

LITIGATING RACE IN VOIR DIRE

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Introduction

Litigating race (group discrimination) in voir dire is largely governed by three Supreme Court cases, *Batson v. Kentucky*,¹ *Miller-El v. Dretke*,² and *Snyder v. Louisiana*.³ Part I of this manual discusses these three cases. Part II lists protected groups under *Batson*. Part III covers pre-trial preparation. Part IV details how to proceed during the three-step *Batson* process. Part V discusses the *Batson* hearing. Part VI covers remedies at trial, on appeal and in post conviction. Part VII discusses what to do if your peremptory strike is challenged.⁴

I. Three Supreme Court cases

1. *Batson v. Kentucky*: —a lighter burden of proof.

Some twenty-two years ago in Louisville, Kentucky, black defendant James Batson objected that the prosecutor's use of peremptory strikes against all four black jurors from his venire violated Equal Protection. Without granting a hearing, the judge denied relief, saying both sides were entitled to "strike anybody they want to." Indeed, the Kentucky Supreme Court affirmed Batson's conviction based on *Swain v. Alabama*,⁵ which required proof of systemic exclusion of black jurors beyond the individual case. Batson had pointed out that his prosecutor was purposely following a manual prescribing peremptory removal of all black jurors. But in 1986 under *Swain*, without proof of discrimination in other cases besides his own, Batson didn't have enough proof of intentional discrimination.

Batson overruled *Swain*, and held that no pattern of discrimination needed to be shown because "even a single invidiously discriminatory governmental act" violates the Equal Protection Clause and requires a new trial.⁶ *Batson* abolished the "crippling burden" of proving systemic discrimination.⁷ *Batson* lightened the burden of proof to make it easier for defendants to prove discrimination based solely on the evidence within the four corners of the case, and prescribed a three-step process⁸:

Step 1. Challenger produces prima facie showing of purposeful discrimination.

Step 2. Opponent demonstrates neutral reason for the strike.

Step 3. Challenger meets burden of proving purposeful discrimination

2. *Miller-El v. Dretke*: — increased scrutiny.

In 2005, almost twenty years after *Batson*, the United States Supreme Court in *Miller-El* expressed its frustration that *Batson* had not cured the problem of discriminatory peremptory jury strikes:

"The rub has been the practical difficulty of ferreting out discrimination"⁹

When the *Miller-El* prosecution removed 10 out of 11 black jurors with peremptory strikes, the state court found no discrimination. But *Miller-El* boldly overturned the state court fact-findings for lack of clear and convincing support in the record, and rejected the state's explanations for excusing them.

"If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much...."¹⁰

Miller-El employed a significantly elevated level of scrutiny of peremptory strikes of black jurors. It also increased the focus on the individual case by noting the importance of **side-by-side comparisons of juror responses** during *voir dire*:

More powerful than ... bare statistics... are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve.¹¹

But *Miller-El* offered no new definitions, rules, or guidelines. Instead, *Miller-El* diluted its stricter scrutiny and emphasis on comparing juror responses, by listing a number of additional factors in support of its finding of discrimination. These factors—unfortunately—provided grounds for distinguishing future cases from *Miller-El*. An example is *Taylor v. O'Neil*, a wrongful death action involving the 2002 Louisville police shooting of a black man in handcuffs.¹²

Taylor v. O'Neil illustrates the weakness of *Miller-El*. Taylor's estate sued Louisville and the detective who shot Taylor. On a jury questionnaire, a number of white panelists (who were not struck) responded similarly to black panelists (who were struck). The Kentucky Court of Appeals upheld denial of relief, because none of the prospective white jurors had the exact same combination of objectionable answers as the struck black jurors. More to the point, Taylor had pointed to no "other circumstances" that would compel a finding of discrimination. The Court of Appeals latched onto the "other circumstances" in *Miller-El* to distinguish *Taylor*, and to support its decision that *Batson* had not been violated.¹³

3. *Snyder v. Louisiana*: — the bare minimum.

In 2008, *Snyder v. Louisiana*¹⁴ compared the *voir dire* treatment of a single black juror with that of two white jurors, and—finding no good reason for disparate treatment—held that peremptorily striking the black juror violated *Batson*. *Snyder* has eliminated the necessity of historical, statistical, "other circumstance" evidence of discrimination from *voir dire* race litigation. After *Snyder*, "other circumstance" evidence is still admissible, and may—even standing alone—still prove discrimination. But "other evidence" proof of discrimination can no longer be deemed essential. *Snyder* reduces the proof needed to win a *Batson* claim to a bare minimum.

Snyder: —one black juror compared with two white jurors.

Snyder clarifies that all it takes for a *Batson* violation is one discriminatory strike. *Batson* involved the wrongful striking of all four black jurors in the venire. In *Miller-El* the prosecutor struck 10 out of 11 black panelists, or 91%. By contrast, the *Snyder* opinion is based on a strike against one prospective juror. That juror, Brooks, —after learning he could make up any missed student-teaching time—expressed no further concern about serving on the jury. As anticipated, the trial continued only two days after Brooks was struck.

Two white jurors in *Snyder* who were not struck had disclosed conflicting obligations at least as serious as Brooks' student teaching. Based on this comparison alone, the United States Supreme Court in *Snyder* reversed and remanded for a new trial. No "other circumstances" are mentioned. *Snyder* is undiluted by reliance on other, supporting factors. By focusing on the wrongful striking of a single black juror, based solely on a comparison with the *voir dire* testimony of two white jurors, *Snyder* strips the burden of proving a *Batson* violation to a bare minimum.

Snyder's dicta on demeanor

A cautionary note: In addition to concern over the black juror's potential lost student-teaching time, the prosecutor in *Snyder* also offered the "race-neutral" reason that Brooks "looked very nervous to me throughout the questioning."¹⁵ *Snyder* did not reach the question of demeanor because the trial court ignored it and made no finding. But in dicta, the Court underscored that great deference is due to trial court rulings on demeanor:

"[N]ervousness cannot be shown from a cold transcript, which is why ... the [trial] judge's evaluation must be given much deference." As noted above, deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor.¹⁶

The demeanor dicta suggest *Snyder* might have gone the other way if the trial court had found that the juror looked nervous. *Snyder*, unfortunately, has left juror demeanor as a potential excuse for striking minority jurors:

... the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "peculiarly within a trial judge's province," and we have stated that "in the absence of exceptional circumstances, we would defer...."¹⁷

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After *Snyder*, defenders may have to grapple more than ever with demeanor, and other intangible excuses. Even before *Snyder*, the Kentucky Supreme Court agreed that a black juror's **lack of demeanor**, *i.e.*, his failure to respond to a question was a race-neutral reason to strike him. In the same case, the prosecutor offered an **unsupported, inconclusive, extra-record allegation** that a police witness had arrested someone in the 1970s with the same surname and address as one of the struck jurors.¹⁸

II. Who is protected?

1. Race

The striking of a single black juror for a racial reason violates the Equal Protection Clause.¹⁹

Under *Batson*, a defendant who is a member of an identifiable racial group may challenge exclusion of members of that group from the jury. Under *Powers v. Ohio*, a white defendant may challenge the striking of black jurors.²⁰

2. Gender

A litigant may challenge use of peremptories to strike jurors on the basis of gender.²¹

3. Religion

Numerous courts have held that jurors may not be struck on the basis of religion.²²

But many courts have gone the other way. In 1995, when a Texas prosecutor used peremptory challenges to remove two Pentecostal jurors on the basis that members of that faith have trouble assessing punishment, the Texas Court of Criminal Appeals found no *Batson* violation.²³ In 2002, the Alabama Court of Criminal Appeals reversed an earlier opinion and held that religious-based strikes of venire members are facially race neutral.²⁴ And in 2007, a New York appellate court held that the prosecutor did not violate *Batson* by using a peremptory strike to challenge a prospective juror whose name sounded possibly Middle Eastern or South Asian, despite defendant's claim of religious discrimination.²⁵

Davis v. Minnesota

The United States Supreme Court refused in 1996 to grant certiorari to correct a peremptory strike against a Jehovah's Witness on the ground that Jehovah's Witnesses are reluctant to exercise authority over other human beings.²⁶ Concurring in denial of certiorari in *Davis*, Justice Ginsburg noted two observations by the lower court: 1) that religious affiliation (or lack thereof) is not as self-evident as race or gender, and 2) ordinarily, inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper.²⁷

But Justice Thomas dissented, arguing that under *J.E.B.*, "no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause."²⁸

4. Disability

Federal law recognizes that discrimination on the basis of mental or physical disability is unlawful.²⁹ As discussed above, *J.E.B.* can be argued to extend to cover discrimination on the basis of disability. State constitutional law may also provide protection.³⁰

5. National Origin, Language

Italian-Americans have been recognized as members of a racial group for *Batson* purposes,³¹ as have Irish-Americans.³² In *Hernandez v. New York*, apparently the U. S. Supreme Court would have found a *Batson* error if strikes had been based purely on Hispanic ethnicity. But the prosecutor's "race-neutral explanation" that he doubted Spanish-speaking jurors' ability to defer to official Spanish translation was held "race-neutral."³³

6. Age, sexual orientation, socio-economic status....

The Kentucky Supreme Court has said that "[c]ertainly age was not a sufficient reason to strike a 43-year-old man."³⁴ But beware, the 6th Circuit has found that (youthful) age is not an improper reason to strike a juror.³⁵

According to SCR 4.300, Kentucky Code of Judicial Conduct, Canon 3, Section B(6):

A judge shall require lawyers in proceedings before the judge to refrain from manifesting by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, against parties, witnesses, counsel, or others.... (emphasis added)

Canon 3, above, supplies grounds for *Batson* challenges on the basis of age, and other grounds. If you have made a *Batson* challenge on the basis of race, and the prosecutor insists the reason for the challenge was (for instance) age, not race, Canon 3 supports an argument that age is not a legitimate reason for the use of a peremptory strike.

7. All litigants

Batson protects every litigant, civil as well as criminal.³⁶ *Batson* applies to both prosecutors and defendants.³⁷ A litigant may object to race-based exclusions of jurors regardless of whether the litigant and the excluded juror share the same race.³⁸

8. All jurors

Batson protects every juror. Peremptorily striking a juror based on race or other group membership discriminates against the juror.³⁹ When you make a *Batson* challenge, you are not just asserting your client's right. You are also asserting the equal protection rights of the excluded jurors.

The exclusion of even a single juror on the basis of race violates the Equal Protection Clause....

The striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown.⁴⁰

III. Pretrial Preparation

1. Find out how jurors are summoned. Is the proper procedure for summoning prospective jurors being followed?⁴¹ Many steps in the jury selection procedure involve personal attendance or approval by the chief circuit judge. Make sure that shortcuts have not been implemented to get around or lessen the chief circuit judge's role and responsibility.⁴² And don't overlook the possibility of illegal discrimination in selecting the grand jury.⁴³

2. Know your jurisdiction. Does the local system, by which prospective jurors are notified of service, excused from service, or granted a delay of service, ultimately result in the elimination of a disparate number of an identifiable group? What percentage of the county population is represented by the various identifiable groups? What percentage of the venire? A comparison of these figures could be important in a *Batson* challenge.

Census data can be extremely helpful. If 19 percent of your county is black, and only 3 percent of the venire is black, and 0 percent of your client's jury is black, you can point out that "happenstance"⁴⁴ is unlikely to have produced such a disparity.

Government web sites are good sources.

—Google "census," or "Kentucky census."

Ask around, see if there has been litigation in your jurisdiction over jury practices. See if remedial actions have been ordered for your jurisdiction. If so, they should be scrutinized. For instance, when a federal district court in Michigan determined that African Americans were under-represented for jury service, the court enacted rules that removed from the jury panel every fifth juror categorized as "white" or "other." As a result, African American participation in jury service increased. But the rules also dramatically reduced jury participation by Hispanics (who fell in the "other" category). Criminal defendants successfully challenged the discriminatory effect of the rules and were granted new trials.⁴⁵

Once you have educated yourself regarding jury practices in your county, the evidence you gather regarding historical, pattern, or practice evidence should prove useful in more than one case.

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3. Know the prosecutor. Gather all the information you can about how individual prosecutors conduct voir dire and exercise strikes. If possible, find out what kind of “neutral” explanations the prosecutor has given in past cases. Does the prosecutor routinely state that the juror “had a scowl” or was “not paying attention”? A prosecutor who repeats the same race-neutral reasons at every trial loses credibility, but only when you point it out, and back it up. After *Snyder*, perhaps more than ever, trial judges will be focusing on the demeanor and credibility of the prosecutor, as well as the jurors.⁴⁶

4. Formulate good questions. Formulate voir dire questions to bring out feelings on race and gender. It is generally within the trial court’s discretion whether to permit group or individual voir dire on the subject of race.⁴⁷ But questioning prospective jurors about possible racial bias or prejudice—at least in some cases—is constitutionally required.⁴⁸ In *Turner*, a capital conviction was reversed because the trial court failed to allow counsel to voir dire potential jurors on the issue of racial bias.⁴⁹

A sample list of voir dire questions is included in Chapter 8.

5. Prepare in advance to take good notes. Create an efficient system for recording the race, gender, physical appearance, and other important characteristics of each and every juror AND for noting each time that a juror says something, no matter what is said. The best way to keep track is with the assistance of another attorney or a paralegal, administrative assistant, secretary, law clerk, or investigator. **Good notes will be crucial for arguing comparisons between struck and unstruck jurors.**

6. Prepare to ensure a proper record. Before trial, check out the court’s video system, including the placement of cameras, and find out what each camera picks up. Will every member of the venire be identifiable by race or other group characteristics in the appellate record during group voir dire? Make sure that each time a venire panelist speaks, the panelist’s identity and group membership are somehow identified for the record. If it will not appear on the video record, you must note it for the record verbally. Will there be jury questionnaires? Will these identify jurors by race or other group membership? If so, you will want to **make sure they are filed in the record** for appellate purposes. The same applies to jury lists and strike sheets.

IV. The Three-Step Process

Step One: The Prima Facie Case

- **Timeliness**

1. Challenging the makeup of the venire. A challenge to the entire venire panel must be made before the prospective jurors are questioned. RCr 9.34 provides:

A motion raising an irregularity in the selection or summons of the jurors or formation of the jury must precede the examination of the jurors.

This is the time to point out to the court that the panel is all white, or that only two of the 40 panel members are women, indicating that something is wrong with the venire selection process.

2. Challenging the prosecutor’s strikes. A *Batson* challenge to the prosecutor’s strikes must be made before the petit jury is sworn and the other panel members are excused. Specifically:

“If there is a challenge to be made to the exercise of peremptories in this state, it should be made when the lists of strikes have been returned to the judge and before the jury has been accepted by the parties and sworn to try the case and before the remainder of the jurors have been discharged from service.”⁵⁰

It is never too late to bring a *Batson* challenge. If defense counsel did not have a chance to make a *Batson* challenge before the panel members were excused and the jury was sworn, the challenge is still timely if it is made “as soon as...practically possible.”⁵¹

- **Mind that record!**

If your client, or a juror, is a member of a protected group, be sure to point it out on the record. For appellate purposes, don’t be reluctant to state the obvious. You and the judge and the prosecutor know that Juror No. 122 is an elderly black woman. But neither a trial transcript nor a videotape record will necessarily show these important details to an appellate court.

Make sure each juror is identified for the record, not only in individual voir dire, but also when the juror speaks in group voir dire. Not only by name, but by group identity.

Be sure the juror strike sheets are made part of the record on appeal.⁵²

- **Do you feel lucky?** Sometimes, at Step One all that defense counsel need do is point out that a protected juror has been struck, and ask for a race-neutral reason. If the Commonwealth asks for a *prima facie* showing of discrimination, you must provide one.

If the Commonwealth forgets to ask, no *prima facie* showing is necessary.

- **A minimal *prima facie* showing of a *Batson* violation has not been defined.** Our highest court has not defined a minimal *prima facie* showing, except to say that the trial judge should consider all the “relevant circumstances.”⁵³ Safe to say, it takes more than a statement of suspicion. Counsel may be well advised to present as much evidence at Step One as possible. Step Three—proving discrimination—can then be used for rebutting the state’s race-neutral reasons, and supplementing the *prima facie* showing, if necessary.
- ***Batson* requires more than a numerical calculation.** Numbers alone cannot form the basis for a *prima facie* showing.⁵⁴ You must be prepared to say more than, “The prosecutor struck 4 of 5 African-Americans.” But if that is all you have, don’t hesitate to raise the issue. Remember *Snyder* found a *Batson* violation based on a wrongful challenge to a single juror.
- **Present side-by-side comparisons of minority and non-minority jurors.** Even “more powerful” than the numbers, said *Miller-El*, were side-by-side comparisons of black venire panelists who were struck and white panelists who were allowed to serve. “If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.”⁵⁵ Under *Snyder* the side-by-side comparison of voir dire treatment of minority versus non-minority venire panelists was key.

More powerful than numbers = side-by-side comparisons of jurors.

—*Miller-El, Snyder*

- **Has the prosecutor asked disparate questions?** Keep track of the prosecutor’s questions to each potential juror. Disparate questioning based on race was another indicator of discrimination in *Miller-El*, as graphic descriptions of the death penalty were given more frequently to potential black jurors than to whites. Also, potential black jurors, more frequently than white jurors, were asked how low a sentence they would be willing to impose.
- **Has the state mischaracterized jurors’ responses?** *Miller-El* pointed to mischaracterization of a venire person’s testimony as evidence of discrimination.⁵⁶
- **Non-group member jurors’ responses need not be identical.** The *Miller-El* Court was impressed with white jurors’ testimony that was merely “comparable,” rather than “identical” to voir dire testimony of struck black jurors.⁵⁷
- **Present the juror’s voir dire as a whole.** *Miller-El* did not confine itself to judging selected words spoken by the juror, but viewed the struck juror’s voir dire testimony as a whole.⁵⁸
- **Look at the prosecutor’s practices in the immediate case.** In *Miller-El*, the Court looked at the fact that the prosecutor reshuffled the venire whenever too many potential black jurors appeared near the front of the line for questioning, and that the prosecutor noted down the race of each panel member, following a manual that included racial stereotypes.⁵⁹

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- **Keep a tally of the number of individual questions** the prosecutor asks each member of the venire. Is the prosecutor spending extensive time engaging minority persons in conversation with the result that eventually the person says something the prosecutor can hang onto for a peremptory strike? If considerably more questions are asked of minority persons compared to non-minority venire persons, this is indicative of bias.
- **Does the prosecutor address minority persons by first names** but non-minorities more formally?
- **Present the basic math.** Present the basic venire numbers in your case, *e.g.*, how many whites versus blacks were called, how many of each group were removed prior to voir dire, how many of each group were challenged for cause, how many removed through peremptories, and what were the final percentages? The basic numbers in *Miller-El* were fairly typical, yet the Supreme Court found them “remarkable.”⁶⁰ *Snyder* also looked at the venire numbers.⁶¹
- **If necessary, look outside the record.** Sometimes false reasons may be shown up within the four corners of the case. Other times a court may not be sure unless it looks beyond the case at hand. Under *Batson* a defendant may rely on “all relevant circumstances” to raise an inference of purposeful discrimination, including relevant circumstances outside the immediate record.⁶²
- **Present other circumstances, historical evidence, patterns, practices, census data.** If you have historical, or other extra-record proof of discrimination, you should present it. This could include census data, court records, or witness testimony.

Miller-El looked to the fact that the Dallas County District Attorney’s Office had, for decades, followed a specific policy of systematically excluding blacks from juries, *Batson* said that a defendant could establish a *prima facie* case with proof that members of the defendant’s race were substantially underrepresented on the venire from which his jury was drawn, or that the venire was selected under a practice providing “the opportunity for discrimination.”⁶³

Remember, under *Snyder*, as discussed above, this evidence is less critical, if a side-by-side comparison of jurors supports a finding of discrimination.

Is there no better explanation, other than race? The *Miller-El* Court found purposeful racial discrimination because, “The facts correlate to nothing as well as to race.”⁶⁴

Step Two: The Neutral Proffer

Once the challenger meets the burden of showing a *prima facie* case of discrimination, the burden shifts to the opponent to come forward with neutral explanations for its peremptory challenges. The prosecution must present justification that does not violate equal protection.⁶⁵

The state’s “racially neutral” reasons need only be neutral on their face.

The state’s “racially neutral” reasons need not “rise to the level justifying exercise of a challenge for cause,”⁶⁶ and need only be neutral on their face.⁶⁷ And you might be surprised what a court will consider a “race-neutral” reason. For example, the Kentucky Supreme Court found in 2007 that striking a black juror because she lived in a high-crime area and that her participation in murder trial would put her in a “tight spot” was race-neutral, and survived a *Batson* challenge.⁶⁸

The state’s reasons must be “clear and reasonably specific.”

Quoting *Batson*, the 6th Circuit has said that the prosecutor’s reason must be “clear and reasonably specific.”⁶⁹ Self-serving explanations based on claims of intuition or mere disclaimers of any discriminatory motive are not sufficient.⁷⁰ The state cannot meet its burden “on mere general assertions that its officials did not discriminate or that they properly performed their official duties. Rather, the state must demonstrate that “permissible racially neutral selection criteria and procedures have produced the monochromatic result.”⁷¹

Step Three: Proving Discrimination

In Step Three, the burden shifts back to the defendant, and the trial court determines if the evidence of discrimination is sufficient to rebut the prosecutor's "race-neutral" reasons. The court must decide **two things**: 1) whether the proffered reasons are neutral and reasonable, and 2) whether the reasons are a **pretext** for purposeful discrimination. Peremptory strikes against protected jurors **must meet both requirements**.⁷²

If the defendant has presented all available evidence at Step One (with or without a hearing) no further evidence need be presented at Step Three. If the state has presented evidence or made claims as part of its race-neutral reasons, however, more evidence may be necessary. The defendant also should be allowed to present rebuttal.⁷³

If a hearing has not already been conducted, this is a good time to ask for a *Batson* hearing. In addition, consider asking for additional individual voir dire to challenge vague excuses such as "he wasn't paying attention," "she was yawning," "he fell asleep in a trial I had last week."

At Step Three, you *must* say *something* to renew your objection.

Caution: Even if you have no more proof to present, at Step Three you must renew your objection to the wrongful strikes, *i.e.*, say **something** after the state proffers its race-neutral reasons. Defendant's silence after the Commonwealth articulated its facially race-neutral reasons for exercising a peremptory challenge has been held **fatal** to a *Batson* claim.⁷⁴

What if race is only a factor?

If it appears at Step Three that race, or other group discrimination, may not have been the **whole** reason for a strike, but you have at least demonstrated that it is a **factor**, you should still argue that a violation has occurred. "We hold that equal protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror."⁷⁵

V. The *Batson* Hearing

The challenger has a right to a hearing. And it is not the *prima facie* case that triggers the right to a hearing. Once a *Batson* challenge is made, a hearing is **mandatory**.⁷⁶ *Batson* requires that "upon *timely* objection to peremptory challenges for alleged discrimination, the court shall hold a hearing to determine if a *prima facie* case of discrimination can be made."⁷⁷ Have a copy of the *Simmons* case ready for the trial judge's review.

1. **Witnesses, documents, and/or judicial notice.** A *Batson* hearing is an opportunity to put on evidence from within the case itself, and, if necessary, extra-record evidence, including census data, historical data, pattern and practice evidence.
2. **Put the prosecutor on the stand.**⁷⁸ Make the prosecutor back up claims of extra-record information. The *Miller-El* Court discounted the prosecution's reason that the juror's family member had prior convictions saying it was "not creditable" in light of prosecutorial "failure to enquire about the matter." Ask for certified prior convictions, and proof of family relationships.

Be aware: The Kentucky Supreme Court—in *Snodgrass*—said the information the prosecutor points to does not have to be proven true, and can be based on personal knowledge, or sources outside the record.⁷⁹

3. **Opinion, reputation, or other impeaching evidence**⁸⁰ should also be allowed, since both the United States and Kentucky Supreme Courts agree that the prosecutor's demeanor and credibility will be key. Trial judges must not accept explanations at face value.⁸¹ It should be proper to attack the prosecutor's credibility.
4. **If nonverbal conduct is at issue**, ask the prosecutor to describe the nonverbal conduct with particularity.⁸² If the juror appears on the trial video, replay it. Ask the prosecutor to point out the offending body language. Be prepared to play back video of other nonstruck jurors showing similar or identical body language. Is there any difference between the struck juror's body language and the non-struck juror's? If the prosecutor cannot point out the body language, or claims it is not visible in the video, argue the prosecutor is arguably relying on "intuition." This is not a "clear and reasonably specific" reason for a strike.⁸³

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In *Washington*, the court found the prosecutor's claim that the juror was "inattentive" and "bored" was troubling where the prosecutor had failed to ask the juror any questions.⁸⁴ Check to see if there were other jurors the prosecutor failed to question. Were they also bored?

With *Snyder* placing more importance on demeanor, now more than ever, "explanations which focus upon a venire person's body language or demeanor **must be closely scrutinized because they are subjective and can be easily used. . . as a pretext for excluding persons on the basis of race.**"⁸⁵

5. Recall jurors for questioning (at your own risk).

Be prepared to deal with the *Snodgrass*⁸⁶ pronouncement that neither the state nor federal constitution require further questioning of a juror to clear up the prosecutor's suspicions articulated in the "race neutral" explanation. Argue that *Gamble* is more recent, and it contradicts, and effectively overrules *Snodgrass* on this point by stating that the court should not accept explanations at face value. In any event, *Snodgrass* does not forbid recalling a juror. Argue that since the burden is on you, due process requires that you be given an opportunity to present any relevant evidence.⁸⁷ But be careful what you wish for. Are you certain the juror's further testimony will support you?

VI. Remedies

A. At the trial level

Be creative: Once the trial judge rules that the prosecutor has not sufficiently articulated "neutral" reasons for a peremptory challenge, what relief are you entitled to? You can be as creative as you want.

Neither the Kentucky Supreme Court nor the United States Supreme Court has set out the proper remedy for a *Batson* violation at the trial level. *Batson*, however, suggests that discharge of the entire panel or placing the improperly discharged jurors back on the panel may be in order.⁸⁸ The Kentucky Supreme Court has also suggested possible relief in *Simmons*.⁸⁹ Although the *Batson* challenge was not timely in *Simmons*, the Court noted that the relief requested was a mistrial, and not a demand that the "alleged discriminatory challenges be disallowed." Discussing timeliness, the Court said, "If it were determined that the challenge of any juror was the result of discrimination, that challenge could have been disallowed and that juror would have remained on the panel."⁹⁰ But *Simmons* should not be considered a limitation on potential forms of relief.

Any of the following could be appropriate:

- a. Mistrial.
- b. The entire venire is reseated⁹¹
- c. The jury panel is discharged and a new panel is assembled.⁹²
- d. The prosecutor loses all peremptory challenges, all persons struck by the prosecutor are placed back on the panel, and the defense is given additional challenges equal to the number of challenges lost by the prosecutor.
- e. The improperly eliminated jurors are placed, not just back on the panel, but on the jury.⁹³
- f. All prosecution strikes are returned to the panel, and the defense is given an opportunity to redo its strikes.
- g. Any other relief you can think of.

Many jurisdictions have decided that a proper *Batson* remedy is that the trial court should disallow the peremptory challenge and seat the challenged juror.⁹⁴ But the *Ezell* court adopted the "flexible" approach used in Texas and Massachusetts, which permits the trial court to choose to reinstate the challenged juror or to seat an entirely new panel. Another court determined that the proper remedy for a *Batson* violation was to strike the entire venire.⁹⁵

Note well: If you are entitled to relief, it means the prosecutor is guilty of illegal discrimination and should be punished. But if the punishment is not strong enough, it will have no deterrent effect.

If the only relief granted is loss of a peremptory, illegal discrimination may be well worth the risk....

If the only relief granted is loss of a peremptory, illegal discrimination may be well worth the risk. The punishment should fit the crime.

B. On appeal

Kentucky appellate courts have been generally hostile to *Batson* claims, finding them untimely, unpreserved, unsupported, procedurally defaulted, or containing sufficient race-neutral reasons.⁹⁶ As a result, in the last ten years, only three Kentucky decisions have sustained *Batson* claims. The most significant of these remains *Washington v. Commonwealth*, in which the Commonwealth first claimed not to recall striking the juror, and then made up a pretext, claiming the juror was struck due to his "youthful age" of 43.⁹⁷ Another case is unreported, and contains no description of the reasons that were found to be pretextual.⁹⁸ The third upheld the Commonwealth's challenge to a defendant's use of peremptory strikes against women.⁹⁹

A trial court's denial of a *Batson* challenge will not be reversed on appeal unless it is clearly erroneous.¹⁰⁰ As noted in *Hernandez*, the decisive question is whether the prosecutor's race-neutral explanation is believable.¹⁰¹ If a *Batson* error is unpreserved, it must meet the "plain error" standard on direct appeal.¹⁰²

Batson error constitutes "structural error," which is not subject to harmless error analysis and requires automatic reversal.¹⁰³

Reversal and remand for a new trial has been ordered based on *Batson* violations.¹⁰⁴ Even where the trial court has failed to make findings on the sufficiency of the prosecutor's explanations and failed to conduct an inquiry into the basis of each peremptory challenge, the remedy has still been held to be reversal of the conviction for a retrial, not remand for a *Batson* hearing.¹⁰⁵

The 6th Circuit has made clear, however, that a remand for further *Batson* proceedings may be an appropriate appellate remedy when the trial record lacks important details, including:

...the order of strikes, who exercised them, or the racial composition of the district in which this case was tried. The record also denies us the district court's thoughts as to how these factors, and any others ...weighed on the district court's conclusion in the third step of the *Batson* analysis.¹⁰⁶

C. In post conviction

Remember that *Miller-El* was a federal habeas case that won at the Supreme Court level **twice** – which is amazing when one considers the strictures of the AEDPA.¹⁰⁷ This means you should pursue and **can win** a *Batson* claim in post conviction, at least if you persevere into federal habeas.

The United States Supreme Court reversed and remanded *Miller-El* the first time, finding that the 5th Circuit should have granted Miller-El a certificate of appealability to consider his habeas claim because reasonable jurists could have debated whether the prosecution's use of peremptory strikes was the result of purposeful discrimination.¹⁰⁸ When the 5th Circuit affirmed his conviction again after remand, certiorari was granted a second time. It was in the second *Miller-El* decision that the United States Supreme Court found that the prosecutor's use of strikes was purposeful, and *Batson* had been violated.¹⁰⁹

Batson claims are federal constitutional claims grounded in 14th Amendment Equal Protection, which must be raised in state post conviction, and "exhausted" in state court, in order to be pursued in federal habeas proceedings.¹¹⁰

If a *Batson* violation appears to have occurred, but was not raised or preserved at trial, or was raised at trial but not pursued on appeal, it should be raised and pursued in post conviction under RCr 11.42 as ineffective assistance of counsel. If a *Batson* violation occurred, but was not apparent at the time of trial, and comes to light only after trial, post conviction relief may be pursued under CR 60.02

Ineffective assistance of trial counsel

In framing an RCr 11.42 or CR 60.02 claim, the improperly struck jurors will need to be identified by name, number, and group characteristic, such as race. Post conviction counsel will need to make the same side-by-side comparison of voir dire treatment of jurors that trial counsel should have made, to demonstrate trial counsel's ineffectiveness. At a hearing, trial counsel can be questioned to determine why no *Batson* challenge was made, *i.e.*, to dispel any presumption that allowing the prosecution to strike minority jurors was defense trial strategy.

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Ineffective assistance of appellate counsel

In *Davis*, trial counsel had preserved *Batson* error, but appellate counsel failed to appeal the trial court's denial of a mistrial. *Davis* threw out the ineffective assistance of appellate counsel claim, because Kentucky does not allow RCr 11.42 to be "used as a vehicle for relief from ineffective assistance of appellate counsel."¹¹¹ Moreover, "[i]neffective assistance of appellate counsel is not a cognizable issue in this jurisdiction."¹¹² However, post conviction counsel should not be deterred by *Davis*, because federal courts, including the 6th Circuit, **do recognize** ineffective assistance of appellate counsel claims.¹¹³ In order to preserve an appellate ineffectiveness claim for federal habeas, Kentucky defenders need to raise ineffective assistance of appellate counsel in the client's RCR 11.42 proceeding. Then if (when) it is denied on appeal, it will be exhausted for federal court purposes.

Note: Appellate counsel has been held **not ineffective** in failing to raise a *Batson* issue where no objection to specific strikes on that basis had been raised in trial court.¹¹⁴

When YOU are challenged

Batson applies to *all* litigants, civil and criminal. This means that defenders are also "prohibited purposeful discrimination on the ground of race in the exercise of peremptory challenges."¹¹⁵

Don't make a strike you can't defend.

Don't make a strike you can't defend. Be prepared to defend each and every one of your own peremptory strikes.

According to *McCollum*, the same Three Step procedure applies to challenges of your strikes, that is, the prosecutor must demonstrate a *prima facie* case of discrimination.¹¹⁶ Then you must articulate a neutral explanation for the peremptory challenges. Finally, the court must decide whether your proffered reasons are neutral and reasonable, and whether your reasons are a **pretext** for purposeful discrimination.¹¹⁷

Eight Red Flags¹¹⁸

1. Disparate treatment, *i.e.*, persons with the same or similar characteristics as the challenged juror were not struck.
2. The reason given for the peremptory challenge is not related to the facts of the case.
3. There was a lack of questioning to the challenged juror or a lack of meaningful questions.
4. Disparate 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.
5. An explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.
6. The prosecutor's statements or demeanor during voir dire.
7. The demeanor of the excluded venire persons.
8. The trial court's past experiences with the prosecutor.

Endnotes:

1. *Batson v. Kentucky*, 476 U.S. 79 (1986).
2. *Miller-El v. Dretke*, 545 U.S. 231 (2005).
3. *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008).
4. Thanks to Kentucky Department of Public Advocacy attorneys Lisa Clare, Glenn McClister, and Donald Morehead, and to former Louisville Metro defender and current federal defender Frank Heft, for contributions to this chapter.
5. *Swain v. Alabama*, 380 U.S. 202 (1965) (requiring proof of a "pattern" of discriminatory challenges).
6. *Batson*, 476 U.S. at 95. See also *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky. 1992) (non-*Batson* case discussing the fact that Kentucky's Constitution provides greater protection than the 14th Amendment).
7. *Batson*, 476 U.S. at 92-93.
8. *Batson*, 476 U.S. at 93-94.
9. *Miller-El*, 545 U.S. at 238.
10. *Miller-El*, 545 U.S. at 240.
11. *Miller-El*, 545 U.S. at 241.
12. *Taylor v. O'Neil*, ___ S.W.3d ___, 2007 WL 2069590 (Ky.App. 2007) (NOT FINAL, currently pending in the Kentucky Supreme Court on discretionary review). The Court of Appeals opinion summarizes distinguishing factors in *Miller-El*, including the prosecution's use of a "jury shuffle," marking the race of the jurors on the jury forms, using disparate tactics in voir-diring black vs. white jurors, mischaracterizing responses of black jurors, using peremptory challenges to strike a higher percentage of blacks, and adopting a formal policy to exclude minorities from jury service.
13. See also, *McPherson v. Commonwealth*, 171 S.W.3d 1 (Ky. 2005) (also latching onto facts in *Miller-El* to distinguish itself); *Taylor v. O'Neil* was still pending at the time of this manual in 2008.
14. *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008).
15. *Snyder*, 128 S.Ct. at 1208.
16. *Snyder*, 128 S.Ct. at 1209. (internal citations omitted)
17. *Snyder*, 128 S.Ct. at 1208. (internal citations omitted)
18. *Chatman v. Commonwealth*, 241 S.W.3d 799 (Ky. 2007).
19. *Snyder*, *supra* (finding clear error in striking one struck black juror, and remanding for further consistent proceedings); see also, *Batson*, 476 U.S. at 95 (a single invidiously discriminatory governmental act is not immunized). *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986); See also *Harrison v. Ryan*, 909 F.2d 84, 88 (3rd Cir. 1990).
20. *Powers v. Ohio*, 499 U.S. 400, 402 (1991).
21. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (putative father's successful challenge to state's exclusion of men from jury); *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky.App. 1998) (defendant could not use his peremptory challenges to strike women from the jury solely on the basis of their gender). [Note that *Hannan v. Commonwealth*, 774 S.W.2d 462 (Ky.App. 1989), which says that *Batson* does not apply to gender discrimination in the use of jury strikes, was decided before *J.E.B.*]
22. *State v. Purcell*, 18 P.3d 113 (Ariz.App. 2001) (extending *Batson* to strikes based on religious affiliation); *Joseph v. State*, 636 So.2d 777, 780 (Fla. 3d. D.C.A. 1994) (Jewish jurors protected under state constitution); *Highler v. State*, 854 N.E.2d 823 (Ind. 2006) (religion in general, dicta); *Commonwealth v. Carleton*, 641 N.E.2d 1057 (Mass. 1994) (reversing due to prosecutor's challenges of jurors Ceglie, Cantwell, McConaghy, Kellegher and Ferolito, because they were based solely on assumption these jurors were Irish or Italian Roman Catholics, but expressly **not reaching** the claim of religion-based discrimination); *People v. Kagan*, 101 Misc.2d 274, 420 N.Y.S.2d 987 (1979) (court could not conclude on basis of four peremptory challenges of persons who it was subsequently ascertained were Jewish that the prosecutor was systematically excluding persons of Jewish faith).
23. *Casarez v. State*, 913 S.W.2d 468 (Texas Ct.Crim.App. 1995) (relying on *J.E.B. v. Alabama ex rel. T.B.* in finding that exercise of peremptory challenges on the basis of religion was not improper).
24. *Smith v. State*, 838 So.2d 413, 436 (Ala.Crim.App. 2002).
25. *People v. Mohammed*, 45 A.D.3d 251 (N.Y.A.D. 2007).
26. *Davis v. Minnesota*, 511 U.S. 1115 (1994) (J. Thomas, dissenting from the denial of certiorari).
27. *Id.*
28. *Davis*, 511 U.S. at 1115.
29. The Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12101 et seq.
30. See *New York v. Green*, 148 Misc.2d 666, 561 N.Y.S.2d. 130 (N.Y.Co.Ct. 1990) (Deafness not a proper reason to strike a juror, under the N.Y. state constitution).
31. *United States v. Biaggi*, 853 F.2d 89, 96 (2nd Cir. 1988) (Italian-Americans)(Italian-Americans are protected, but prosecutor presented sufficient neutral reasons for strikes).

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32. *Commonwealth v. Carleton*, 641 N.E.2d 1057 (Mass. 1994) (reversing due to prosecutor's challenges of jurors Ceglio, Cantwell, McConaghy, Kellegher and Ferolito).
33. *Cf., People v. Mohammed*, 45 A.D.3d 251 (N.Y.A.D. 2007) (court refused to find *Batson* error for striking jurors whose names sounded Middle-Eastern, or South Asian).
34. *Washington v. Commonwealth*, 34 S.W.3d 376, 379 (Ky. 2000)
35. See *United States v. Maxwell*, 160 F.3d 1071 (6th Cir. 1998) (upholding strikes against two jurors, aged 18 and 21); see also, *Ford v. Seabold*, 841 F.2d 677, 682 (6th Cir. 1988) (neither young adults nor college students are a "distinctive group" as required to establish prima facie violation of Sixth Amendment fair cross section requirement).
36. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 618-619 (1991) (race-based exclusion violates equal protection rights of the challenged jurors); See also *Washington v. Goodman*, 830 S.W.2d 398, 400-402 (Ky. App. 1992).
37. *Georgia v. McCollum*, 505 U.S. 42 (1992), *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky. App. 1998).
38. *Powers v. Ohio*, 499 U.S. 400, 401 (1991).
39. *Powers v. Ohio*; *Edmonson v. Leesville Concrete Co.*; *Georgia v. McCollum*.
40. *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986); see also *Snyder, supra* (finding clear error in striking one black juror); *Batson*, 476 U.S. at 95 (a single invidiously discriminatory governmental act is not immunized); and, *Harrison v. Ryan*, 909 F.2d 84, 88 (3rd Cir. 1990).
41. See KRS Chapter 29A and Administrative Procedures of the Court of Justice, Part II, Jury Selection and Management (II Ad. Pro. Sections 1-33).
42. See *Commonwealth v. Nelson*, 841 S.W.2d 628 (Ky. 1992).
43. See *Campbell v. Louisiana*, 523 U.S. 397 (1998).
44. *Miller El*, 545 U.S. at 232.
45. *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998) (Jury selection plan which provided for random removal of one in five non-African-Americans violated Jury Selection and Service Act (JSSA) warranting reversal).
46. See also, *Commonwealth v. Snodgrass*, 831 S.W.2d 176 (Ky. 1992) (okay to strike black juror on the basis of information prosecutor received from source other than voir dire indicating that the juror lived in same neighborhood as defendant).
47. RCr 9.38; *cf., Irvin v. Dowd*, 366 U.S. 717, 723-724 (1961).
48. *Turner v. Murray*, 476 U.S. 28 (1986); *but cf., Ristaino v. Ross*, 424 U.S. 589 (1976) (fact that defendants were black and victim white did not elevate right to question veniremen specifically about racial prejudice to constitutional dimension); and *Ham v. South Carolina*, 409 U.S. 524 (1973) (where defense was "framing" due to civil rights activities and racial issues were inextricably bound up with the trial, right to voir dire on race was constitutionally protected).
49. *Turner*, 476 U.S. 28 (1986); see also *Bob Jones University v. United States*, 461 U.S. 574 (1983) (people who hold beliefs against interracial marriages are not impartial and do have a racial animus).
50. *Simmons v. Commonwealth*, 746 S.W.2d 393, 398 (Ky. 1988); see also, *Dillard v. Commonwealth*, 995 S.W.2d 366, 370 (Ky. 1999).
51. *Gamble v. Commonwealth*, 68 S.W.3d 367 (Ky. 2002) (*Batson* objection sustained on appeal though not raised until after prospective jurors who had been stricken were discharged and had left courtroom); *Washington v. Commonwealth*, 34 S.W.3d 376, 378 (Ky. 2000) (defense objected after panel sworn — prosecutor had erred in failing to identify struck juror).
52. RCr 9.36(4) (If trial counsel so moves, the written record on appeal shall include the juror strike sheets); CR 75.07(4) (record on appeal shall include the juror strike sheets pursuant to RCr 9.36).
53. *Commonwealth v. Hardy*, 775 S.W.2d 919, 920 (Ky. 1989). See also *Wells v. Commonwealth*, 892 S.W.2d 299, 302 (Ky. 1995) (requiring that the "facts and circumstances of the selection" raise an inference of discrimination).
54. *Hardy*, 775 S.W.2d at 920. (emphasis added)
55. *Miller-El*, 545 U.S. at 241.
56. *Miller-El*, 545 U.S. at 244.
57. *Miller-El*, 545 U.S. at 250.
58. *Miller-El*, 545 U.S. at 273 (Breyer concurrence).
59. *Miller-El*, 545 U.S. at 233.
60. *Miller-El*, 545 U.S. at 232: "The numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. "The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members Happenstance is unlikely to produce this disparity."
61. *Snyder*, 128 S.Ct. at 1207: "Eighty-five prospective jurors were questioned as members of a panel. Thirty-six of these survived challenges for cause; 5 of the 36 were black; and all 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory strikes."
62. *Batson*, 476 U.S. at 96-97.

63. *Batson*, 476 U.S. at 95.
64. *Miller-El*, 545 U.S. at 266.
65. See *United States v. Maxwell*, 160 F.3d 1071, 1074 (6th Cir. 1998), citing *J.E.B. v. Alabama*.
66. *Batson*, 476 U.S. at 97.
67. *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion) (“At this step of the inquiry, the issue is the facial validity of the prosecutor’s explanation. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”); accord, *Chatman*, 241 S.W.3d 799.
68. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2007) (Justice McAnulty, with Chief Justice Lambert, dissenting on this issue)
69. *United States v. Gibbs*, 182 F.3d 408, 438-39 (6th Cir. 1999); accord *Washington v. Commonwealth*, 34 S.W.3d at 379; see also *Gamble*, 68 S.W.3d at 371.
70. *Washington v. Commonwealth*, *supra*.
71. *Batson*, 476 U.S. at 94.
72. *Gamble*, 68 S.W.3d at 371.
73. For instance, evidence of African-American housing patterns could be introduced to disprove the race-neutrality of living in a high crime area as a reason for striking a black juror.
74. *Chatman*, 241 S.W.3d 799.
75. *Benavides v. American Chrome & Chemicals*, 893 S.W.2d 624, 627 (Tex. App. – Corpus Christi 1994).
76. *Batson*, 476 U.S. 79 (1986); *McKinnon v. State*, 547 So.2d 1254 (Fla. App. 4 Dist. 1989) (challenger is entitled to a “full hearing.”)
77. *Simmons v. Commonwealth*, 746 S.W.2d 393, 397 (Ky. 1988).
78. See *Keeton v. State*, 749 S.W.2d 861 (Tex. Crim. App. 1988); *Smith v. State*, 814 S.W.2d 858 (Tex. App. – Amarillo 1991); *Ex Parte Lynne*, 543 So.2d 709, 712 (Ala. 1988) (counsel permitted to cross-examine opposing counsel).
79. *Snodgrass*; but cf., *Gamble*, contradicting *Snodgrass*, stating explanations must not be accepted at face value.
80. KRE 607, 608.
81. *Gamble*, 68 S.W.3d at 371.
82. See *Price v. Short*, 931 S.W.2d 677, 681-682 (Tex. App.-Dallas 1996).
83. *United States v. Gibbs*, 182 F.3d 408, 438-39 (6th Cir. 1999); accord *Washington v. Commonwealth*, *supra*, 34 S.W.3d at 379; see also *Gamble*, 68 S.W.3d at 371.
84. *Washington*, 34 S.W.3d at 379.
85. *Epps v. United States*, 683 A.2d 749, 753 (D.C.App. 1996), quoting *People v. Harris*, 544 N.E.2d 357, 380 (Ill. 1989) (emphasis added).
86. *Snodgrass*.
87. See *Green v. State*, 891 S.W. 2d 340, 342 (Tex. App. - Beaumont 1995) (because burden on appellant, appellant “had the opportunity to call venireperson Brown to the stand and question him”); see also, *Camacho v. State*, 864 S.W.2d 524 (Tex. Crim. App. 1993) (court pointed out that after prosecutor states neutral explanation, defense has opportunity to present evidence to rebut the explanation); *Mackintrush v. State*, 978 S.W.2d 293 (Ark. 1998) (emphasizing importance of presenting additional evidence or argument after hearing the other party’s “racially neutral” explanation).
88. *Batson*, 476 U.S. at 99, fn. 24.
89. *Simmons*, 746 S.W.2d at 397.
90. *Simmons*, 746 S.W.2d at 398.
91. See *State v. Franklin*, 456 S.E.2d 357 (S.C. 1995), and *United States v. Bentley-Smith*, 2 F.3d 1368 (5th Cir. 1993).
92. *Brogden v. State*, 649 A.2d 1196 (Md.App. 1994); *Gilchrist v. State*, 627 A.2d 44 (Md.App. 1993).
93. *State v. Bennett*, 907 S.W.2d 374 (Mo.App. E.D. 1995).
94. *Ezell v. State*, 909 P.2d 68, 72 (Okla. Cr. 1995)
95. *People v. Rodriguez*, 58 Cal. Rptr. 2d 108, 115 (Cal. App. 5 Dist. 1996).
96. Based on review of westlaw search for all Kentucky cases containing the word “Batson.”
97. *Washington v. Commonwealth*, 34 S.W.3d 376 (Ky. 2000).
98. *Pryor v. Commonwealth*, 2003 WL 21241881 (Ky.App. 2003) (reversing due to trial court acceptance of “pretextual” reasons) (NOT REPORTED).
99. *Wiley v. Commonwealth*, 978 S.W.2d 333 (Ky.App. 1998).
100. *Hernandez v. New York*, 500 U.S. 352, 369 (1991) see also *Wells v. Commonwealth*, 892 S.W.2d 299 (Ky. 1995).
101. *Hernandez*, 500 U.S. at 365.
102. *Chatman v. Commonwealth*, 241 S.W.3d 799 (Ky. 2007), citing, *United States v. Jackson*, 347 F.3d 598 (6th Cir. 2003).

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103. *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (racial discrimination in the selection of grand jurors is structural error that requires automatic reversal); *Avery v. Georgia*, 345 U.S. 559, 561 (1953) (jury selection based on race warrants reversal of a conviction regardless of the strength of the evidence presented); *United States v. Angel*, 355 F.3d 462, (6th Cir. 2004).
104. *Washington*, 34 S.W.3d 376; *But see, United States v. Hill*, 146 F.3d 337 (6th Cir. 1998) (remand for further proceedings and specific findings by the trial court on a *Batson* issue).
105. *Cleveland v. State*, 888 S.W.2d 629, 632 (Ark. 1994).
106. *United States v. Hill*, 146 F.3d 347 (6th Cir. 1998); see also *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1520 (6th Cir. 1988) (indicating the need for a “full record for intelligent appellate review” including 1) the racial composition of the initial group seated and the final jury panel sworn; 2) the number of peremptory strikes allowed each side; and 3) the race of those who were struck or excused from the jury panel throughout voir dire (whether for cause or by a peremptory challenge), the order of strikes, and by whom they were exercised, and—in the right case—the percentage of the “cognizable racial group” in the jury pool, or the racial composition of the district wherein the jury pool is selected).
107. Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, § 104(d), 110 State 1214, 1219.
108. *Miller-El v. Cockrell*, 537 U.S. 322 (2003)
109. *Miller-El v. Dretke*, 545 U.S. 231 (2005)
110. *White v. Mitchell*, 413 F.3d 517 (6th Cir. 2005) (Failure to present a *Batson* ineffectiveness claim in state court precluded federal habeas relief).
111. *Commonwealth v. Davis*, 14 S.W.3d 9 (Ky. 1999), quoting, *Harper v. Commonwealth*, 978 S.W.2d 311, 318 (Ky. 1986).
112. *Lewis v. Commonwealth*, 42 S.W.3d 605, 614 (Ky. 2001).
113. *Valentine v. United States*, 488 F.3d 325 (6th Cir. 2007) (failure to raise a *Batson* claim on appeal); *McFarland v. Yukins*, 365 F.3d 688, 699 (6th Cir. 2004) (must meet two-prong *Strickland* test to establish ineffective assistance of appellate counsel).
114. *Greer v. Mitchell*, 264 F.3d 663 (6th Cir. 2001).
115. *Georgia v. McCollum*, 505 U.S. 42 (1992).
116. *Collum*, 505 U.S. 42 (1992).
117. *Gamble*, 68 S.W.3d at 371.
118. Compiled in *Smith v. State*, 814 S.W.2d 858, 860-61 (Tex. App. – Amarillo 1991) and *State v. Martin*, 892 S.W.2d 348, 353 (Mo. App. W.D. 1995); see also *State v. Davis*, 894 S.W.2d 703 (Mo. App. W.D. 1995). ■

