful discrimination by keeping the various factors in mind and will create a better record for appellate review. Adoption of the Richie approach is a solution to race-based peremptory challenges within the Batson framework. The advantages of the factor approach provide an alternative to suggestions that peremptory challenges be either eliminated entirely or reduced in number.

177. See Raphael & Ungvarsky, supra note 33, at 274.
178. See id.
179. See Swift, supra note 116, at 338.
180. See id. at 365 (concluding that requiring that a neutral explanation be related to the specific facts of the case necessitates "active judicial supervision of the lawyer's peremptory challenges and therefore effectively limits a lawyer's opportunities for improper discrimination").
182. See Reid Hastie, Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?, 40 Am. U. L. Rev. 703, 726 (1991) (proposing that "[j]ury selection procedures should limit attorney participation to modest levels and reduce or eliminate the institution of peremptory challenges"); see also Abraham Abramovsky & Jonathan I. Edeltein, Cameras In the Jury Room: An Unnecessary and Dangerous Precedent, 28 Ariz. St. L.J. 865, 880 (1996) (listing the reduction or elimination of peremptory challenges as one of the jury system reform suggestions voiced in the "aftermath of..."
It is essential to the integrity of the justice system that peremptory challenges be preserved since the selection of "an impartial jury is one of the most important aspects of any . . . trial." The multi-factor approach outlined in Part III allows for both the elimination of discrimination from jury selection and the preservation of peremptory challenges.