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A PRIMER ON *BATSON*, INCLUDING DISCUSSION OF *JOHNSON V. CALIFORNIA*, *MILLER-EL V. DRETKE*, *RICE V. COLLINS*, & *SNYDER V. LOUISIANA*

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I. INTRODUCTION

The United States is a country founded on principles of equality and fairness. Its citizens are guaranteed such principles through a series of protected rights promulgated in the United States Constitution and the constitutions of every state. Fundamental to the existence of these rights is the assurance that the right to equal protection under the law will be defended at all costs. While each branch of government endeavors to protect this right, federal and state judiciaries stand in the unique position of ensuring that our system of adjudication exists free of racial bias.[1]

Key to the United States' system of adjudication is the right to a trial by jury.[2] This right is embodied in the Sixth and Seventh

1. *See* Act of July 20, 1840, ch. 47, 5 Stat. 394 (requiring federal courts in each state to apply the same qualifications and exemptions for jurors).

2. *See* Duncan v. Louisiana, 391 U.S. 145, 153–54 (1968) (noting that the right to trial by jury in criminal cases has been guaranteed in all state constitutions in one form or another).

Amendments to the Constitution[3] and is incorporated in all state constitutions.[4] In selecting juries, the judicial system affords all parties to a suit the opportunity to eliminate, without cause, a certain number of jurors that the parties feel will hinder their case.[5] This form of juror elimination, known as a peremptory challenge, was adopted by the United States from English common law,[6] and was codified by the First Congress in 1790.[7]

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.... [T]he jury trial provisions ... reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power ... found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Id. at 155–56; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *349, *379 (stating the importance of resolving civil issues by one's peers, rather than the judiciary).

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*.

Id. (articulating the importance of arbitrating civil disputes in a form evaluated by citizens and not magistrates).

3. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."); *id.* amend. VII ("In Suits at common law ... the right of trial by jury shall be preserved ....").

4. *See* Sandra Day O'Connor, *Juries: They May Be Broken, but We Can Fix Them*, 44 FED. LAW 20, 20 (1997) (noting that all state constitutions have adopted the right to trial by jury).

5. FED. R. CRIM. P. 24(b); *see also* 28 U.S.C. § 1870 (2006) (entitling each side in a civil trial to three peremptory challenges); FED. R. CIV. P. 47 (providing for the examination of jurors and requiring the court to permit the number of peremptory challenges granted by 28 U.S.C. § 1870).

6. *See* Sandra Day O'Connor, *Juries: They May Be Broken, but We Can Fix Them*, 44 FED. LAW. 20, 21–22 (1997) (recounting the historical origins and evolution of the jury system in the United States). Peremptory challenges have been a part of English common

The use of peremptory challenges, however, has not been without consequence. Over time, the ability to eliminate jurors without cause transformed into a legal tool for purposeful discrimination.[8] The systematic exclusion of jurors on account of their race became commonplace, and any challenge to exclusions was met with onerous burdens.[9]

Recognizing this assault on the constitutional principle of equality, the United States Supreme Court in *Batson v. Kentucky*[10] sought to end the unbridled use of peremptory challenges as a tool for racial discrimination.[11] The effects of *Batson* were felt nationwide and resulted in a measure of protection against the use of racially motivated peremptory challenges. Unfortunately, *Batson* did not become the cure many had hoped for, and parties determined to exclude jurors on the basis of race developed pretextually "race-neutral" means to do so without violating *Batson*.[12] Much of the *Batson* jurisprudence from the late 1980s and 1990s consists of a torrent of decisions

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law since as early as the sixteenth century. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *336, *348 (referencing a 1531 statute and recognizing, "[N]o person, arraigned for felony, can be admitted to make any more than *twenty* peremptory challenges." (citing 22 Hen. 8 ch. 14)).

7. *See* Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119 (allowing for peremptory strikes in cases of treason and capital punishment).

8. *See generally* Strauder v. West Virginia, 100 U.S. 303, 309–10 (1879) (noting that a state denies equal protection to a black defendant when the defendant is tried before a jury in which members of the defendant's race have been expressly excluded by state law).

9. *See* Swain v. Alabama, 380 U.S. 202, 221 (1965) (refusing to find a violation of the Equal Protection Clause where the State had used peremptory challenges to strike every black member from the venire panel).

> The *Swain* Court tried to relate peremptory challenge to equal protection by presuming the legitimacy of prosecutors' strikes except in the face of a longstanding pattern of discrimination . . . .
>
> *Swain*'s demand to make out a continuity of discrimination over time, however, turned out to be difficult to the point of unworkable . . . .

Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 238–39 (2005).

10. Batson v. Kentucky, 476 U.S. 79 (1986).

11. *See id.* at 87–88, 92–93 (holding that discriminatory jury selection practices violate the Equal Protection Clause of the Fourteenth Amendment). "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87.

12. *See* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 456, 478–79 (1996) (examining all *Batson* decisions between 1986 and 1993 and determining that, of the total number of peremptory challenges, *Batson* violations were recognized 18% of the time).

restricting the application of *Batson*, finding *Batson* challenges to have been waived, or finding *Batson* challenges to have been without merit under the restrictive applications of *Batson* established by the circuit courts.

Over the past five years, on multiple occasions, the Supreme Court has explained, clarified, and thereby fortified its *Batson* decision.[13] Although there exists a bounty of scholarly articles dictating the original requirements of *Batson* and reciting its original disappointing progeny, little exists analyzing the cumulative effect of the Supreme Court's past five years of *Batson* decisions, which have sought to reinforce *Batson*'s original promise. This Article serves as a guide through these recent decisions and details the effects these decisions have had, if any, on the various circuit courts.

Unfortunately, the Supreme Court's efforts to provide clarity within the *Batson* framework have not been rewarded by consistency below.[14] Instead, some circuit courts have cobbled together a divergent patchwork of different rules concerning applicability and waiver not decided by the Supreme Court.[15] Others, in choosing not to apply the Supreme Court's recent holdings, persistently distinguish the cases before them from the recent holdings of the Supreme Court.[16] Thankfully, several

13. *See* Snyder v. Louisiana, 552 U.S. 472, 485 (2008) (refusing to accept the prosecutor's implausible justification for a peremptory challenge when it resulted in a disparate impact upon jurors of a particular race and no evidence in the record supported an alternate explanation); Johnson v. California, 545 U.S. 162, 168 (2005) (holding that "more likely than not" is an inappropriately high standard to establish a prima facie case of discrimination); *Miller-El II*, 545 U.S. at 241 (employing comparative analysis of the effects of peremptory challenges to determine that the disparate effect upon jurors of a particular race led to inferences of discrimination).

14. *Compare, e.g.*, United States v. Whitfield, 314 F. App'x 554, 556 (4th Cir. 2008) (determining that a defendant must rebut a facially race-neutral reason or waive the challenge), *with* Fields v. Thaler, 588 F.3d 270, 276 (5th Cir. 2009) (holding that a defendant *may* waive his *Batson* claim if he fails to rebut facially race-neutral reasons), *cert. denied*, No. 10-5060, 2010 WL 2630291 (U.S. Oct. 4, 2010).

15. *See* Lewis v. Horn, 581 F.3d 92, 103 (3d Cir. 2009) (identifying factors that imply discrimination but declining to adopt the factors enunciated in *Miller-El II*), *cert. denied*, No. 09-10741, 2010 WL 1942210 (U.S. Oct. 4, 2010); *see also* United States v. Ervin, 266 F. App'x 428, 432 (6th Cir. 2008) (stating that the first requirement of the first step of a *Batson* challenge is for the defendant to demonstrate that he is a member of a cognizable racial group); Kandies v. Polk, 385 F.3d 457, 474 (4th Cir. 2004) (holding that a failure to argue that the State's proffered reasons for challenges were pretextual constituted waiver of the objection).

16. *See* Woodward v. Epps, 580 F.3d 318, 338 (5th Cir. 2009) (applying different

circuits have strived to conform their jurisprudence to the recent teachings of the Supreme Court. This Article demonstrates the divergent approaches taken by the different circuit courts, which cumulatively yield that the extent of a person's *Batson* rights is a function of the geography in which his or her case is tried.

Accordingly, while any analysis of this divergent jurisprudence is undoubtedly useful, this Article serves as a geographical "primer" of sorts by explaining the essential steps to presenting a *Batson* challenge within each circuit. Ultimately, the goal of this Article is to provide a thorough analysis of recent circuit court *Batson* jurisprudence while concurrently issuing "rules of the road" useful to all practitioners, wherever their cases may be driving them.

II. SUPREME COURT *BATSON* JURISPRUDENCE

The 1986 *Batson* decision marked a shift in the jury selection process. Seeking the end of an era in which criminal prosecutors could dictate the racial make-up of a jury, the Supreme Court sought to prohibit the use of race as a non-spoken basis for peremptory challenges.[17] The Court provided a three-step process for asserting the improper use of peremptory challenges:

Step one: The party challenging the strike (challenging party) must make a prima facie showing that the strike is driven by racial discrimination;

Step two: Once a prima facie showing is made, the party who peremptorily struck (striking party) must proffer a race-neutral explanation; and

Step three: If a race-neutral explanation is provided, the court must decide, looking at the totality of the circumstances, whether the striking party's race-neutral reason is a pretext for purposeful

Batson standards between capital and noncapital cases), *cert. denied*, 130 S. Ct. 2093 (2010); *see also* United States v. Barnette, 390 F.3d 775, 797 (4th Cir. 2005) (declining to conclude there was discriminatory intent in the striking of black venirepersons over white venirepersons with similar characteristics because the prosecution had not exhausted all of its peremptory strikes, provided a race-neutral explanation for its strikes, and had not eliminated all black venirepersons from the jury), *vacated*, 546 U.S. 231 (2005).

17. *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986) ("The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors.... [P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

discrimination.[18]

Under this process, if a prima facie showing is made, the striking party "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenge[]."[19] "The trial court then will have the duty to determine if the [challenging party] has established purposeful discrimination."[20]

Building upon this framework, the Supreme Court has recently expanded the criteria used to determine whether counsel has engaged in purposeful discrimination in exercising a peremptory strike. Although much analysis exists regarding *Batson* and its original progeny, to gain a complete understanding of recent circuit court treatment, it is necessary to summarize *Batson*'s progeny and its effect on the three-step framework.

A. *Pre-2005 Supreme Court* Batson *Jurisprudence: Expanding* Batson*'s Availability but Limiting Its Efficacy*

By 2005, the Supreme Court had expanded the class of individuals eligible to raise challenges under *Batson*'s first step. In *Powers v. Ohio*,[21] the Court recognized that a violation of *Batson* not only transgressed the rights of the challenging party but also violated the excluded juror's right to participate in jury service free

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18. Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322, 328–29 (2003); *Batson*, 476 U.S. at 96–98.

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El I, 537 U.S. at 328–29 (citations omitted) (citing *Batson*, 476 U.S. at 96–98).

19. *See Batson*, 476 U.S. at 98 & n.20 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981)) (noting that the striking party cannot merely rebut the challenging party's case "by denying that he had a discriminatory motive or affirming his good faith in making individual selections" (internal quotation marks omitted)). Interestingly, *Batson* concluded that great deference was owed to a trial court's determination under *Batson*'s third step. *Id.* at 98 n.21.

> In a recent Title VII sex discrimination case, we stated that "a finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.

Id. (citations omitted) (quoting Anderson v. Bessemer City, 470 U.S. 564, 573 (1985)).

20. *Id.* at 98.

21. Powers v. Ohio, 499 U.S. 400 (1991).

from racial discrimination.[22] Expanding on this theory, the Supreme Court held that a challenging party need not be a member of the same cognizable racial group as the excluded venire person.[23] Similarly, the Court held that *Batson*'s protection includes gender-based discrimination.[24] Finally, in *Edmonson v. Leesville Concrete Co.*,[25] the Court extended *Batson*'s applicability to civil cases, as "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal."[26]

With respect to *Batson*'s second step, which requires a striking party to proffer a race-neutral reason, the Supreme Court expanded the definition of race-neutral, thereby limiting the potential success of a *Batson* challenge. For example, in *Hernandez v. New York*[27] and *Purkett v. Elem*,[28] the Supreme Court detailed the broad types of reasons that would satisfy *Batson*'s second step.[29] In doing so, the Court essentially eliminated the requirement that the proffered reason be sufficiently related to the matter

22. *Id.* at 407–09.

> While States may prescribe relevant qualifications for their jurors, a member of the community may not be excluded from jury service on account of his or her race. Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.

Id. at 407–08 (citations and internal quotation marks omitted).

23. *Id.* at 416. "To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id.* at 415.

24. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129 (1994) (holding that discrimination against a juror "on the basis of gender" is prohibited in the same manner in which racial discrimination is prohibited).

25. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

26. *Id.* at 630. Likewise, the Supreme Court noted that a *Batson* challenge is not solely limited to use by criminal defendants, but is extended to prosecutorial parties as well. *See* Georgia v. McCollum, 505 U.S. 42, 55–56 (1992) (applying *Batson* and *Powers* to hold that the Equal Protection Clause prohibits criminal defendants from engaging in intentional racial discrimination in exercise of peremptory challenges and that the State has third-party standing to raise claims of excluded venirepersons).

27. Hernandez v. New York, 500 U.S. 352 (1991).

28. Purkett v. Elem, 514 U.S. 765 (1995) (per curiam).

29. *See id.* at 769 (opining that a race-neutral reason does not need to be one that makes sense, but one that is not based on race); *Hernandez*, 500 U.S. at 360 (indicating that the question to address in the second step of the *Batson* analysis is solely whether a discriminatory intent is facially evident in the prosecutor's explanation, and holding that striking Latino jurors based on their proficiency in Spanish does not constitute racial discrimination).

at hand,[30] so that facial neutrality became the only concern of step two.[31] As a result, reasons that effectuated a racially disparate impact were upheld through "fantastic," "silly," or "superstitious" explanations.[32]

Finally, the Supreme Court, through 2004, treated the third step of *Batson* merely as a test of in personam credibility:[33]

> [T]he decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge.
>
> . . . .
>
> . . . The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been

30. *See Purkett*, 514 U.S. at 768–69 (stating that the *Batson* language seemingly requiring the reason given to relate to the case was only a warning "meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith"). "What it means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* at 769.

31. *See Hernandez*, 500 U.S. at 360 (explaining what constitutes a race-neutral reason). The Court defined step two as requiring "an explanation based on something other than the race of the juror," and "[u]nless a discriminatory intent is inherent in [counsel's] explanation, the reason offered will be deemed race neutral." *Id.*; *see also* Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 167 (2005) (noting that the lack of focus on the relatedness of the proffered reason results in attention only to the facial validity of the reason).

32. *See Purkett*, 514 U.S. at 775 (Stevens, J., dissenting) ("Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how 'implausible or fantastic,' even if it is 'silly or superstitious,' is sufficient to rebut a prima facie case of discrimination." (citations omitted)); *see also* Bruner v. Cawthon, 681 So. 2d 161, 172 (Ala. Civ. App. 1995) (accepting peremptory strikes of jurors for being too youthful or for making grammatical errors on the jury questionnaire as valid non-racial reasons for striking under the reasoning established in *Purkett*); People v. Payne, 666 N.E.2d 542, 549 (N.Y. 1996) (allowing "outlandish or entirely evanescent" reasons for peremptory challenges); State v. Gill, 460 S.E.2d 412, 416 (S.C. Ct. App. 1995) (upholding the strike of a juror by the prosecution where the credibility determinations by the trial court are accorded great deference and the trial court found the prosecution's reasoning for its strike to be credible). *Contra* Haile v. State, 672 So. 2d 555, 557 (Fla. Dist. Ct. App. 1996) (remanding a case where the trial judge conducted an insufficient inquiry into the reasons offered for a peremptory challenge and noting that the holding of *Purkett* might not be controlling because of independent guarantees in the Florida state constitution).

33. *See Hernandez*, 500 U.S. at 365 ("Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility.'" (quoting Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986))).

settled, there seems nothing left to review.[34]

Thus, instead of focusing on the actual validity of the proffered race-neutral reason, the Supreme Court instructed trial courts to focus on "the genuineness of the motive" in step three.[35] Moreover, as noted in *Purkett*, while the burden of persuasion "rests with, and never shifts from, the opponent of the strike," the first two steps of *Batson* govern the production of evidence that allows the trial court in step three to determine the persuasiveness of the proffered reason.[36]

In the twenty years after *Batson*, the Supreme Court expanded the class of individuals eligible to raise a *Batson* challenge but required only that a proffered reason retain facial neutrality.[37] Moreover, the Supreme Court limited a trial court's evaluation under step three to assessing the credibility of the striking party.[38] Consequently, by 2005, the Supreme Court had modified *Batson*'s framework by expanding the availability of *Batson* under step one while simultaneously limiting, and thereby perhaps eviscerating, its practical utility under steps two and three.

B. *Post-2005 Supreme Court* Batson *Jurisprudence: Ferreting out Discrimination and Requiring Judicial Verification*

Since 2005, the Supreme Court has reinforced the *Batson* framework that prohibits the use of peremptory strikes as a tool for racial discrimination.[39] Through four primary decisions, the Court has dramatically modified *Batson* steps one and three,

34. *Id.* at 365, 367.

35. *See Purkett*, 514 U.S. at 769 (emphasis omitted) (admonishing the lower court for focusing on reasonableness of the proffered reason and not its genuineness).

36. *See id.* at 768 ("It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.").

37. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) (expanding *Batson* challenges to civil cases as well as criminal); Powers v. Ohio, 499 U.S. 400, 407–08 (1991) (explaining that discrimination in jury selection violates the rights of the challenging party, and that the excluded juror and the challenging party do not have to be the same racial group as the excluded juror).

38. *See Hernandez*, 500 U.S. at 365 (determining that the third step in *Batson* primarily concerns credibility).

39. *See generally* Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 237–38 (2005) (noting the harm caused to defendants when there is discrimination in the choosing of a jury panel); Johnson v. California, 545 U.S. 162, 169 (2005) (holding that a challenging party can prove discrimination by a variety of evidence in a *Batson* challenge).

thereby strengthening the reach of *Batson* and reinforcing the constitutional principles of fairness and equality.[40]

1. A Prima Facie Case Requires No More than an Inference of Discrimination

As noted above, the Supreme Court's prior decisions modified *Batson*'s step one by expanding the classes of individuals eligible to assert *Batson* challenges.[41] Looking beyond eligibility, the Court recently clarified a "narrow but important" issue regarding the burden of proof required to sustain a prima facie case of purposeful discrimination.[42] In *Johnson v. California*,[43] the Supreme Court reemphasized the rights of jurors, reasoning that "the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race."[44] In reversing the California Supreme Court, the Supreme

40. *See* Snyder v. Louisiana, 552 U.S. 472, 479 (2008) (requiring that before an appellate court can give deference to a trial judge's determination of demeanor as an appropriate reason for a strike, such showing must be expressly stated in the record); Rice v. Collins, 546 U.S. 333, 341–42 (2006) (stating that the Ninth Circuit erred in reversing the trial court's determination of credibility when there was evidence, although not on the record, to support the prosecutor's proffered reasons for the peremptory strikes); *Johnson*, 545 U.S. at 170 (instructing that a challenging party need only have enough evidence for the judge to infer that discrimination has occurred); *Miller-El II*, 545 U.S. at 240–66 (reviewing five factors that help "ferret out" discrimination in jury selections).

41. *See Edmonson*, 500 U.S. at 630 ("The harms we recognized in *Powers* are not limited to the criminal sphere."); *Powers*, 499 U.S. at 407–08 ("While States may prescribe relevant qualifications for their jurors, a member of the community may not be excluded from jury service on account of his or her race." (citation omitted)).

42. *See Johnson*, 545 U.S. at 168 (reversing California's "require[ment] at step one that the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias" (quoting People v. Johnson, 71 P.3d 270, 280 (Cal. 2005)) (internal quotation marks omitted)). In *Johnson*, after the prosecution had peremptorily struck all African American members of the venire panel, defense counsel raised a *Batson* challenge arguing that the prosecutor's peremptory strikes constituted a "systematic attempt to exclude African-Americans from the jury panel." *Id.* at 165. Instead of proceeding to step two and seeking an explanation from the prosecutor, the trial judge explained that her own examination of the record had convinced her that the prosecutor's strikes could be justified by race-neutral reasons and the defendant failed to present a prima facie challenge. *Id.* at 165–66. The California Supreme Court affirmed the judgment, holding the defendants must establish a prima facie case of purposeful discrimination under a "more likely than not" standard. *Id.* at 167 (emphasis omitted) (quoting *Johnson*, 71 P.3d at 278) (internal quotation marks omitted). The Supreme Court reversed. *Id.* at 168.

43. Johnson v. California, 545 U.S. 162 (2005).

44. *Id.* at 172 (requiring no more than an inference of discrimination and reaffirming

Court held that *Batson* step one does not require a "more likely than not" showing that discrimination occurred.[45] The Court noted that imposing a "more likely than not" standard improperly combined steps one and three by requiring the challenging party to persuade the trial court at the outset.[46] Instead, the Supreme Court held the appropriate standard is an "inference of discrimination," so that a challenging party "satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."[47] It explained that "a prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the *sum of the proffered facts* gives 'rise to an inference of discriminatory purpose.'"[48] Thus, while "[s]tates do have flexibility in

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that *Batson* violations not only harm the "defendant and the excluded juror," but also "touch the entire community").

45. *Id.* at 173. The Court stated that "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case" of purposeful discrimination in jury selection. *Id.* at 168.

46. *See id.* at 170 (explaining that the Court did not intend for the opponent to have to persuade the judge in *Batson*'s first step).

> The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question. The three-step process thus simultaneously serves the public purposes *Batson* is designed to vindicate and encourages prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process.

Johnson, 545 U.S. at 172–73 (citations and internal quotation marks omitted).

47. *Id.* at 170.

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

Id.

48. *Id.* at 169 (emphasis added) (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986)).

> In *Batson*, we spoke of the methods by which prima facie cases could be proved in permissive terms. A defendant may satisfy his prima facie burden, we said, "by relying solely on the facts concerning [the selection of the venire] *in his case*." We declined to require proof of a pattern or practice because "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'"

formulating appropriate procedures to comply with *Batson*," per *Johnson*, flexibility under step one extends only as far as an inference can reach.[49]

2. Other Factors May Be Considered to Determine Whether Peremptory Strikes Violate the Equal Protection Clause

Handing down perhaps its biggest expansion of *Batson* yet, the Supreme Court in *Miller-El v. Dretke* (*Miller-El II*)[50] recognized "the practical difficulty of ferreting out discrimination in selections discretionary by nature."[51] Although the Supreme Court deliberated *Batson* expansion in *Miller-El v. Cockrell* (*Miller-El I*),[52] in *Miller-El II*, the Court provided five non-exhaustive, yet illustrative factors useful to lower courts in "ferreting out" the discriminatory pretext of peremptory strikes.[53]

a. Statistical Analysis of Stricken Jurors

The first factor the Supreme Court considered in *Miller-El II* was the statistical significance of peremptorily struck jurors.[54] Analyzing the total number of peremptory strikes used against members of a cognizable racial group and their overall effect on the venire panel, the Court noted that "'prosecutors used their per-emptory strikes to exclude 91% of the eligible African-

Id. at 169 n.5 (alterations in original) (citation omitted) (quoting *Batson*, 476 U.S. at 95).

49. *See* Johnson v. California, 545 U.S. 162, 168 (2005) (refusing to explicitly provide parameters for a prima facie case).

50. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231 (2005) (reversing the Fifth Circuit's denial of a *Batson* challenge on the merits). In Miller El v. Cockrell (*Miller-El I*), 537 U.S. 322 (2003), the predecessor action to *Miller-El II*, the Supreme Court reversed the Fifth Circuit's denial of federal habeas relief and reasoned that, "[a]fter examining the record of Miller-El's extensive evidence of purposeful discrimination by the [prosecution] before and during his trial, . . . an appeal was in order, since the merits of the *Batson* claim were, at the least, debatable by jurists of reason." *Miller-El II*, 545 U.S. at 237.

51. *Miller-El II*, 545 U.S. at 238 (recognizing the Court's long history of attempts to end racial discrimination in jury selection).

52. Miller El v. Cockrell (*Miller-El I*), 537 U.S. 322 (2003).

53. *See Miller-El II*, 545 U.S. at 240–66 (evaluating the prosecution's proffered reasons for striking African-American persons from the jury panel). In *Miller-El I*, the Supreme Court hinted at the factors that might be considered in establishing purposeful discrimination. *See Miller-El I*, 537 U.S. at 343–48 (describing the prosecution's rationales for striking African-American jurors from the jury panel). However, because *Miller-El II* evaluated the merits of the *Batson* challenge and enunciated in greater detail the considered factors, this Article primarily relies on *Miller-El II*.

54. *See Miller-El II*, 545 U.S. at 240 (noting that "[t]he numbers describing the prosecution's use of peremptories are remarkable").

American venire members .... Happenstance is unlikely to produce this disparity.'"[55] Notably, *Miller-El I* foreshadowed the importance of statistical analysis in raising an inference of discrimination when the Court recognized that "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors."[56]

b. Comparative Juror Analysis

Noting that "side-by-side comparisons of some black venire panelists who were struck and white panelists [who were] allowed to serve" are "[m]ore powerful than ... bare statistics,"[57] the Supreme Court then conducted a comparative juror analysis in *Miller-El II*.[58] The Supreme Court recognized that, when "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 ...."[59] Moreover, the Court emphasized that "a [striking party] simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons ...."[60] Neither the trial court nor the reviewing court, therefore, is authorized to "imagine a

55. *Id.* at 241 (alteration in original) (quoting *Miller-El I*, 537 U.S. at 342).

56. *Miller-El I*, 537 U.S. at 342 (analyzing the same statistical data as in *Miller-El II*).

57. *Miller-El II*, 545 U.S. at 241 (conducting such analysis on two struck jurors and determining that the proffered reasons for their exclusion applied to Caucasian jurors not struck).

58. *See id.* (noting that the transcript of voir dire proceedings is sufficient to allow for comparative juror analysis on appeal).

> There can be no question that the transcript of voir dire, recording the evidence on which Miller-El bases his arguments and on which we base our result, was before the state courts, nor does the dissent contend that Miller-El did not 'fairly presen[t]' his Batson claim to the state courts.

Id. at 242 n.2 (alteration in original) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)).

59. *Id.* at 241.

> The whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking Warren in an implausible light. Comparing his strike with the treatment of panel members who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not.

Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 252 (2005).

60. *Id.*

reason that might not have been shown up as false."[61] Consequently, even though comparative juror analysis may not be presented to nor conducted by the trial court, the Supreme Court recognized the sua sponte utility of comparative juror analysis in determining the credibility of a striking party's proffered reason.[62]

c. Contrasting Questions to Jurors of a Different Race

The Supreme Court also looked at the "contrasting *voir dire* questions posed respectively to black and nonblack panel members."[63] The Court observed that African-American venire members were subjected to a detailed account, or "graphic script" of the gruesome factual scenario, whereas Caucasian venire members received a "bland description."[64] This disparate questioning, the Supreme Court concluded, "is evidence that prosecutors more often wanted blacks off the jury," supporting a finding of purposeful discrimination "absent some neutral and extenuating explanation."[65]

d. Use of a Jury Shuffle

Next, the Supreme Court considered a factor in *Miller-El II* arising from the rule in Texas that permits a party to "shuffle" the venire panel before voir dire begins.[66] Because *Miller-El II* originated from a Texas criminal proceeding, the parties were allowed to a exercise jury shuffle.[67] In a jury shuffle, "either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are

61. *Id.* (prohibiting courts from postulating race-neutral reasons for peremptory strikes).

62. *Id.* at 242 n.2.

63. *Id.* at 255.

64. *See Miller-El II*, 545 U.S. at 255–63 (analyzing disparate prefatory remarks made prior to questioning a "potential juror's thoughts on capital punishment"). Prior to asking a "potential juror's thoughts on capital punishment," the striking party described the method of execution in either "general terms" or "rhetorical and clinical detail." *Id.* at 255.

65. *Id.* at 255–63 (noting that 94% of Caucasian venire panel members received a bland description compared to 53% of African Americans that received a graphic description).

66. *See id.* at 253 (discussing the process for a jury shuffle).

67. *See id.* at 253 n.12 (acknowledging that article 35.11 of the Texas Code of Criminal Procedure provides the statutory source for Texas jury shuffles).

seated and reached for questioning."[68] A jury shuffle, therefore, potentially allows for "members seated at the back . . . to escape *voir dire* altogether, for those not questioned by the end of the week are dismissed."[69] The Supreme Court concluded that "the [striking party's] decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel . . . raise[d] a suspicion that the State sought to exclude African-Americans from the jury."[70] The Court further implied that a prima facie case may be established through the use of jury shuffles as "nothing stops the suspicion of discriminatory intent from rising to an inference."[71] Thus, the Supreme Court implicitly held that even factors unique to each state, such as the Texas jury shuffle, may serve as evidence of purposeful discrimination if used in a discriminatory fashion.[72]

e. History of Systematically Excluding Jurors on Account of Race

The final factor the Supreme Court considered in *Miller-El II* was the striking party's formal policy of excluding minorities from jury service.[73] Specifically, the Supreme Court noted that the district attorney's office "had adopted a formal policy to exclude minorities from jury service" in a document dubbed "the Sparling Manual," which was distributed to prosecutors and "available at least to one of the prosecutors in Miller-El's trial."[74] This policy to exclude minorities served as clear evidence of consistent efforts to purposefully discriminate.[75]

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68. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 253 (2005).

69. *Id.* (explaining the mechanics of the Texas jury shuffle).

70. *Id.* at 254 (quoting Miller El v. Cockrell (*Miller-El I*), 537 U.S. 322, 346 (2003)) (internal quotation marks omitted) (referencing indications that the prosecution was using the jury shuffle to manipulate the racial composition of the venire to be questioned).

71. *Id.* at 254–55 (addressing the striking party's assertion that there may have been a race-neutral reason for the shuffles and holding that such reason is irrelevant in determining whether an inference of discrimination exists).

72. *See id.* at 253 (explaining that discrimination may extend "to include broader patterns of practice during the jury selection," such as "[t]he prosecution's shuffling of the venire panel, its enquiry into views on the death penalty, [and] its questioning about minimum acceptable sentences").

73. *Miller-El II*, 545 U.S. at 263–64.

74. *Id.* at 264 (relying on the Sparling Manual as evidence of a specific policy to exclude jurors on account of their race).

75. *See id.* at 266 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old

Ultimately, *Miller-El II* established that trial and reviewing courts are not bound by the arguments recorded but retain the discretion, if not the duty, to look at other factors such as those discussed above.[76] In looking at "the totality of the relevant facts," however, the Supreme Court emphasized that courts are not free to conjure reasons for peremptory strikes and may need to consider additional factors in order to judge the credibility of a proffered reason.[77] Further, while the *Miller-El II* factors were discussed in the context of *Batson*'s third step, such factors presumptively apply to step one's lighter burden for proving an inference of discrimination.[78] The presence of a factor described above, therefore, may serve as evidence of an inference of discrimination or proof that a proffered reason is a pretext for racial discrimination.[79]

3. No Appellate Court Deference Need Be Given to a Trial Court's Credibility Determination Where the Record Lacks Specific Factual Findings

Recognizing that a "trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous," the Supreme Court in *Snyder v. Louisiana*[80] and *Rice*

manual of tips on jury selection, as shown by their notes of the race of each potential juror.").

76. *Id.* at 251–52; *see also* Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (requiring application of the *Miller-El II* factors where there exists persisting doubts as to discriminatory intent). "In *Miller-El v. Dretke*, the Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478.

77. *See Miller-El II*, 545 U.S. at 239, 252 (emphasizing the need to look at all relevant circumstances in step one and step three of *Batson*).

78. *See generally* Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 239, 266 (2005) ("The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.").

79. *Id.* at 265.

80. Snyder v. Louisiana, 552 U.S. 472 (2008) (reversing the denial of a *Batson* challenge because the record contained no evidence that the trial court had conducted a credibility analysis of the striking party's proffered race-neutral reason). In *Snyder*, the striking party proffered two reasons for the strike. *Id.* at 478. One of the two peremptory strikes was based on the prospective juror's alleged nervousness as observed by the prosecutor, and the second was the prosecutor's perception that this prospective juror might return a lesser verdict to ensure a quicker end to the trial because of school obligations. *Id.* at 478–82. The trial court provided no explanation in its overruling of the

v. Collins[81] evaluated appellate courts' roles in reviewing a trial court's step three determination.[82] The Supreme Court concluded that, at step three, a "trial court has a pivotal role in evaluating . . . 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."[83] Thus, while a reviewing court typically defers to a trial court's

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Batson challenge. *Id.* at 479. Noting that it could not presume that the trial court had rejected the challenge based on demeanor, the Supreme Court reversed the trial court, concluding the second justification for the strike was a pretext for racial discrimination. *Id.* at 485–86.

81. Rice v. Collins, 546 U.S. 333 (2006) (holding that the attempt to set aside the trial court's conclusion that the prosecutor did not strike a juror for racial discriminatory purposes did not satisfy the requirements for granting a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act (AEDPA)). In *Rice*, the prosecution proffered three reasons for striking an African-American juror. *Id.* at 336–37. One of the three race-neutral explanations was based on the demeanor of the struck juror, which the trial judge admittedly did not witness. *Id.* at 336–37, 339. The trial court denied the *Batson* challenge. *Id.* at 336. On appeal from the district court's denial of habeas relief, the Ninth Circuit concluded that the trial court improperly accepted the race-neutral reasons. *Id.* at 339–41. The Supreme Court reversed, holding that, although no deference could be given to the demeanor-based reason, the other proffered race-neutral reasons contained a sufficient factual basis to warrant deference. *Rice*, 546 U.S. at 341–42.

82. *Snyder*, 552 U.S. at 476–79 (determining the level of deference that must be afforded to a trial court where the trial court fails to provide specific factual findings for step three of *Batson*); *see also Rice*, 546 U.S. at 338–39 (noting the difference between the standard of review for direct appeals and AEDPA collateral attack appeals).

> On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. Under AEDPA, however, a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Thus, a federal habeas court can only grant Collins' petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge. State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by "clear and convincing evidence."

Rice, 546 U.S. at 338–39 (citations omitted) (quoting 28 U.S.C. § 2254(d)(2), (e)(1) (2000)).

83. *Snyder*, 552 U.S. at 477 (noting that a trial court is in the best position to evaluate credibility).

> Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance.

Id. (alteration in original) (citation omitted) (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)).

determinations regarding credibility and demeanor,[84] the Supreme Court refused to extend such deference where the trial court failed to make a specific finding in the record on the credibility of one proffered reason when the other proffered reason was deemed pretextual.[85] Noting that a juror's demeanor "cannot be shown from [the] cold transcript," the Supreme Court held in *Snyder* that it could not presume the trial court credited the striking party's reason without an express determination in the record.[86] Conversely, in *Rice*, the Supreme Court deferred to the trial court's ruling on discriminatory intent because, even though the trial court failed to include an express finding in the record, there was additional evidence to support the credibility of other proffered reasons.[87] Thus, *Snyder* and *Rice* establish that, unless

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84. *See id.* at 477 (acknowledging that determinations of credibility and demeanor "lie peculiarly within a trial judge's province" (quoting *Hernandez*, 500 U.S. at 365) (internal quotation marks omitted)).

85. *See id.* at 479–86 (applying comparative juror analysis to the striking party's second proffered reason and concluding that the proffered reason was pretextual as it could apply to other Caucasian jurors not struck). Thus, because the trial court failed to denote in the record whether it found the striking party's first proffered reason credible, and the second proffered reason was deemed discriminatory, the Supreme Court could not defer to the trial court's credibility determination. Snyder v. Louisiana, 552 U.S. 472, 479–86 (2008).

> [I]n light of the circumstances here—including absence of anything in the record showing that the trial judge credited the claim that Mr. Brooks was nervous, the prosecution's description of both of its proffered explanations as "main concern[s]," and the adverse inference noted above—the record does not show that the prosecution would have pre-emptively challenged Mr. Brooks based on his nervousness alone.

Id. at 485 (alteration in original) (citations omitted).

86. *Id.* at 479 (citations and internal quotation marks omitted) (relying on the record as the source of the trial court's credibility determination). "[T]he record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor." *Id.*

> Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It is possible that the judge did not have any impression one way or the other concerning Mr. Brooks' demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks' demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, we cannot presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous.

Id.

87. *See Rice*, 546 U.S. at 340–42 (observing that comparative juror analysis does not

the cold record states the trial court's basis for a credibility determination, a reviewing court cannot defer to such a finding and can uphold the trial court's step three determination only where another proffered reason is deemed nondiscriminatory.

Ultimately, the past five years of *Batson* analysis have resulted in formidable changes, thereby increasing the protection afforded under the Equal Protection Clause. These decisions can be summarized as follows:

(1) A *Batson* challenge requires only an inference of discrimination;[88]

(2) A reviewing court should look at all possible factors in determining the existence of purposeful discrimination;[89]

(3) A reviewing court should not defer to a determination regarding credibility or demeanor where no explicit support exists in the record.[90]

The remainder of this Article reviews circuit court treatment of these recent Supreme Court modifications to *Batson* and determines which courts are aligning with the pronouncements of the higher court. After analyzing each circuit court's respective application of these recent decisions, a summary section then provides "rules of the road" useful for raising, preserving, and appealing a *Batson* claim.

III. CIRCUIT COURT JURISPRUDENCE APPLYING THE SUPREME COURT'S POST-2005 *BATSON* PROGENY

In the last five years, the circuit courts have distinctively interpreted the Supreme Court's *Batson* jurisprudence. Consequently, each circuit court has developed its own criteria for establishing and reviewing *Batson* claims. While some circuit

look for non-struck jurors who could be considered better candidates for a peremptory strike but looks for other non-struck jurors who exhibited characteristics at issue in the proffered race-neutral reason).

88. *Snyder*, 552 U.S. at 485 (noting that, if a prosecutor's reason to strike is pretextually significant, it will indicate an inference of discriminatory intent); Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 252 (2005) (observing that comparing the struck juror with jurors similarly situated can give rise to discriminatory intent).

89. *Snyder*, 552 U.S. at 478 (reviewing all considerations before determining whether a strike had a discriminatory purpose); *Miller-El II*, 545 U.S. at 251–52 (requiring the trial court to consider the proffered reason to determine whether the prosecutor's strike was discriminatory).

90. *See, e.g.*, *Rice*, 546 U.S. at 343 (Breyer, J., concurring) (stating that gender, youth, and demeanor were not reasonable explanations).

courts have viewed the Supreme Court's recent decisions as an opportunity to flex the *Batson* standard, other circuit courts have resolved to limit the utility of such jurisprudence. As illustrated below, each circuit remains distinct in its application of *Batson.*

A. *First Circuit*

The First Circuit has reviewed relatively few *Batson* decisions in the last five years. Consequently, the court has evaluated a limited number of circumstances implicating the Supreme Court's recent *Batson* jurisprudence. Despite the court's limited number of holdings, the First Circuit's treatment of *Batson* predominantly focuses on step one, which requires the challenging party to raise an inference of racial discrimination.[91]

1. Analysis of Recent *Batson* Holdings

In 2007, the First Circuit concluded that, under step one of *Batson*, a challenging party is required to raise only an inference of discrimination.[92] The court explicitly invalidated a likelihood-of-discrimination standard at step one, noting that such a standard "parallels the standard repudiated in *Johnson.*"[93]

Although the First Circuit has recognized the minimal burden imposed by *Batson*'s first step, the court has struggled to define what constitutes an "inference" of discrimination.[94] The primary debate centers on the weight afforded to statistical analysis.[95] In

91. *See, e.g.*, Aspen v. Bissonnette, 480 F.3d 571, 575 (1st Cir. 2007) ("'[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (quoting Johnson v. California, 545 U.S. 162, 170 (2005))).

92. *See id.* (recognizing that an inference of discrimination is sufficient to establish a prima facie case). Although this case involved gender discrimination, the Supreme Court extended the reach of *Batson* to include discrimination based on gender. "The Commonwealth correctly states that an 'inference' of discrimination is the *Batson* prima facie case standard. But it is apparent that the Appeals Court equated an 'inference' of discrimination with a showing that gender was the 'likely' reason that the prosecutor exercised her peremptory challenges." *Id.* at 577.

93. *Id.* at 575 n.3 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 1310 (Philip Babcock Gove, ed., 3d ed. 1993)) (relying on *Johnson*, which "relied exclusively on *Batson* as precedent" for the supposition that a "more likely than not" burden is improper under step one).

94. *See, e.g., id.* at 575–76 (observing that the lower court incorrectly equated an inference with a heightened showing that discrimination was likely).

95. *See, e.g., Aspen*, 480 F.3d at 577 ("Relevant numeric evidence includes the percentage of strikes directed against members of a particular group, the percentage of a

Miller-El II, the Supreme Court dictated that statistical disparities could serve as evidence of pretextual discrimination but did not specify the exact statistical requirements.[96] In the last five years, the First Circuit has touched on this issue and "cautioned that a party 'who advances a *Batson* argument ordinarily should come forward with facts, not just numbers alone.'"[97] The First Circuit has yet to uphold an inference of discrimination based on statistics alone.[98]

Even though the First Circuit has cautioned against finding an inference of discrimination based on numbers alone, it has "left open the possibility" "that a 'statistical disparity alone can demonstrate a prima facie case,'"[99] if there is a complete statistical picture.[100] The court has defined a complete statistical picture as "the percentage of strikes directed against members of a particular group, the percentage of a particular group removed from the venire by the challenged strikes, and a comparison of the percentage of a group's representation in the venire to its representation on the jury."[101] Thus, while the Supreme Court has not yet de-

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particular group removed from the venire by the challenged strikes, and a comparison of the percentage of a group's representation in the venire to its representation on the jury." (citations omitted)).

96. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 241 (2005).

97. *Aspen*, 480 F.3d at 577 (quoting United States v. Bergodere, 40 F.3d 512, 516 (1st Cir. 1994)) ("By itself, the number of challenges used against members of a particular [group] is not sufficient to establish ... a prima facie case." (alterations in original) (quoting United States v. Esparsen, 930 F.3d 1461, 1467 (10th Cir. 1991)) (internal quotation marks omitted)).

98. *See* Odunukwe v. Bank of Am., 35 F. App'x 58, 60 (1st Cir. 2009) (concluding there was no prima facie case based on statistical analysis); United States v. Girouard, 521 F.3d 110, 116 (1st Cir. 2008) (noting that the court has "never decided whether mere numbers may establish a prima facie case"); *Aspen*, 480 F.3d at 577 (refusing to hold a prima facie case was established based solely on statistical analysis).

99. *Aspen*, 480 F.3d at 577 & n.6 (quoting Brewer v. Marshall, 119 F.3d 993, 1005 (1st Cir. 1997)); *see also Odunukwe*, 335 F. App'x at 60 (concluding no inference of discrimination was shown based "solely on the number of strikes against persons of color" because the venire panel had a "higher [percentage] than the minority percentage existing in the original venire").

100. *See Girouard*, 521 F.3d at 116 ("In any case, it is clear that even if bare statistics can make out a prima facie case, that does not mean that any statistical proffer will satisfy the burden."). Notably, *Girouard* held that *Batson* applied to religious discrimination. *Id.* at 116 n.9. "Therefore, because we assume for the purposes of this opinion, that *Batson* applies to religious discrimination, this statement in *Snyder* would apply to religious discrimination as well." *Id.* at 115–16 n.9.

101. *Odunukwe*, 335 F. App'x at 60 (quoting *Aspen*, 480 F.3d at 577) (internal quotation marks omitted) (noting that reviewing courts also consider the other factors

fined the exact utility of statistical analysis under *Batson*, the First Circuit, in struggling to define its applicability, has crafted new prerequisites that must be met for prior to statistical consideration.

2. Practical Application

In fulfilling step one of *Batson* in the First Circuit, it is important to note that statistical analysis evidencing discrimination will likely not establish an inference of discrimination unless the analysis establishes a complete statistical picture as described above. Therefore, to successfully assert a prima facie case of discrimination in courts within the First Circuit, the challenging party should include additional evidence of discriminatory intent derived from "the striking party's questions and statements during the voir dire . . . and whether similarly situated jurors from outside the allegedly targeted group were permitted to serve."[102]

Once a prima facie case is established and the striking party has provided a race-neutral explanation pursuant to step two, the challenging party is not required to rebut the race-neutral reasons.[103] Such action may be advisable, however, for the challenging party has the ultimate burden of persuasion.[104] The *Miller-El II* factors provide a basis for rebuttal evidence.[105] Upon submission of all relevant evidence, the First Circuit will consider the totality of the circumstances to determine whether the

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enunciated in *Miller-El II*).

102. *Id.* (listing the non-numeric factors evaluated in reviewing the denial of a *Batson* claim under step one).

103. *See* Richards v. Relentless, Inc., 341 F.3d 35, 44 (1st Cir. 2003) ("If the objecting party 'fulfills this requirement by establishing, say, a prima facie case of a racially driven impetus,' the party seeking to use the challenge 'must proffer a race-neutral explanation for having challenged the juror.' Once such an explanation is given, the district court must then decide whether the objecting party has 'carried the ultimate burden of proving that the strike constituted purposeful discrimination on the basis of race.'" (citations omitted) (quoting United States v. Bergodere, 40 F.3d 512, 515 (1st Cir.1994))).

104. *See id.* (explaining that, following the proffering of a race-neutral explanation, the objecting party has the final and ultimate burden of proving that the strike was made because of the juror's race (quoting *Bergodere*, 40 F.3d at 515) (internal quotation marks omitted)).

105. *See, e.g.*, Aspen v. Bissonnette, 480 F.3d 571, 577 (1st Cir. 2007) (demonstrating that, in addition to statistical evidence, the court may also consider relevant factors such as: the statements and questions made by the striking party during the voir dire; whether the striking party could have eliminated additional members of the alleged targeted group through any unused peremptory challenges; and whether similarly situated persons not belonging to the alleged targeted group were selected to serve on the jury).

proffered race-neutral reasons are a pretext for racial discrimination.[106]

B. *Second Circuit*

When compared to its sister courts, the Second Circuit has, at times, adopted a more liberal approach to *Batson*.[107] In recognizing the Supreme Court's pronouncements in *Johnson*, *Miller-El II*, *Rice*, and *Snyder*, the Second Circuit has expanded on *Batson*'s first and third steps, resulting in a process more sensitive to racial animus.[108]

1. Analysis of Recent *Batson* Holdings

In 2005, the Second Circuit recognized that the challenging party need not prove a pattern of discrimination during jury selection to establish a prima facie case, a conclusion that proved consistent with the Supreme Court's holding in *Johnson* later that year.[109] The court also noted that "a defendant raising a *Batson*

106. *See Odunukwe*, 335 F. App'x. at 60 (explaining that the court examines all relevant circumstances, including both numeric and non-numeric factors, in determining whether a prima facie case for racial discrimination was made); *see also Richards*, 341 F.3d at 44–45 (allowing a trial court to consider a juror's city of residency as a valid race-neutral reason to strike when other minority jurors of the same race were not challenged).

107. *See, e.g.*, Dolphy v. Mantello, 552 F.3d 236, 239 (2d Cir. 2009) (concluding that peremptorily striking a heavyset African American under the guise that overweight jurors have a tendency to be sympathetic to defendants was not credible as a race-neutral explanation).

108. *See* Brown v. Alexander, 543 F.3d 94, 101 (2d Cir. 2008) (suggesting that the first step in *Batson* should not be burdensome, provided the facts suggest a discriminatory purpose); Messiah v. Duncan, 435 F.3d 186, 194, 200 (2d Cir. 2006) (advising that a discriminatory motive for applying a peremptory strike violates the Fourteenth Amendment and proclaiming it is inappropriate on habeas review to supplant the trial court's credibility determination even if reasonable minds could reach a different conclusion).

109. *See* DeBerry v. Portuondo, 403 F.3d 57, 69 n.8 (2d Cir. 2005) (reasoning that there was no clear error and upholding a *Batson* challenge denial). Although the Second Circuit found no clear error, it noted the lower court's misapplication of *Batson* first step:

> Nor do we adopt Justice Pincus's understanding of *Batson*, which at times confused 'pattern' with 'prima facie case' and with discriminatory intent. Our task is not to determine how well the trial court could articulate its understanding of legal principles but rather whether it applied the principles correctly and avoided clear error in its findings of fact. Because Justice Pincus correctly applied *Batson* by assessing the credibility of the prosecutor's explanations and his credibility findings are not clearly erroneous, he committed no error sufficient to justify granting the writ.

Id. (citations omitted); *see also* Cousin v. Bennett, 511 F.3d 334, 338 (2d Cir. 2008) (upholding the denial of a *Batson* challenge because challenging one African American

claim of purposeful racial discrimination does not have to demonstrate that all venirepersons who were peremptorily excused belong to the same 'cognizable racial group.'"[110]

Moreover, in determining what evidence is necessary to establish a prima facie case under step one, the Second Circuit has analyzed the applicability of statistical analysis while noting the import of a well-developed record in establishing an inference of discrimination.[111] Notably, the court has recognized a prima facie case based solely on the pattern of the prosecution's peremptory strikes.[112] In describing the statistical analysis used to establish an inference of discrimination, the Second Circuit has classified two types of patterns: the challenge rate and the exclusion rate.[113]

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juror after challenging fourteen non-African Americans did not create a prima facie case of discrimination). In *Cousin*, the Second Circuit, however, did note that a single strike could meet the first step of *Batson*:

> For example, if a prosecutor who possessed no information about prospective jurors other than what was visible from their appearance, proceeded to challenge the only African-American juror in a venire of sixty, or if a prosecutor's remarks or questions in the course of exercising a single challenge indicated racial motivation, the single challenge might well be sufficient to sustain a *prima facie* showing of a *Batson* violation.

Cousin, 511 F.3d at 338.

110. Green v. Travis, 414 F.3d 288, 297, 301 (2d Cir. 2005) (upholding the denial of a writ for habeas corpus based on a *Batson* challenge because "it was not clearly erroneous for the district court to find that Green failed to establish by a preponderance of the evidence that intentional racial discrimination motivated the prosecution's peremptory challenges"). "Although our Circuit has not explicitly held that a *prima facie Batson* claim may be raised to protest the peremptory exclusion of venirepersons from more than one racial group, we have previously permitted such challenges to proceed." *Id.* at 298 n.5.

111. *See* Overton v. Newton, 295 F.3d 270, 278 (2d Cir. 2002) (opining that in appropriate circumstances statistics alone may establish a prima facie showing of racial discrimination); *see also Green*, 414 F.3d at 299 (explaining that a statistical pattern of strikes against a certain racial group may be sufficient to infer discrimination).

112. *See Green*, 414 F.3d at 299 (noting that, "although the Appellate Division did not address whether the pattern of the prosecution's peremptory strikes established a *prima facie* case of discrimination under *Batson*, we find that it did").

> At the time of the *Batson* challenge, the prosecutor had used one hundred percent of her peremptory strikes to remove Black and Hispanic jurors. Sixty percent of the prosecution's peremptory challenges were used to exclude Blacks while the remaining forty percent of the prosecution's peremptory challenges were used to exclude Hispanics. Furthermore, at the time of the *Batson* challenge, the prosecution had stricken all of the Black members of the jury pool not already struck for cause.

Id.

113. *See* Jones v. West, 555 F.3d 90, 97–98 (2d Cir. 2009) (describing the statistical "patterns that can give rise to an inference of discrimination").

The challenge rate is the comparison of the "total peremptory strikes against members of a cognizable racial group . . . to the percentage of that racial group in the venire."[114] The exclusion rate is the disproportionate number of peremptory challenges used to strike a cognizable class of persons.[115] "The distinction between the two types of challenges is an important one. Cases involving successful challenges to exclusion rates have typically included patterns in which members of the racial group are completely or almost completely excluded from participating on the jury."[116] In contrast, cases involving challenge rates are successful upon a finding of "a substantial statistical disparity."[117]

To establish a prima facie case based on the challenge or exclusion rate, however, the Second Circuit has required a complete record.[118] In other words, to establish a prima facie case based on the challenge rate, "the record should include, at a minimum, the number of peremptory challenges used against the racial group at issue, the number of peremptory challenges used in total, and the percentage of the venire that belongs to that racial group."[119] However, "[w]hen the asserted prima facie case is

114. *Id.* at 98 ("Discriminatory purpose may be inferred when a party exercises a disproportionate share of its total peremptory strikes against members of a cognizable racial group compared to the percentage of that racial group in the venire.").

115. *Id.* ("[A]n intent to exclude can also be inferred when a party uses peremptory challenges to strike a disproportionate number of members of a cognizable racial group from the venire.").

116. *See id.* (distinguishing the trial court's finding of a "'substantial statistical disparity'" as the challenge rate (quoting Jones v. West, 473 F. Supp. 2d 390, 408 (W.D.N.Y. 2007))); *see also* Brown v. Alexander, 543 F.3d 94, 101 (2d Cir. 2008) (requiring "that statistical arguments be based on a well-developed factual record").

117. *See Jones*, 555 F.3d at 98 (quoting *Jones*, 473 F. Supp. 2d at 408) (internal quotation marks omitted) (stating that "[t]he district court computed the relevant challenge rate of the prosecutor's strikes against black potential jurors . . . and found 'a substantial statistical disparity' that would have satisfied Jones's burden of establishing a prima facie case of discrimination" (quoting *Jones*, 473 F. Supp. 2d at 408)).

118. *See* Sorto v. Herbert, 497 F.3d 163, 171–72 (2d Cir. 2007) (reasoning that "[t]he record before us contains insufficient data as to the prosecution's strike pattern to support a finding that the state court unreasonably applied *Batson*"). It should also be noted that parallel to the necessity of a complete record is the significance of raising a *Batson* challenge at the appropriate time, for "an early *Batson* challenge limits the state court's ability to properly assess a *prima facie* case." *Id.* at 170.

119. *Jones*, 555 F.3d at 98; *see also Sorto*, 497 F.3d at 171–72 (describing what a sufficient record would likely include).

> A sufficient record would likely include evidence such as the composition of the venire, the adversary's use of peremptory challenges, the race of the potential jurors stricken, and a clear indication as to which strikes were challenged when and on what

based upon the [exclusion rate], the record need only include how many members of that group were in the venire, and how many of those were struck."[120] By classifying and imposing record requirements for statistical analysis, the Second Circuit has provided palpable means to infer discrimination from statistics.

Finally, in evaluating step three of *Batson*, the Second Circuit has aligned with the Supreme Court's holdings in *Snyder* and *Rice*, recognizing the importance of assessing the credibility of the proffered race-neutral reason.[121] Although emphasizing that "[t]rial courts applying the third *Batson* prong need not recite a particular formula of words, or mantra,"[122] the court has held that, where the grounds for making the strike are not self-evident, "a trial court must somehow 'make clear whether [it] credits the non-moving party's race-neutral explanation for striking the relevant panelist.'"[123] Thus, whether an express explanation is needed rests on whether the "trial [court] affords the parties a reasonable opportunity to make their respective records . . . ."[124]

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ground, and which strikes were cited to the trial court as evidence of a discriminatory intent.

Sorto, 497 F.3d at 171–72.

120. *Jones*, 555 F.3d at 99; *see also* Harris v. Kuhlmann, 346 F.3d 330, 345 (2d Cir. 2003) ("[W]here every black juror was subject to a peremptory strike, a 'pattern' plainly exists.").

121. *See* United States v. Thompson, 528 F.3d 110, 116–17 (2d Cir. 2008) (applying *Snyder* in a reverse *Batson* challenge by questioning the race-neutral reasons for striking a white venireperson while allowing similarly situated Latino and an African American jurors to serve); Messiah v. Duncan, 435 F.3d 186, 200 (2d Cir. 2006) (stating that "even if '[r]easonable minds reviewing the record might disagree about the prosecutor's credibility,' it is inappropriate on habeas review 'to supersede the trial court's credibility determination.'" (alteration in original) (quoting Rice v. Collins, 546 U.S. 333, 341–42 (2006))).

122. Dolphy v. Mantello, 552 F.3d 236, 239 (2d Cir. 2009) (citing Galarza v. Keane, 252 F.3d 630, 640 n.10 (2d Cir. 2001)) (vacating the district court's order which denied habeas corpus relief under the AEDPA). As this case involved determining the propriety of the denial of a *Batson* challenge under 28 U.S.C. § 2254, the Second Circuit applied a de novo review. *Id.*

123. *Id.* (alteration in original) (quoting *Messiah*, 435 F.3d at 198) ("An 'unambiguous rejection of a *Batson* challenge will demonstrate with sufficient clarity that a trial court deems the movant to have failed to carry his burden to show that the prosecutor's proffered race-neutral explanation is pretextual.'" (quoting *Messiah*, 435 F.3d at 198)); *see also* United States v. White, 552 F.3d 240, 252 (2d Cir. 2009) (holding that the trial court's observation of a struck juror's demeanor was sufficient for its credibility determination); United States v. Lee, 549 F.3d 84, 94 (2d Cir. 2008) (recognizing the trial court's explicit credibility determination and deferring to it).

124. *Messiah*, 435 F.3d at 198 ("'Although reviewing courts might have preferred the

However, if afforded, the "[trial court] may express [its] *Batson* ruling on the credibility of a proffered race-neutral explanation in the form of a clear rejection or acceptance of a *Batson* challenge."[125] By requiring an express determination in such non-self-evident situations, the Second Circuit has implicitly applied *Snyder* and *Rice*.

2. Practical Application

In the Second Circuit, statistical analysis may be used to meet the requirements of *Batson*'s first step, but if the statistical exclusion rate does not indicate that a cognizable racial group is almost or completely excluded, the challenging party will need to establish the necessary numerical data to determine the overall challenge rate.[126] For non-numerical evidence, a prima facie showing of discrimination can likely be established through evidence of any of the *Miller-El II* factors.[127] Additionally, if a

trial court to provide express reasons for each credibility determination, no clearly established federal law required the trial court to do so.'" (quoting McKinney v. Artuz, 326 F.3d 87, 100 (2d Cir. 2006))); *see also Thompson*, 528 F.3d at 116–17 (exemplifying the importance of an opportunity for each party to make their respective record). In *Thompson*, "the District Court elicited the Defendants' explanations for the peremptory challenge of [the struck juror], examined those explanations through questioning and colloquy, and stated on the record that it found the explanations not credible and 'weak.'" *Id.* at 117; *see also* United States v. Douglas, 525 F.3d 225, 239 (2d Cir. 2008) ("The record in the present case persuades us that the district court permissibly found that the government articulated, and possessed, a neutral reason for excusing the juror in question and that he would have been excused whether or not race was a consideration.").

125. *Messiah*, 435 F.3d at 198 (citing *McKinney*, 326 F.3d at 100) (holding that the actions of the trial court were sufficient to allow a clear acceptance or rejection).

> The trial judge listened to the arguments, asked defense counsel if he had anything more to contribute and then unequivocally stated on the record his acceptance of all five of the prosecutor's strikes, including that of Woodbury. It is evident that the trial judge did not discredit or find unpersuasive the prosecutor's race-neutral explanations for striking Woodbury. Clear acceptance of that strike following the *Batson* challenge, the proffered race-neutral explanation, and the ensuing discussion was a succinct but adequate *Batson* ruling.

Id. at 199.

126. *See* Sorto v. Herbert, 497 F.3d 163, 171 (2d Cir. 2007) (reasoning that raising a round one *Batson* challenge while unused strikes were still at large did not allow the court to review a complete record with which to evaluate statistically whether the used strikes were racially discriminatory).

127. *See* Overton v. Newton, 295 F.3d 270, 278 (2d Cir. 2002) (recognizing that the Second Circuit has not dictated any factors for establishing a prima facie case under *Batson* step one). "[T]he Court has not, to date, provided a more particularized view of what constitutes a *prima facie* showing of discrimination under *Batson*." *Id.*

striking party proffers a race-neutral reason prior to the establishment of a prima facie case by the challenging party, step one is considered moot and the trial court may move directly to step three.[128] Notably, even where a trial court has deemed step one moot, in an AEDPA habeas corpus proceeding, the court can still evaluate whether a prima facie case of discrimination exists.[129]

After asserting a prima facie case of discrimination and receiving the striking party's race-neutral reason, the challenging party in the Second Circuit may attempt to rebut the proffered explanation.[130] Although rebuttal is not required, it is useful in overcoming the challenging party's burden of persuasion.[131] Thus, if the challenging party chooses to provide rebuttal evidence, the trial court will consider such evidence at step three in ruling on discriminatory intent.[132]

C. *Third Circuit*

In attempting to define the contours of the Supreme Court's recent *Batson* decisions, the Third Circuit has struggled to uniformly accept statistical analysis under step one but has otherwise aligned itself with *Batson*'s general principles.[133]

1. Analysis of Recent *Batson* Holdings

The past six years of Third Circuit *Batson* jurisprudence

128. *See* Isaac v. Brown, 205 F. App'x 873, 876–77 (2d Cir. 2006) (noting the trial court correctly skipped step one where the striking party had already proffered its race-neutral reason).

129. *See Sorto*, 497 F.3d at 175 n.9 ("Though that approach was taken in *Hernandez v. New York*, a *habeas* court remains free to affirm based on the *prima facie* rulings." (citation omitted)).

130. *See id.* at 174 (allowing Sorto to rebut the state's race-neutral explanation for the strikes).

131. *See* Jones v. West, 555 F.3d 90, 102 (2d Cir. 2009) (explaining that the defendant had produced a record demonstrating that the prosecutor was putting forth pretextual reasons for striking black jurors).

132. *See* McCrory v. Henderson, 82 F.3d 1243, 1251 (2d Cir. 1996) (noting that in the third step of *Batson*, the trial court will consider whether the challenging party has established purposeful discrimination).

133. *Compare* Holloway v. Horn, 355 F.3d 707, 722 (3d Cir. 2004) (reasoning that a proportionately high strike rate of black jurors was not the only factor the court considered to infer racial discrimination), *with* Brinson v. Vaughn, 398 F.3d 225, 235 (3d Cir. 2005) (determining that the pattern of strikes alone may establish an inference of racial discrimination).

indicates a growing resistance to statistical analysis. In 2004, the Third Circuit held a statistically high strike rate against black jurors was not necessary to establish a prima facie case of racial discrimination.[134] Later, in 2005, the court ruled that a strike rate alone could satisfy step one of *Batson* as "such a pattern is more than sufficient to require a trial court to proceed to step two of the Batson procedure."[135]

More recently, however, the Third Circuit has required statistical evidence of both the exclusion rate and the challenge rate, noting that, "'[f]or the statistical evidence to be relevant, data concerning the entire jury pool is necessary.'"[136] In an attempt to

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134. *See Holloway*, 355 F.3d at 722 (reversing and holding that a prima facie case had been established based on the pattern of strikes). "Holloway moved for a mistrial after the prosecutor had used seven of eight peremptory strikes against African-Americans; the Commonwealth ultimately used eleven of twelve strikes in that manner." *Id.*

> We note that Holloway did not establish the number of blacks in the venire during the course of the state court proceedings. The parties were able to ascertain the composition in this habeas proceeding, largely by relying on the prosecutor's voir dire notes once they were turned over to Holloway as part of the limited discovery conducted before the District Court. Eighty-seven potential jurors were questioned during the voir dire, forty-two of whom were struck for cause. Of the remaining forty-five potential jurors, the defense struck nine before the prosecutor had an opportunity to use a peremptory challenge. The parties agree that of the thirty-six venirepersons the prosecutor had an opportunity to strike, fourteen were black and twenty-two were white. The prosecutor, as noted, used eleven strikes against blacks. Thus, the prosecutor struck eleven of the fourteen blacks he had an opportunity to strike.
>
> Although this evidence further supports Holloway's prima facie showing, it is by no means necessary to establish a prima facie showing under *Batson* given the other evidence of record. Moreover, because Holloway failed to develop this information in state court, we do not consider it here.

Id. at 723 n.11.

135. *Brinson*, 398 F.3d at 235 (concluding that, although "[s]uch a pattern, of course, does not necessarily establish racial discrimination," it is sufficient to meet *Batson* step one).

> The pattern of strikes alleged by the defense is alone sufficient to establish a prima facie case under the circumstances present here. In *Batson*, as noted, the Supreme Court stated that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." The stark pattern here qualifies.

Id. (citations omitted) (quoting Batson v. Kentucky, 476 U.S. 79, 97 (1986)).

136. Abu-Jamal v. Horn, 520 F.3d 272, 291 (3d Cir. 2008) (quoting Medellin v. Dretke, 371 F.3d 270, 278–79 (5th Cir. 2004) ("The number of strikes used to excuse minority and male jury pool members is irrelevant on its own. Indeed, depending on the make-up of the jury pool, such numbers could indicate that the state discriminated against

explain its recent deviation, the Third Circuit has remarked, "the racial composition of the venire, if composed almost entirely of [a cognizable racial group], could 'provide an innocent explanation' that would weigh against finding a pattern of discrimination."[137] In its most recent *Batson* holding, the Third Circuit has redefined the requirements of statistical analysis by limiting relevant numerical data to those jurors of "the defendant's race."[138] This conservative posture contravenes the Supreme Court's holding in *Powers v. Ohio*, which rejected "that in equal protection analysis the race of the objecting defendant constitutes a relevant precondition for a *Batson* challenge" and recognized that "this limitation on a defendant's right to object conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause."[139] Thus, while the Supreme Court has yet to speak on the boundaries of using statistical analysis under *Batson*, the Third Circuit's current requirement, limiting such analysis to jurors of the defendant's race, appears unconstitutional.

Anglos and females."), *vacated on other grounds sub nom.* Beard v. Abu-Jamal, 130 S. Ct 676 (2010) (vacating and remanding in light of *Smith v. Spisak*, 130 S. Ct. 676 (2010), which dealt with the penalty phase and not *Batson* challenges). Thus, if the record is devoid of "evidence from which to determine the racial composition or total number of the entire venire," then statistical analysis is irrelevant as lacking important contextual markers to evaluate the strike rate. *Id.* at 291–92 (citing Deputy v. Taylor, 19 F.3d 1485, 1492 (3d Cir. 1994)).

137. *Id.* at 293 (quoting *Brinson*, 398 F.3d at 235).

138. *See* Lewis v. Horn, 581 F.3d 92, 103 & n.6 (3d Cir. 2009) ("The strike rate is computed by comparing the number of peremptory strikes the prosecutor used to remove ... potential jurors [of the defendant's race] with the prosecutor's total number of peremptory strikes exercised ...." (first and second alteration in original) (quoting *Abu-Jamal*, 520 F.3d at 290) (internal quotation marks omitted)).

139. Powers v. Ohio, 499 U.S. 400, 406, 410 (1991) (rejecting the argument "that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors").

> The State contends that our holding in the case now before us must be limited to the circumstances prevailing in *Batson* and that in equal protection analysis the race of the objecting defendant constitutes a relevant precondition for a *Batson* challenge. Because Powers is white, the State argues, he cannot object to the exclusion of black prospective jurors. This limitation on a defendant's right to object conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law.

Id. at 406.

Beyond statistical analysis, the Third Circuit has articulated additional factors it considers relevant to establishing a prima facie case of discrimination, yet has hesitated to adopt all of the factors enunciated in *Miller-El II*.[140] In determining whether a challenging party has established a prima facie case, the Third Circuit has enumerated specific factors it previously considered relevant, including "(1) the number of racial group members in the panel, (2) the nature of the crime, (3) the race of the defendant and the victim, (4) a pattern of strikes against racial group members, and (5) the prosecution's questions and statements during the voir dire."[141]

Finally, in reviewing *Batson* challenges under step three, the Third Circuit has applied and refined the *Miller-El II* rationale.[142] Notably, the majority of *Batson* step three credibility decisions in the Third Circuit have dealt with ascertaining the persuasiveness of a prosecutorial training video flouting the principles established in *Batson*.[143] As implicitly recognized by the court, this video was reminiscent of *Miller-El II*'s Sparling Manual, which provided historical evidence of a "specific policy of systematically excluding [a cognizable racial group] from juries."[144] In most cases,

140. *Lewis*, 581 F.3d at 103 (identifying factors to be used in determining an inference of discrimination, but refusing to specifically adopt the factors enunciated in *Miller-El II*). "[W]e have identified several additional relevant factors, including how many members of the cognizable racial group are in the venire panel; the nature of the crime; and the race of the defendant and the victim." *Id.* (quoting *Abu-Jamal*, 520 F.3d at 288 n.16) (internal quotations marks omitted).

141. *Id.* (quoting Simmons v. Beyer, 44 F.3d 1160, 1167 (3d Cir. 1995)) (internal quotation marks omitted).

> In *Batson*, the Supreme Court identified "a 'pattern' of strikes against black jurors included in the particular venire" and "the prosecutor's questions and statements during voir dire examination and in exercising his challenges" as two of the "relevant circumstances" courts may consider in deciding whether a defendant has established a prima facie case of racial discrimination, and we have identified several additional relevant factors, including "'how many members of the cognizable racial group are in the venire panel; the nature of the crime; and the race of the defendant and the victim.'"

Id. (citations omitted).

142. *See* Bond v. Beard, 539 F.3d 256, 269 (3d Cir. 2008) (applying the *Miller-El II* factors for discriminatory intent in a discussion of the third step of the *Batson* analysis).

143. *See Lewis*, 581 F.3d at 104 (stating that the "McMahon training tape" and similar "general information" are not inconsequential but will not substitute for specific information); *Bond*, 539 F.3d at 273 (addressing the district court's conclusions about the "McMahon video" in the context of *Batson* step three analysis).

144. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 263, 266 (2005) ("If anything

however, the Third Circuit has refused to conclude that this video, in and of itself, was proof of discriminatory intent, holding instead that "[t]his type of general information, while not inconsequential, will not do as a substitute for the concrete, case specific information."[145] In fact, the court has determined the training video was only persuasive when combined with other relevant factors,[146] which comports with the Supreme Court's emphasis on looking to the totality of relevant circumstances.[147]

2. Practical Application

To avoid waiver at the outset, the Third Circuit requires the

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more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection."); *see also Bond*, 539 F.3d at 270–75 (engaging in comparative juror analysis and determining the existence of a historical policy of discriminatory practices).

145. *Lewis*, 581 F.3d at 104 (finding no prima facie case based on video flouting *Batson* principles created four years after trial). Although dealing with step one of *Batson*, this case is instructive because, if such evidence cannot establish an inference of discriminatory intent, it certainly cannot serve as proof of discriminatory intent. *See* Batson v. Kentucky, 476 U.S. 79, 98 (1986) (holding that only after completing steps one and two will the trial court consider whether the defendant has established purposeful discrimination); *see also Bond*, 539 F.3d at 273–74 ("Given this testimony that . . . denies the existence of a culture of discrimination, the District Court did not clearly err in deciding that this 'additional evidence,' like the McMahon videotape, does not support a conclusion that the District Attorney's Office had a culture of discrimination."). Specifically, the court quoted prosecutorial staff member statements that:

> (1) the videotape represents McMahon's personal views, not those of the office; (2) the office policy was to follow the requirements of *Batson*; (3) only ten to fifteen assistant district attorneys actually attended the lecture seen in the videotape; and (4) while the videotape was available to new prosecutors, it was not part of a regular training program.

Bond, 539 F.3d at 273.

146. *See* Wilson v. Beard, 426 F.3d 653, 669–70 (3d Cir. 2005) (concluding there was discriminatory intent under step three of *Batson* where the prosecutor of the case was the Assistant District Attorney featured in the video and asserted race-neutral reasons were deemed pretextual under comparative analysis).

> In reaching this conclusion, the [District] Court found that, given the breadth of the categories of black jurors whom McMahon recommends striking in the videotape, it would be difficult to accept that all of the black jurors struck by McMahon were struck for reasons that were race-neutral. In particular, the District Court noted that McMahon struck at least six black women, consistent with statements he made in the tape that "young" and "older" black women did not make prosecution-friendly jurors.

Id. at 669.

147. *See Miller-El II*, 545 U.S. at 263 (looking to other factors in addition to historical policies promoting the use of race to exclude cognizable racial groups from juries).

challenging party to assert a "timely or contemporaneous objection," or an objection prior to the swearing of the venire panel.[148] Upon a timely *Batson* objection, the Third Circuit allows the usage of statistical analysis in determining an inference of discrimination so long as: (1) the challenge rate and the exclusion rate are both evaluated, and (2) such rates are calculated (albeit seemingly unconstitutionally so) according to the race of the defendant.[149] When using non-numerical data to establish a prima facie case, a challenging party should focus on the factors specifically enumerated by the Third Circuit as the court has yet to explicitly recognize all of the factors enunciated in *Miller-El II*.[150]

After a challenging party makes a prima facie showing of discrimination, in the Third Circuit, the striking party must assert a race-neutral explanation for the peremptory strike.[151] But if the striking party asserts its race-neutral reasons prior to the establishment of a prima facie showing, step one is considered moot.[152] Upon this assertion, the challenging party may rebut the explanation.[153] Although failure to present rebuttal evidence does not result in waiver, it is useful in overcoming the challenging party's burden of persuasion.[154] Finally, the trial court will evaluate the evidence provided by both parties and determine the

148. Abu-Jamal v. Horn, 520 F.3d 272, 280–82 (3d Cir. 2008) ("A timely objection gives the trial judge an opportunity to promptly consider alleged misconduct during jury selection . . . ."), *vacated on other grounds sub nom.* Beard v. Abu-Jamal, 130 S. Ct 676 (2010) (vacating and remanding in light of *Smith v. Spisak*, 130 S. Ct. 676 (2010), which dealt with the penalty phase and not *Batson* challenges).

149. *See Lewis*, 581 F.3d at 103 (emphasizing the importance of information on the strike rate, the exclusion rate, and the racial composition of the venire in making prima facie *Batson* cases).

150. *See id.* ("[W]e have identified several additional relevant factors, including how many members of the cognizable racial group are in the venire panel; the nature of the crime; and the race of the defendant and the victim." (quoting *Abu-Jamal*, 520 F.3d at 288 n.16) (internal quotations marks omitted)).

151. *Id.*

152. *See* Hardcastle v. Horn, 368 F.3d 246, 256 (3d Cir. 2004) ("[O]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." (quoting Hernandez v. New York, 500 U.S. 352, 359 (1991)) (internal quotation marks omitted)).

153. *See* Bond v. Beard, 539 F.3d 256, 270–72 (3d Cir. 2008) (examining both the prosecutor's reason and the challenger's rebuttal arguments for each struck juror individually).

154. *See Hardcastle*, 368 F.3d at 258 (sustaining a *Batson* challenge when the striking party failed to meet even the minimal burden of production required by step two).

credibility of the striking party's race-neutral reason.[155]

D. *Fourth Circuit*

In the past five years, the Fourth Circuit has primarily focused on the proof necessary to establish a *Batson* violation.[156] This focus is likely attributable to the Supreme Court's negative response to the Fourth Circuit's decisions in *Barnette v. United States*[157] and *Kandies v. Polk*.[158] In vacating and remanding these decisions, the Supreme Court held that the Fourth Circuit failed to evaluate the evidence in light of *Miller-El II*.[159] Although no specific reasons were articulated, the Supreme Court likely took issue with the Fourth Circuit's conclusion that "*Batson* is not violated whenever two veniremen of different races provide the same responses and one is excluded and the other is not,"[160] as such a conclusion conflicts with the Court's reliance on juror comparative analysis as a tool for determining purposeful discrimination.[161]

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155. *See id.* at 259 ("Step three requires a court conducting a *Batson* inquiry to 'address[] and evaluate[] all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason and determine[] whether the defendant has met his burden of persuasion.'" (alterations in original) (quoting Riley v. Taylor, 277 F.3d 261, 286 (3d Cir. 2001) (en banc))).

156. Unlike the circuits previously discussed, the Fourth Circuit has not focused on the first step of *Batson*; instead, it has focused all of its efforts reviewing evidentiary sufficiency under step three. *See* Golphin v. Branker, 519 F.3d 168, 187 (4th Cir. 2008) (proceeding directly to the sufficiency of the *Batson* claim under step three without mentioning steps one or two).

157. Barnette v. United States, 546 U.S. 803 (2005) (vacating and remanding the Fourth Circuit's decision).

158. Kandies v. Polk, 545 U.S. 1137 (2005) (vacating and remanding the Fourth Circuit's decision).

159. *See Barnette*, 546 U.S. at 803 ("Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of [*Miller-El II*]."); *Kandies*, 545 U.S. at 1137 ("Judgment vacated, and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of [*Miller-El II*]").

160. United States v. Barnette, 390 F.3d 775, 796 (4th Cir. 2004) (quoting Matthews v. Evatt, 105 F.3d 907, 918 (4th Cir. 1997)) (internal quotation marks omitted), *vacated*, 546 U.S. 803 (2005).

161. *See* Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 241 (2005) (noting that "[m]ore powerful than the bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists 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

1. Analysis of Recent *Batson* Holdings

Following these decisions, the Fourth Circuit has applied comparative juror analysis in reviewing *Batson* challenges[162] but has refused to overrule a trial court noting the "great deference" given to the trial court's findings.[163] Interestingly, the court has shied away from reviewing challenges to prima facie cases of racial discrimination, reasoning that an "appellate court may assume that a prima facie showing was made" where "race neutral reasons were offered at trial."[164] Instead, the court has limited its review of *Batson* decisions to challenges involving factual insufficiency under step three and, consequently, has developed additional criteria for proving racial discrimination.[165]

The Fourth Circuit has recently required that "if parts one and two of the test are satisfied, . . . the party opposing the peremptory challenge [must] establish that the reason offered was a pretext for racial discrimination."[166] Thus, between steps two and three, the

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purposeful discrimination to be considered at *Batson*'s third step." *Id.*

162. *See* Golphin v. Branker, 519 F.3d 168, 179–88 (4th Cir. 2008) (detailing the *Miller-El II* holding and applying it to facts of the case).

> Unlike *Miller-El II*, a side-by-side juror comparison does not tend to show pretext in this case. Holder and her sister were in the same age range as Tilmon and Kevin, who were 19 years old and 17 years old, respectively; no other juror was similarly situated. Grice was ten years older than his brother, and Phillips was eight years younger than her sister. More importantly, neither juror's siblings were in the same age range as Tilmon and Kevin.

Id. at 186; *see also* United States v. Norris, 140 F. App'x 443, 444–45 (4th Cir. 2005) (per curiam) (concluding there was no clear error in the denial of a *Batson* challenge). "The Government's proffered explanation was that it struck the juror in question based on its belief that he might be biased as a result of his brother's pending criminal charge. No empaneled juror had a pending criminal charge or family member with a pending criminal charge." *Norris*, 140 F. App'x at 444.

163. *See Golphin*, 519 F.3d at 183–84, 187 (noting that statistical evidence alone is insufficient for a finding of purposeful discrimination). "Although Tilmon's statistical evidence is certainly probative under *Miller-El II*, it alone cannot carry the day." *Id.* at 187 (citations omitted).

164. United States v. McKoy, 129 F. App'x 815, 821 (4th Cir. 2008) (citing Hernandez v. New York, 500 U.S. 352, 358–59 (1991)).

165. *See, e.g.*, *id.* at 821–22 (reasoning that the United States had offered race-neutral reasons for its peremptory challenges).

166. *Id.* at 820 (citing Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995)) (noting that, after steps one and two, "the burden then reverts to the party opposing the peremptory challenge"); *accord* United States v. Farrior, 535 F.3d 210, 221 (4th Cir. 2008) (holding there was no clear error in the trial court's denial of a *Batson* challenge).

> Because the Government provided race-neutral explanations for the challenged

Fourth Circuit has essentially inserted a sub-step requiring the challenging party to demonstrate its basis for raising the *Batson* challenge. The court has treated this sub-step as mandatory, concluding that "[t]he failure to argue pretext after the challenged strike has been explained constitutes a waiver of the initial *Batson* objection."[167] Notably, the Supreme Court has never held such a requirement to exist, stating that "the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it."[168] As a result, the Fourth Circuit's sub-step inherently limits the ability of the challenging party to pursue a *Batson* claim by precluding its availability should the challenging party fail to rebut the proffered race-neutral reason.

2. Practical Application

Pursuant to *Batson*'s first step, a prima facie case of discrimination is achieved through a mere inference of discrimination.[169] Although recent Fourth Circuit *Batson* holdings do not define the parameters of step one, a challenging party should not rely solely on statistical analysis in establishing a prima facie case unless such statistical data clearly establishes discrimination.[170]

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strike, the burden shifted to Farrior to prove that the explanations given were pretext for discrimination, which Farrior has simply failed to do. Accordingly, the district court did not clearly err in rejecting Farrior's *Batson* challenge.

Farrior, 535 F.3d at 221 (citation omitted).

167. United States v. Whitfield, 314 F. App'x 554, 556 (4th Cir. 2008) (citing Davis v. Balt. Gas & Elec. Co., 160 F.3d 1023, 1027 (4th Cir. 1998)) (holding that the party raising the *Batson* challenge had waived its objection because it failed to argue pretextual discrimination after the non-movant proffered a race-neutral reason).

168. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 251–52 (2005) (citing Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322, 339 (2003)). "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Id.* at 252. *Contra* United States v. Goodson, 319 F. App'x 222, 224 (4th Cir. 2009) (holding that, because the movant failed to identify "similarly situated venire members who were not peremptorily challenged," the trial court did not err in denying the *Batson* challenge), *cert. denied*, 130 S. Ct. 296 (2009).

169. *See* Batson v. Kentucky, 476 U.S. 79, 96 (1986) ("[T]he defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.").

170. *See* Allen v. Lee, 366 F.3d 319, 330 (4th Cir. 2004) ("Though statistics are not utterly bereft of analytical value, they are, at best, manipulable and untrustworthy absent a holistic view of the circumstances to which they apply."). *But see* Howard v. Moore, 131

Rather, a challenging party should raise an inference of discrimination through the *Miller-El II* factors because, if established, such factors should presumptively establish an inference of discrimination.[171] If a striking party provides an explanation for its peremptory strikes under step two of *Batson*, then a prima facie showing under step one is rendered moot.[172]

In the Fourth Circuit, after a race-neutral reason has been proffered, the challenging party must rebut the explanation.[173] A failure to rebut will result in waiver of the *Batson* claim.[174] Without such rebuttal, a trial court will automatically find the challenging party has failed to meet its burden of persuasion.[175] If the challenging party rebuts the striking party's explanation, however, the trial court will balance the explanations provided by both parties and determine the credibility of the striking party's reason.[176]

E. *Fifth Circuit*

The Fifth Circuit has a notable history of supplying decisions the Supreme Court has deemed reversible under *Batson*.[177] Indeed, the *Miller-El* decisions originated from the Fifth Circuit.[178]

F.3d 399, 407 (4th Cir. 1997) (holding that a "prosecutor's striking of six out of the seven black prospective jurors constituted a prima facie case of discrimination").

171. *See* Golphin v. Branker, 519 F.3d 168, 185 (2008) (citing *Miller-El II*, 545 U.S. at 265) (stating that, cumulatively, the *Miller-El II* factors establish discrimination).

172. United States v. McKoy, 129 F. App'x 815, 820 (4th Cir. 2005).

173. *See* United States v. Farrior, 535 F.3d 210, 221 (4th Cir. 2008) ("Because the Government provided race-neutral explanations for the challenged strike, the burden shifted to Farrior to prove that the explanations given were pretext for discrimination . . . .").

174. United States v. Whitfield 314 F. App'x 554, 556 (4th Cir. 2008).

175. *See Farrior*, 535 F.3d at 221 (holding that, without adequate rebuttal of race-neutral explanations, a party's *Batson* claim may be rejected without error).

176. *See Golphin*, 519 F.3d at 187 (weighing statistical evidence used to rebut a race-neutral explanation).

177. *See* Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231 (2005) (overturning the Fifth Circuit's affirmation of the district court's judgment); Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322 (2003) (concluding that the Fifth Circuit erred in not granting a certificate of appealability upon a denial of habeas corpus by the district court); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (reversing the judgment of the Fifth Circuit, concluding the Fifth Circuit erred in holding that, because the peremptory challenge was exercised by a private litigant, rather than the result of state action, no constitutional guarantee was implicated).

178. Miller-El v. Dretke, 361 F.3d 849 (5th Cir. 2004), *rev'd*, Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231 (2005); Miller-El v. Johnson, 261 F.3d 445 (5th Cir. 2001), *rev'd sub nom.* Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322 (2003).

Perhaps as a result, the Fifth Circuit has struggled with certain concepts outlined in *Miller-El II*, and yet it has clearly grasped other concepts established in *Johnson*, *Snyder*, and *Rice*.

1. Analysis of Recent *Batson* Holdings

In terms of *Batson*'s first step, the Fifth Circuit recently held that a prima facie case was established "when the prosecution's use of peremptory challenges to strike six African-American veniremen result[ed] in an all-white jury."[179] Citing *Johnson*, the court observed that "the Supreme Court's use of the word *permissive* [was intended] to describe the method by which prima facie cases may be proved to mean *not restrictive*."[180] "In other words, *Batson* intended for a prima facie case to be simple and without frills."[181] Also concerning step one of *Batson*, the Fifth Circuit has expressly held that a *Batson* challenge need not be raised by a member of a cognizable racial group.[182]

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179. Price v. Cain, 560 F.3d 284, 286–87 (5th Cir. 2009) (noting that a "more likely than not" standard is too high of a burden under step one of *Batson*).

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination.

Id. at 287 (quoting Johnson v. California, 545 U.S. 162, 170 (2005)).

180. *Id.* ("The Supreme Court recently stressed in *Johnson v. California*, that *Batson* 'spoke of methods by which prima facie cases could be proved *in permissive terms*.'" (citations omitted) (quoting *Johnson*, 545 U.S. at 169 n.5)).

181. *Id.*

> To make a prima facie case, Price needed to show only that the facts and circumstances of his case gave rise to an inference that the State exercised peremptory challenges on the basis of race. This was a light burden, and Price carried it. Price, an African-American man, was tried for the rape of a Chinese-American woman. The State used six of its twelve peremptory challenges to strike African-Americans from the venire, and the resulting jury was all-white. Under *Batson*'s "permissive terms," these facts and circumstances were "sufficient to permit the trial judge to draw an inference that discrimination has occurred."

Id. (citations omitted) (quoting *Johnson*, 545 U.S. at 170).

182. Moody v. Quarterman, 476 F.3d 260, 267 (5th Cir. 2007) (upholding the denial of a *Batson* challenge because the challenging party failed to rebut race-neutral reasons). "[I]t is patently clear that the state trial court's ruling was contrary to clearly established Supreme Court law . . . that defendants have standing to raise a prospective juror's equal protection claim by way of a *Batson* challenge, even if the prospective juror is of a different race." *Id.* (citations omitted). *Contra Price*, 560 F.3d at 286 (misstating *Batson*'s first step as requiring "a defendant . . . [to] show that he is a member of a cognizable racial group" whereby the peremptory challenge resulted in the removal of members of that

With respect to step three of *Batson*, the majority of post-2004 Fifth Circuit decisions have centered on purposeful discrimination determinations. Focusing primarily on juror comparative analysis, the Fifth Circuit has sought to restrict its availability by limiting its use to reviewing courts. While the Supreme Court sua sponte considered juror comparative analysis in *Miller-El II*,[183] the Fifth Circuit has distinguished its decisions from *Miller-El II*, holding that "[c]apital cases employ different standards than noncapital cases at times."[184] With respect to capital cases, the court has held that it must engage in comparative juror analysis to determine the existence of purposeful discrimination.[185] Accordingly, while the Fifth Circuit has expressly held that the failure to rebut proffered

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same group); United States v. Jynes, 197 F. App'x. 351, 353 (5th Cir. 2006) (requiring that "a claimant must show that he belongs to a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove co-members of his race from the venire members").

183. *See Miller-El II*, 545 U.S. at 240–41 (noting a clear "disparity" in the number of African-American members of the panel that were ultimately struck).

184. *See* Fields v. Thaler, 588 F.3d 270, 276 (5th Cir. 2009) (alteration in original) (quoting Woodward v. Epps, 580 F.3d 318, 338 (5th Cir. 2009)) (internal quotation marks omitted) (noting that comparative juror analysis is conducted in capital cases); *see also* Woodward, 580 F.3d at 338 (declining to find waiver applicable to capital cases and thereby engaging in comparative juror analysis). Notwithstanding its attempts to draw a bright line for the use of comparative juror analysis, the Fifth Circuit has on occasion refused to conduct such an analysis even in capital murder cases. *See* Haynes v. Quarterman, 526 F.3d 189, 200 (5th Cir. 2008) (rejecting a *Batson* claim with respect to one juror because of the challenging party's failure to rebut the prosecution's race-neutral reasons); *see also Fields*, 588 F.3d at 276 n.3 (noting the inconsistency in its rule regarding comparative juror analysis in capital cases and its prior decision in *Haynes*).

> This court's opinion in *Haynes v. Quarterman*, a capital case, cited *Arce* in support of its rejection of the petitioner's *Batson* claim with respect to one prospective juror, stating that "since the defendant similarly acquiesced [by failing to dispute the prosecution's explanation] in the present case, the district court could properly accept the state trial court's acceptance of the prosecutor's explanation as race-neutral." To the extent that there is any inconsistency between *Haynes*, *Reed*, and *Woodward*, such inconsistency does not affect the outcome of Fields's noncapital case.

Fields, 588 F.3d at 276 n.3 (alteration in original) (citations omitted) (quoting *Haynes*, 526 F.3d at 200).

185. Fields, 588 F.3d at 276.

> In [a prior decision], this court concluded that *Miller-El II* requires a comparative juror analysis even if it was not presented in state court. In *Woodward v. Epps*, however, the court observed that "[c]apital cases employ different standards than noncapital cases at times," and noted that our court has held that a defendant may waive a *Batson* claim based upon comparative juror analysis if, during voir dire, he failed to rebut the State's race-neutral reasons for striking black jurors.

Id. (alteration in original) (citations omitted) (quoting *Woodward*, 580 F.3d at 338).

race-neutral explanations results in waiver,[186] subsequent decisions of the court have limited the application of this requirement to non-capital and civil cases.[187] With respect to non-capital cases, however, the Fifth Circuit has analyzed factors not previously considered by lower courts, including comparative juror analysis.[188]

Additionally, in evaluating trial court credibility determinations, the Fifth Circuit has sharply modified its approach, withdrawing from a perfunctory review to a more thoughtful, analytical approach. Prior to *Miller-El II*, the Fifth Circuit gave almost complete deference to step three credibility determinations, thereby rarely finding a clearly erroneous trial court ruling.[189]

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186. *See* United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) ("By failing to dispute the prosecutor's short-term employment explanation in the district court, defendants have waived their right to object to it on appeal."). *But see Fields*, 588 F.3d at 280 (holding that a failure to rebut does not result in waiver but serves as evidence of a challenging party's "acquiescence").

187. *See Woodward*, 580 F.3d at 338 ("Capital cases employ different standards than noncapital cases at times, and our more recent decision . . . suggests that waiver does not apply in capital cases." (citation omitted)).

> We need not resolve that question, however, because even if we assume that the Texas court did not perform a comparative analysis or that it did and that its analysis was inadequate under *Miller-El II* or *Batson*, its decision that Fields had not shown disparate treatment with respect to the strikes of Green and McAlpin is not unreasonable.

Fields, 588 F.3d at 276–77; *see also* United States v. Brown, 553 F.3d 758, 796 (5th Cir. 2008) (noting that the challenging party had rebutted the striking party's proffered reasons and "both the prosecution and the court failed to take the comparative features of two venire members into account"); *Williamson*, 533 F.3d at 275–76 ("Viewing the Government's proffered explanation for striking Wilson in light of his answers to the court's and the Government's questions, as well as the Government's treatment of the non-black venire members, the explanation does not persuade." (footnote omitted)).

188. *E.g.*, United States v. Williamson, 533 F.3d 269, 274–75 (5th Cir. 2008) (recognizing that "appellate review of alleged *Batson* errors is not a hollow act" and reversing the trial court's denial of a *Batson* claim after conducting a comparative juror analysis because the striking party's "explanation falter[ed] upon closer examination").

189. *See* United States v. Davenport, No. 93-1216, 1994 WL 523653, at *7 (5th Cir. Sept. 6, 1994) (deferring to the trial court's credibility determination because such a determination is a "pure issue of fact"); Polk v. Dixie Ins. Co., 972 F.2d 83, 86 (5th Cir. 1992) (concluding that the trial court's credibility determination was not clearly erroneous because of deference given to the trial court in its position as fact finder); United States v. Hinojosa, 958 F.2d 624, 632 (5th Cir. 1992) ("The trial judge's decision rests upon a credibility determination, and, thus, we interfere with that decision only if it is clearly erroneous or an abuse of discretion."); United States v. Guerra-Marez, 928 F.2d 665, 673 (5th Cir. 1991) (affording "great deference" to the credibility determination of the trial court); United States v. Valley, 928 F.2d 130, 136 (5th Cir. 1991) (deferring to the trial

Focusing on the factual nature of credibility assessments, the Fifth Circuit previously gave deference to a trial court's *Batson* ruling even where proffered reasons were suspicious or where the trial court failed to thoroughly state its determinations on the record.[190] Within the last five years, however, the Fifth Circuit has shied away from granting blanket deference to trial court credibility determinations and, instead, has engaged in thoughtful analyses of all relevant facts to determine whether trial court *Batson* rulings were clearly erroneous.[191]

Similarly, in analyzing proffered demeanor-based, race-neutral reasons under step three of *Batson*, the Fifth Circuit previously stated "[t]he Supreme Court demands that the trial court especially scrutinize explanations based purely on demeanor."[192] Specifically, the court required that a trial court conduct a "'factual inquiry' or a 'sensitive' inquiry into the demeanor-based reasons" because "'[t]he trial judge is present during *voir dire* and is best able to observe the demeanor and tenor of voice of the venireperson.'"[193] Where a trial court simply analyzes demeanor

court's credibility determinations where the trial court "alluded to additional race-neutral factors" that supported the challenged strike). Pursuant to *Miller-El II*, a trial court may not independently offer its own reasons for a challenged strike and may only rely on the explanations proffered by the striking party. Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 252 (2005).

190. *See Davenport*, 1994 WL 523653, at *7 (deferring to the trial court "despite the presence of highly suspicious factors in the [striking party's] explanation for challenging"); *Guerra-Marez*, 928 F.2d at 673 n.9 ("The district judge considered their arguments, and apparently found that the appellees had failed to carry their burden in impeaching the prosecutor's explanations. Affording that determination 'great deference,' we uphold the district court's ruling." (citations omitted)).

191. Reed v. Quarterman, 555 F.3d 364, 375–82 (5th Cir. 2009) (applying the *Miller-El II* factors to determine the existence of purposeful discrimination where the trial court previously denied a *Batson* challenge); *Brown*, 553 F.3d at 796–97 (engaging in a comparative juror analysis even though the trial court previously denied the *Batson* challenge).

192. Haynes v. Quarterman, 561 F.3d 535, 539 (5th Cir. 2009) (determining habeas corpus relief was warranted due to evidence of a *Batson* violation), *abrogated by* Thaler v. Haynes, 130 S. Ct. 1171 (2010) (per curiam). "[W]e accord the trial court the primary role in adjudicating demeanor-based *Batson* challenges because the trial court is in a better position to evaluate those challenges and is not relying, as the appellate court does, solely on the paper record." *Id.*

193. *Id.* at 540 (quoting Smith v. State, 814 S.W.2d 858, 861–62 (Tex. App.—Amarillo 1991)).

Batson requires the trial judge to embrace a participatory role in *voir dire*, noting the subtle nuance of both verbal and nonverbal communication from each member of the

"from the cold paper record," the trial court is in no better position than that of the reviewing court and is "owe[d] . . . no deference" by the reviewing court.[194] However, the Supreme Court recently clarified the issue of whether "a judge, in ruling on an objection to a peremptory challenge under *Batson* . . . , must reject a demeanor-based explanation for the challenge unless the judge personally observed and recalls the aspect of the prospective juror's demeanor on which the explanation is based."[195] Thus, although a trial judge's observations of voir dire are an important factor in making a ruling on a striking party's race-neutral explanation that is based on a juror's demeanor, this does not mean that a "demeanor-based explanation for a peremptory challenge *must* be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor."[196] The court's modifications to its step three standard of evaluation in the past five years have consequently shifted from cursory analysis to one of greater attentiveness to all factual circumstances.

2. Practical Application

In establishing an inference of discrimination pursuant to *Batson*'s first step, a challenging party in the Fifth Circuit should only use statistical analysis where such an analysis evidences extreme racial disparity—e.g., when all or most members of a cognizable racial group are removed from the jury panel. A prima facie case can otherwise be established permissively through any fact or circumstance that denotes improper pretext.[197] If a

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> venire . . . . The trial judge is present during *voir dire* and is best able to observe the demeanor and tenor of voice of the venireperson . . . . Accordingly, although a prosecutor gives a race-neutral explanation, the trial judge, based upon all the evidence and his observations and experience, may determine whether or not the explanation is artificial or pretextual.

Id. (alterations in original) (quoting *Smith*, 814 S.W.2d at 861–62).

194. *Id.* ("Because the trial judge did not witness the actual voir dire at issue, his position as fact-finder with regard to the demeanor of the veniremembers at issue *is no better than that of this Court.*" (citations and internal quotation marks omitted)).

195. *Thaler*, 130 S. Ct. at 1172.

196. *Id.* at 1174 (emphasis added).

197. *See* Price v. Cain, 560 F.3d 284, 287 (5th Cir. 2009) (declaring that a party making a *Batson* challenge carries a "light burden" in regard to meeting step one and all that is needed is a showing "that the facts and circumstances of [the] case [give] rise to an inference that the state exercised peremptory challenges on the basis of race").

challenging party is precluded, for whatever reason, from making a prima facie showing before the striking party proffers its explanation under step two, the "question of [the challenging party's] prima facie case is rendered moot and [the court's] review is limited to the second and third steps of the *Batson* analysis."[198]

At step two, the striking party's race-neutral reason need only be neutral on its face. Upon such an assertion, the Fifth Circuit has required the challenging party to rebut the explanation in non-capital and civil cases to preserve challenging the assertion on appeal.[199] Therefore, such rebuttal is recommended to preserve review upon appeal of the striking party's reason in non-capital and civil cases and also to help meet the challenging party's burden of persuasion.

Finally, in analyzing the credibility of the race-neutral reason, the Fifth Circuit has begun to engage in an increasingly thoughtful analysis of all the relevant facts in accordance with *Miller-El II*.[200] In assessing demeanor-based reasons, the trial court should conduct a sensitive factual inquiry.[201]

F. *Sixth Circuit*

The Sixth Circuit has encountered a broad array of factual scenarios involving *Batson* challenges. As a result, the court has analyzed the various steps of *Batson* and drawn legal lines further delineating each step. In doing so, the Sixth Circuit has also recognized the Supreme Court's recent holdings regarding *Batson* but has limited their application and, therefore, their utility.

1. Analysis of Recent *Batson* Holdings

Aligning with a number of its sister circuits, the Sixth Circuit has

198. United States v. Williamson, 533 F.3d 269, 274 (5th Cir. 2008) (quoting United States v. Williams, 264 F.3d 561, 571 (5th Cir. 2001)) (internal quotation marks omitted) (recognizing that a court need not determine whether step one has been met when the striking party proffers an explanation for its challenged strikes).

199. Wright v. Harris Cnty., 536 F.3d 436, 438 (5th Cir. 2008); United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993). In capital cases, the Fifth Circuit has recently suggested that this rebuttal requirement does not apply. Woodward v. Epps, 580 F.3d 318, 338 (5th Cir. 2009).

200. Reed v. Quarterman, 555 F.3d 364, 375–82 (5th Cir. 2009); United States v. Brown, 553 F.3d 758, 796–97 (5th Cir. 2008).

201. Haynes v. Quarterman, 561 F.3d 535, 541 (5th Cir. 2009), *abrogated by* Thaler v. Haynes, 130 S. Ct. 1171 (2010) (per curiam).

focused on the value of statistical analysis in evaluating the first step of *Batson*. Although never recognizing an inference of discrimination solely from statistics,[202] the court has articulated that an inference based on statistics requires at least "information concerning the ultimate composition of the jury or the number or percentage of black jurors."[203] The Sixth Circuit has also noted that an inference raised by statistics is more likely to occur "after the jury selection process has ended, [and] the final jury sworn has a percentage of minority members that is significantly less than the percentage in the group originally drawn for the jury (or in the whole jury pool or in the district)."[204] In order to utilize statistics, therefore, the Sixth Circuit essentially implies that a *Batson* challenge should be raised at the conclusion of voir dire.

The Sixth Circuit has imposed certain hurdles to raising an inference of discrimination, such as instructing trial courts that when "there are minority members on the jury but the prosecutor did not use all its peremptory challenges, [the existence of minority jurors and unused strikes] would be a factor tending to refute discrimination" under *Batson* step one.[205] The Sixth Circuit has

202. *See* United States v. Ervin, 266 F. App'x 428, 432 (6th Cir. 2008) ("The district court found that while one African-American male was struck, two African-Americans were not struck and served on the jury. These facts do not provide a basis upon which to infer discriminatory motive."); United States v. Johnson, 182 F. App'x 423, 427–28 (6th Cir. 2006) (holding that the "prosecutor's strike of two potential black jurors is not enough to raise an inference of discrimination without something more, such as information concerning the ultimate composition of the jury or the number or percentage of black jurors").

203. *Johnson*, 182 F. App'x at 427–28 (holding that only "where the prosecution used all or nearly all of its peremptory challenges to exclude members of an identifiable minority racial group" is an inference of discrimination established through statistics alone); *see also Ervin*, 266 F. App'x at 432 ("The racial and gender composition of the initial group seated and the final jury panel sworn is also relevant.").

204. *Johnson*, 182 F. App'x at 428 (quoting United States v. Sangineto-Miranda, 859 F.2d 1501, 1521–22 (6th Cir. 1988)) (internal quotation marks omitted) (rejecting the "premise that an inference of intentional discrimination will *always* arise if . . . there is a showing that the prosecution used all its peremptory challenges to exclude blacks"). The court rejected such a per se rule because its inflexibility did not account for other relevant considerations, such as "the percentage of the racial group in the district jury pool or original jury; the pattern of strikes exercised by the defense; the number of strikes available to the government; and the composition of the ultimate jury sworn." *Id.* (quoting *Sangineto-Miranda*, 859 F.2d at 1521) (internal quotation marks omitted); *see also Ervin*, 266 F. App'x at 432 ("An inference of discrimination may be raised if there was a pattern of strikes against jurors of either a particular race or gender.").

205. *Johnson*, 182 F. App'x at 428 (quoting *Sangineto-Miranda*, 859 F.2d at 1522) (internal quotation marks omitted). The court also admittedly provided an extreme

further limited the availability of a prima facie case of discrimination through its pronouncement that "the defendant must first show that he is a member of a cognizable racial group."[206] As established in *Powers*, this requirement appears erroneous as it "contravene[s] the substantive guarantees of the Equal Protection Clause" and deprives the excluded jurors "of a significant opportunity to participate in civil life."[207] "[A]lthough an individual juror does not have the right to sit on any particular petit jury, he or she does possess the right not to be excluded from one on account of race."[208]

For *Batson*'s third step, the Sixth Circuit has repeatedly emphasized the challenging party's ultimate burden of persuasion in establishing purposeful discrimination.[209] The court has noted that, "when the explanations are stacked up against the strike opponent's prima facie case," the trial court "can and should *eventually* reject explanations that are 'implausible,' 'fantastic,' 'silly,' 'superstitious,' or otherwise reflect pretext."[210] Conse-

example of statistical analysis that would not lend itself to an inference of discrimination where, when "the defense strikes all six whites from an original jury panel of six blacks and six whites, there is a lesser inference of discrimination from the fact that the prosecution's subsequent strikes fall solely on the six remaining blacks." *Id.* (quoting *Sangineto-Miranda*, 859 F.2d at 1522) (internal quotation marks omitted).

206. *Ervin*, 266 F. App'x at 432 (stating the first requirement of a prima facie case of discrimination is that the defendant shows that he is a member of a cognizable racial group); *see also* United States v. Watford, 468 F.3d 891, 911–12 (6th Cir. 2006) ("[T]he opponent of a peremptory strike makes out a prima facie case of purposeful discrimination by proving (1) that he or she is a member of a cognizable racial group . . . .").

207. Powers v. Ohio, 499 U.S. 400, 400, 406–07 (1991) (explaining how the discriminatory use of peremptory challenges not only harms the defendant by implicating constitutional guarantees, but also "harms the excluded jurors and the community at large" by depriving citizens the opportunity to participate in the administration of justice "on account of his or her race").

208. *Id.*

209. *See* United States v. Kimbrel, 532 F.3d 461, 466 (6th Cir. 2008) (noting that "the ultimate burden of *persuasion* regarding racial motivation rests with, and never shifts from, the opponent of the strike" (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam)) (internal quotation marks omitted)); United States v. Beverly, 369 F.3d 516, 527 (6th Cir. 2004) (reasoning that the challenging party failed to persuade the trial court with only proof of disparate impact); United States v. Lucas, 357 F.3d 599, 609 (6th Cir. 2004) (concluding that the challenging party failed to bear the burden of persuasion in proving purposeful discrimination).

210. *Kimbrel*, 532 F.3d at 467–68 (holding that, at step two of *Batson*, the striking party need not produce "a reason that makes sense, but [only] a reason that does not deny equal protection" (quoting *Purkett*, 514 U.S. at 768) (alteration in original) (internal quotation marks omitted)).

quently, at step three, the trial court incurs the responsibility to "'weigh the asserted [race-neutral] justification against the strength of the [strike opponent's] prima facie case under the totality of the circumstances.'"[211] Despite recognizing that *Batson*'s third step requires the court to balance the challenging party's prima facie case against the race-neutral reasons proffered by the striking party, the Sixth Circuit has held that a failure to rebut the race-neutral reasons is sufficient grounds to affirm the denial of a *Batson* claim.[212]

Likewise, the Sixth Circuit has limited its review to the evidence considered by the trial court, remarking that a "[challenging party] might have demonstrated that the articulated reasons were in fact a pretext by showing, for example, that the [striking party] had not challenged . . . jurors of other races."[213] The court has not, therefore, conducted sua sponte comparative juror analysis.[214] Though the Sixth Circuit has not followed the mandate in *Snyder* to consider "all of the circumstances that bear upon the issue of racial animosity,"[215] the court has noted that comparative juror analysis does not search "for similarly situated people who were treated the same."[216] Instead, the Sixth Circuit has properly recognized

211. *Id.* at 466 (quoting Paschal v. Flagstar Bank, 295 F.3d 565, 574 (6th Cir. 2002)) (holding that the striking party never has the burden of persuasion and trial courts cannot combine steps one and two of *Batson*). "The court thus not only conflated steps two and three of the *Batson* analysis—assessing the persuasiveness of Kimbrel's proffered explanation without first acknowledging that he had come forward with a race-neutral justification—but it also explicitly indicated that Kimbrel, the proponent of the strike, bore the burden of persuasion." *Id.*

212. *See* Braxton v. Gansheimer, 561 F.3d 453, 464 (6th Cir. 2009) (concluding there was no *Batson* violation where the defendants failed to rebut the prosecution's race-neutral reasons); United States v. Forrest, 402 F.3d 678, 687 (6th Cir. 2005) ("After the defending party offers its race-neutral justification, the challenging party must demonstrate that the purported explanation is merely a pretext for a racial motivation."); United States v. Hestle, 107 F. App'x 500, 502–03 (6th Cir. 2004) (implying that the challenging party's failure to rebut race-neutral justifications precluded a determination of pretext).

213. *Braxton*, 561 F.3d at 464 (quoting United States v. Tucker, 90 F.3d 1135, 1142 (6th Cir. 1996)) (internal quotation marks omitted).

214. *See id.* (holding that there was no discriminatory intent where the challenging party failed to provide any argument as to why a race-neutral reason based on demeanor was a pretext for discrimination).

215. Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (noting the "Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted").

216. United States v. Torres-Ramos, 536 F.3d 542, 559–60 (6th Cir. 2008) (holding that the lower court misapplied comparative juror analysis by comparing only peremptorily struck jurors).

the Supreme Court's approach in *Miller-El II* to "engag[e] in 'side-by-side comparisons of some black venire panelists who were struck and white ones who were not.'"[217]

Finally, in assessing credibility under step three of *Batson*, the Sixth Circuit has required specific findings regarding credibility determinations.[218] The court has reasoned that, "'when the purported race-neutral justification is predicated on subjective explanations like body language or demeanor,' an 'on-the-record analysis of each of the elements of a *Batson* challenge is especially important.'"[219] Thus, where a trial court fails to conduct a specific factual inquiry and "merely credit[s] the explanation," the Sixth Circuit gives no deference to the credibility of that specific, subjective reason.[220] However, the court has recognized that when other proffered reasons are deemed race-neutral, there exists an independent basis for supporting the denial of a *Batson* challenge.[221] Comparatively, by considering all relevant circum-

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> In the instant case, rather than engaging in "side-by-side comparisons of some black venire panelists who were struck and white ones who were not," the district court compared the excluded African-American to other, white panelists who had also been excluded. In other words, rather than asking whether similarly situated people were treated differently, the district court instead searched for similarly situated people who were treated the same. This kind of inquiry, which seeks similarity and ignores differences, is not what the Equal Protection Clause requires.

Id. at 560 (citations omitted); *see also* United States v. Odeneal, 517 F.3d 406, 419–20 (6th Cir. 2008) (concluding that "the district court erred in failing to fully consider the evidence of pretext presented by Defendants as part of its duty to consider the plausibility and persuasiveness of the race-neutral explanation based on the totality of the circumstances surrounding the strike"). "The failure of the prosecution to inquire regarding a reason purported to be a basis for a juror's dismissal serves as evidence of discrimination. Indeed, failure to ask undermines the persuasiveness of the claimed concern." *Odeneal*, 517 F.3d at 421 (citations and internal quotations marks omitted).

217. *Torres-Ramos*, 536 F.3d at 559–60 (quoting Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 241 (2005)).

218. *See Braxton*, 561 F.3d at 466 (holding that, in evaluating demeanor-based reasons, the trial court must provide factual findings on the record).

219. *Id.* at 461 (quoting McCurdy v. Montgomery Cnty., 240 F.3d 512, 521 (6th Cir. 2001)) (holding that in evaluating demeanor-based reasons the trial court must provide factual findings on the record).

220. *See id.* at 461–62 (citing *McCurdy*, 240 F.3d at 521) (noting that in *McCurdy* the trial court did not blindly accept the given explanation but found for itself that the juror in question was struck for reasons other than his race).

221. *See* United States v. Kimbrel, 532 F.3d 461, 466 (6th Cir. 2008) ("[T]he court must assess the [striking party's] credibility under all of the pertinent circumstances, and then . . . weigh the asserted justification against the strength of the [challenging party's] prima facie case under the totality of the circumstances." (third alteration in original)

stances, including the credibility determination of the trial court, the Sixth Circuit has applied an analysis mimicking that of the Supreme Court's approach in *Snyder* and *Rice*.

2. Practical Application

At step one, the challenging party in the Sixth Circuit may use statistical analysis to show an inference of discrimination, but such analysis should not be offered until after the conclusion of voir dire (and before the jury is sworn).[222] Otherwise, an inference may be established through any fact or circumstance indicating racial bias, including the factors considered in *Miller-El II*.[223] Although the Sixth Circuit has required that a *Batson* challenge must be raised by a member of a cognizable racial group, given the Supreme Court's holding in *Powers v. Ohio* that such a requirement is unconstitutional, its applicability appears to be questionable.[224]

Next, a striking party must offer a race-neutral reason that need not be plausible or persuasive.[225] If this reason is given prior to step one's completion, step one is rendered moot.[226] So long as the reason is facially neutral, the striking party's burden of proof is met.[227] After a facially valid reason is offered, a challenging party must rebut the explanation with additional evidence.[228] Failure to

(quoting Paschal v. Flagstar Bank, 295 F.3d 565, 574 (6th Cir. 2002)) (internal quotations marks omitted)).

222. *See* United States v. Johnson, 182 F. App'x 423, 428 (6th Cir. 2008) (noting the use of statistical analysis to demonstrate an inference of discrimination).

223. *See* United States v. Torres-Ramos, 536 F.3d 542, 559 (6th Cir. 2008) (emphasizing that the trial judge must consider an inference of discrimination "in light of all evidence with a bearing on it" (quoting Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 251–52 (2005)) (internal quotation marks omitted)).

224. *See* Powers v. Ohio, 499 U.S. 400, 406 (1991) (explaining that racial identity is not a precondition to raising a *Batson* challenge because such a notion is at odds with the Equal Protection Clause).

225. *See Kimbrel*, 532 F.3d at 466–68 (stating that, at step two of a *Batson* inquiry, the trial court may not inquire about how persuasive or plausible an offered justification may be); United States v. Lucas, 357 F.3d 599, 609 (6th Cir. 2004) (holding that there is no need for a race-neutral explanation to be persuasive or plausible).

226. United States v. Ervin, 266 F. App'x 428, 433 (6th Cir. 2008).

227. *See* United States v. Watford, 468 F.3d 891, 912 (6th Cir. 2006) (opining that step two of a *Batson* challenge is satisfied when the striking-party provides a race-neutral explanation for the strike).

228. *See* United States v. Forrest, 402 F.3d 678, 687 (6th Cir. 2005) (stating that a challenging party bears the burden to demonstrate that the striking-party's race-neutral explanation is actually racially motivated).

do so may result in waiver of the *Batson* challenge.[229]

Finally, a trial court, in performing its step three duties, should provide specific factual findings when evaluating a demeanor-based reason.[230] Moreover, if there exists multiple reasons for a strike that are not all subjective, the trial court may assess credibility through consideration of all relevant facts.[231]

G. *Seventh Circuit*

In the last five years, the Seventh Circuit has reviewed an array of *Batson* claims. Noting that "the [trial] court, not just the defendant, has an interest in a trial process free of discrimination," the Seventh Circuit has sought to apply the Supreme Court's holdings in *Johnson*, *Miller-El II*, *Snyder*, and *Rice*.[232]

1. Analysis of Recent *Batson* Holdings

In analyzing *Batson*'s first step, the Seventh Circuit has expressly adopted the *Johnson* holding, recognizing that "the burden at the prima facie stage is low, requiring only circumstances raising a suspicion that discrimination occurred, even when those circumstances are insufficient to indicate that it is more likely than not that the challenges were used to discriminate."[233] With respect to statistical analysis, the court has concluded that "a pattern of strikes against jurors of a particular race may give rise to an inference of discrimination"[234] when examined at the conclusion of the jury-selection process.[235] Although the Seventh

229. *See* Braxton v. Gansheimer, 561 F.3d 453, 465 (6th Cir. 2009) (concluding that the failure to rebut the strike-proponent's race-neutral explanation was grounds for denying the *Batson* challenge).

230. *See id.* at 466 (evaluating a demeanor-based reason for striking a juror and reasoning that the strike-opponent failed to provide clear and convincing evidence).

231. *See* United States v. Torres-Ramos, 536 F.3d 542, 559 (6th Cir. 2008) (noting that the trial judge must consider an inference of discrimination "in light of all evidence with a bearing on it" (quoting Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 251–52 (2005)) (internal quotation marks omitted)).

232. *See, e.g.*, United States v. Stephens, 421 F.3d 503, 511 (7th Cir. 2005) (affirming that a prima facie case of discrimination had been met based on the trial court's sua sponte *Batson* challenge).

233. Franklin v. Sims, 538 F.3d 661, 665–66 (7th Cir. 2008) (quoting *Stephens*, 421 F.3d at 512) (internal quotation marks omitted) (holding that the trial court properly considered statistics in denying *Batson* claim under step one).

234. *Stephens*, 421 F.3d at 512–13 (reasoning there was an inference of discrimination based on statistical analysis).

235. *See Franklin*, 538 F.3d at 665 (concluding that the defendant's attempt to limit

Circuit has considered statistical-based claims primarily where there exists numerical data for both the exclusion rate and challenge rate,[236] the court has noted that either rate may, in and of itself, be sufficient to render an inference of discrimination.[237] Interestingly, the court has acknowledged that, at *Batson*'s first step, a trial court "may consider apparent reasons for the challenges discernible on the record, regardless of whether those reasons were the actual reasons for the challenge."[238] Though this view seemingly combines steps one and three of *Batson*, the Seventh Circuit has denied such conflation, clarifying that the "consideration of 'apparent reasons' is in fact nothing more than a consideration of 'all relevant circumstances,'" and that "[i]n light

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the evaluation of statistical data to specific points has not been recognized as a valid means to raise an inference of discrimination).

> Franklin argues that the Illinois Appellate Court should have focused on the fact that the State struck two of the three African-American panelists on the first six-person panel because it was at that point that the trial judge denied Franklin's *Batson* motion. Franklin's point is well-taken, but we cannot conclude it was *unreasonable* for the court to examine the entirety of the jury-selection process. Franklin does not point to any case that parses out the inquiry as he suggests, and both *Johnson* and *Stephens* countenance the methodology used by the Illinois Appellate Court.

Id. at 666.

236. *See id.* at 665 (affirming the denial of a prima facie case based on statistics); *Stephens*, 421 F.3d at 512–13 (remanding the case for further *Batson* proceedings after reasoning there was a prima facie showing that the strike was racially motivated based on statistical analysis).

237. *Stephens*, 421 F.3d at 512 (holding that an inference "can be evident where a prosecutor uses peremptory challenges to eliminate all, or nearly all, members of a particular race" and when "a disproportionate number of peremptory challenges were exercised to exclude members of a particular cognizable group").

> In this case, all of the six peremptory challenges were used against members of minority racial groups. Three challenges were used against Hispanic-Americans, eliminating 75% of the Hispanic-Americans on the venire. That also represented a use disproportionate to the representation on the venire, with the government using 50% of its challenges to eliminate members of a racial group that comprised approximately 13% of the venire. Finally, the prosecutor struck the sole Asian-American venire member. Even more compelling, however, is that the prosecutor used no challenges at all against prospective white jurors, which meant that the government used 0% of its challenges on the group that comprised 75% of the venire at the time the peremptories were exercised.

Id. at 513–14.

238. *Id.* at 515 (noting, however, that consideration of actual reasons does not occur until the third step of *Batson*). "The Supreme Court made clear that the persuasiveness of the constitutional challenge is to be determined at the third *Batson* stage, not the first, and has rejected efforts by the courts to supply reasons for the questionable strikes." *Id.* at 516.

of *Johnson*, an inquiry into apparent reasons is relevant only insofar as the strikes are so clearly attributable to that apparent, nondiscriminatory reason that there is no longer any suspicion, or inference, of discrimination in those strikes."[239]

With respect to step three of *Batson*, the Seventh Circuit has recognized the applicability of the factors enunciated in *Miller-El II*.[240] The court, however, has reviewed only those factors raised by the challenging party.[241] The Seventh Circuit, unlike some of its sister circuits, has not required a challenging party to rebut a proffered race-neutral reason.[242] Instead, the court has only looked at "the persuasiveness of the [striking party's] justification for his [peremptory] strike."[243] This credibility determination has

239. *Id.* at 516, 518 (rejecting the striking party's attempt "to transport the detailed weighing process from the second and third steps of *Batson* to the *prima facie* analysis").

240. *See* United States v. Corley, 519 F.3d 716, 721, 723 (7th Cir. 2008) (upholding the trial court's *Batson* challenge denial on the grounds that the trial court had "accepted the government's argument" and "[the] determination [wa]s supported by the record").

> In meeting that burden, a defendant may introduce evidence of a pattern of strikes against members of a particular race, disparate questioning by the prosecutor in *voir dire*, and evidence that the prosecutor's proffered reason for a challenged strike of a prospective juror of a particular race applied just as well to an otherwise-similar prospective juror of another race who was permitted to serve.

Id. at 721.

241. *See* United States v. Hendrix, 509 F.3d 362, 370–71 (7th Cir. 2007) (stating that at step three "the court must determine whether the defendant has carried his burden of proving purposeful discrimination by the prosecution").

242. *See id.* at 371 ("[A]t the third stage, the defendant may offer additional evidence to demonstrate that the proffered justification was pretextual."); *Stephens*, 421 F.3d at 510 (holding that a *Batson* challenge can be raised for the first time on appeal).

> Because the issue was not raised at trial by Stephens, the government could have argued before this court that it was forfeited. Of course, the government was well aware that a forfeiture on direct appeal would merely delay consideration of the issue. The district court had already informed the defendant of his right to pursue the *Batson* issue in the context of a post-conviction motion under [28 U.S.C.] § 2255. Rather than argue forfeiture and proceed along that path, the government instead informed both Stephens and this court that it would affirmatively waive any forfeiture argument it may have on this issue for purposes of this appeal, and the issue was briefed to this court on the merits.

Stephens, 421 F.3d at 510. Notably, 28 U.S.C. § 2255 allows for a prisoner to contest a state court determination via a habeas corpus petition in federal district court. *See* 28 U.S.C. § 2255 (2006) ("A prisoner in custody under sentence of a court . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."). This remedy is obviously not available in civil proceedings.

243. *Hendrix*, 509 F.3d at 371 (citing Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322, 338–39 (2003)). "The issue is whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Id.*

focused on "how reasonable, or how improbable, the [striking party's] explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy."[244]

In evaluating a trial court's credibility determinations, the Seventh Circuit has articulated that, even where a trial court had not factually supported its credibility determination, the reviewing court may look to the record to determine whether there exists the possibility of pretext.[245] The court has limited such review, however, to give no deference where the trial court has failed to assess credibility on the record and the record is further devoid of facts supporting the credibility determination.[246] Yet, in the context of comparative juror analysis, the Seventh Circuit has reviewed the entire record regardless of the trial court's credibility determination.[247]

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244. United States v. Stephens, 514 F.3d 703, 711 (7th Cir. 2008) (quoting *Miller-El I*, 537 U.S. at 339) (internal quotation marks omitted) (evaluating credibility by looking to whether the proffered reason fits within some viable trial strategy).

245. *See Corley*, 519 F.3d at 723 ("Although it would be more helpful for the district courts in these *Batson* cases to explicitly make credibility determinations, and perhaps state on the record the basis for rejecting the comparisons with the similarly-situated jurors, there is no ambiguity in this record."); Coulter v. McCann, 484 F.3d 459, 469 (7th Cir. 2007) (reviewing a comparative juror analysis and stating that the trial court was not open to being second-guessed because the factually based credibility findings were not clearly contradicted by the record).

246. *See Stephens*, 514 F.3d at 713 ("The decision of the district court incorrectly recounts much of the record and fails to note material portions. Because the district court did not factor in material portions of the record, it misapplied the *Batson* three-part test. As a result of its misapplication of the *Batson* test, no deference is due to the district court's decision finding intentional discrimination."); United States v. Taylor, 509 F.3d 839, 845 (7th Cir. 2007) ("Nothing in this ruling can be read to apply to Watson. Without the court's explanation for upholding the strike (we say this because the peremptory strike stood despite the lack of a clear ruling), we have nothing to review."); Lamon v. Boatwright, 467 F.3d 1097, 1099–100 (7th Cir. 2006) ("[T]he court concluded that the trial judge's ruling, although quite skimpy, sufficiently showed that he assessed the prosecutor's credibility . . . . The court reasoned that the entire record . . . supported the trial judge's decision to credit the prosecutor's facially nondiscriminatory reasons for exercising the strike as she did.").

247. *See Stephens*, 514 F.3d at 712 (discussing guidelines for reversing a lower court's finding that lacks an explanation based on the record).

> Additionally, we cannot defer to a district court decision that ignores material portions of the record without explanation. "[W]henever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise." Our deference depends on "the district court's account of the facts [being] plausible in light of the record viewed in its entirety."

Because the Seventh Circuit requires factual support for credibility determinations, the court implicitly demands record completeness, which further highlights the Supreme Court's recognition of this requirement in *Snyder* and *Rice*.[248] In evaluating demeanor-based reasons, the court has similarly echoed the *Snyder* approach, noting that "*Snyder* makes clear that a summary denial does not allow us to assume ... the [striking party's] reason[s] [were] credible; rather, the district court's silence leaves a void in the record that does not allow us to affirm the denial."[249] Even if the proffered reason is demeanor-based, the Seventh Circuit requires a complete record that supports the trial court's determination.[250]

2. Practical Application

In the Seventh Circuit, statistical analysis may be used to establish an inference of discrimination.[251] Accordingly, the challenging party should assert sufficient numerical data to calculate the exclusion rate and the challenge rate.[252] A prima facie case may also be established through circumstances or facts giving rise to an inference of racial animus.[253]

Next, the striking party must proffer a facially neutral reason for

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Id. (alterations in original) (citations omitted); *see also Hendrix*, 509 F.3d at 371–72 (looking to the entire record to evaluate the trial court's comparative juror analysis).

248. United States v. McMath, 559 F.3d 657, 666 (7th Cir. 2009) (remanding for evidentiary hearing to determine the trial court's reasons for denying a *Batson* challenge), *cert. denied*, 130 S. Ct. 373 (2009).

249. *Id.* "Like *Snyder*, the record here does not show that the prosecutor based the strike on Juror 7's expression alone and, as *Snyder* teaches, we cannot presume that the prosecutor's race-neutral justification was credible simply because the district judge ultimately denied the challenge." *Id.*

250. *See id.* (finding that "the district court made no findings regarding the prosecutor's race-neutral demeanor-based justification of the strike," and determining a remand was the appropriate step (citing United States v. Taylor, 277 F. App'x 610, 612–13 (7th Cir. 2008))).

251. *See* Franklin v. Sims, 538 F.3d 661, 666 (7th Cir. 2008) ("[T]he Illinois Appellate Court primarily relied on the fact that the State struck only two out of four African-American jurors of the thirty-six-person venire .... Factors such as these are widely recognized as appropriate and important considerations at *Batson*'s first step ....").

252. *See id.* at 663 (noting that the appellate court took the entire venire and the peremptory strikes into consideration when concluding that two strikes against African Americans were insufficient to establish a prima facie case).

253. *See id.* at 665 (holding that the burden of the defendant at the first step of *Batson* is low and only requires a showing of circumstances that give rise to a suspicion of discrimination).

each challenged strike.[254] If such reasons are given prior to determining whether the challenging party has made a prima facie showing, such determination is moot.[255] The challenging party may rebut the proffered reason, but such action is not mandatory. Because both the trial court and the reviewing court will only consider evidence offered before the trial court, the challenging party should preserve all relevant evidence. Finally, at step three, a trial court must provide factual findings for a credibility determination.[256]

H. *Eighth Circuit*

Although recognizing the applicability of the Supreme Court's recent *Batson* holdings, the Eighth Circuit has on multiple occasions distinguished its cases from *Miller-El II* and *Snyder*. As a result, the expansions provided by these Supreme Court decisions have remained relatively unapplied by the Eighth Circuit.

1. Analysis of Recent *Batson* Holdings

With respect to *Batson*'s first step, the Eighth Circuit has avoided any mention of *Johnson*'s "inference of discrimination" standard.[257] The court, however, has spoken with regard to the use of statistics in establishing a prima facie case.[258] The Eighth Circuit has not suggested "that numbers alone create or negate a prima facie case under *Batson*," but has recognized a prima facie case where all strikes are issued only against members of a cognizable racial group.[259] The Eighth Circuit has, therefore,

254. *See* McCain v. Gramley, 96 F.3d 288, 290 (7th Cir. 1996) (stating that the striking party has the burden of offering race-neutral reasons for challenging the jurors).

255. *See* Boston v. McCann, 232 F. App'x 603, 607 (7th Cir. 2007) ("[O]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot." (quoting Hernandez v. New York, 500 U.S. 352, 359 (1991)) (internal quotation marks omitted)).

256. *See* United States v. Ferguson, 935 F.2d 862, 864 (7th Cir. 1991) (noting that the Supreme Court has recognized that a trial judge's findings are based on credibility determinations and great deference should be afforded to such findings).

257. Johnson v. California, 545 U.S. 162, 170 (2005).

258. *See* Moran v. Clarke, 443 F.3d 646, 652 (8th Cir. 2006) (holding that peremptorily striking every African American and no one else constituted sufficient evidence to establish an inference of discrimination).

259. *See id.* (distinguishing from its previous holding that "numbers alone could not

conservatively limited the applicability of statistical analysis under step one to situations where the exclusion rate equals one hundred percent.

The Eighth Circuit has also followed a more conservative approach in reviewing a trial court's step three analysis. While the court has recognized the utility of the factors announced in *Miller-El II*, the court has emphasized *Miller-El II*'s extenuating and distinguishable circumstances.[260] Thus, the court has required the challenging party to show proof of multiple factors in order to establish purposeful discrimination.[261] The court has also concluded that comparative analysis should be considered,[262] and in conducting such analysis, the challenging party may present a side-by-side comparison of stricken venire panelists and panelists allowed by the striking party to serve.[263] Yet, despite the Eighth

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establish a prima facie case").

> In *Luckett*, the defendant's Batson challenge rested primarily on the fact that "the prosecutor had used most of his peremptory challenges against potential African-American jurors." We held that numbers alone could not establish a prima facie case. Here, by contrast, Moran's attempt to strike all of the black members of the venire and no one else constituted a pattern of using challenges that gave rise to an inference of discrimination.

Id. (citations omitted) (quoting Luckett v. Kemna, 203 F.3d 1052, 1054 (8th Cir. 2000)).

260. *See* Smulls v. Roper, 535 F.3d 853, 867 (8th Cir. 2008) (en banc) (stating that "[t]his case contains nowhere near the strong circumstantial evidence present in *Miller-El II* that compelled the Supreme Court to conclude that the trial court made an unreasonable determination of the facts when it upheld the ten peremptory strikes"), *cert. denied*, 129 S. Ct. 1905 (2009).

261. *See* Barnett v. Roper, 541 F.3d 804, 812 (8th Cir. 2008) (affirming the trial court's denial of a *Batson* challenge), *cert. denied*, 130 S. Ct. 63 (2009).

> Although the use of the strikes against only women may constitute some evidence of a discriminatory motive, Barnett does not point to the presence of any young, single males in the jury pool whom the prosecutor should have struck. Further, the egregious facts present in *Miller-El* were not present during Barnett's trial. There was no jury shuffling, and no different forms of questioning were posed to the male and female members of the jury pool. Accordingly, any differences between the justification for the strike and the answers given by Straub are not sufficient to rebut by clear and convincing evidence the sex-neutral explanation offered by the prosecutor.

Id.

262. *See* Swope v. Razzaq, 428 F.3d 1152, 1155 (8th Cir. 2005) (per curiam) (concluding that the challenging party had failed to offer evidence through a comparative juror analysis). "Swope failed, however, to make the district court aware of any similarly situated jurors who had not been struck." *Id.*

263. *See* United States v. Haskell, 468 F.3d 1064, 1071 (8th Cir. 2006) (noting that comparisons of panelists showing similarities would be evidence of a pretext of

Circuit's express recognition that compared jurors need not be identical, the court has distinguished jurors on subtle differences, rationalizing those differences as "ha[ving] a direct bearing on a legitimate, reasonable, non-race-based trial strategy."[264] However, allowing such subtle distinctions between comparative juror members renders comparative juror analysis essentially worthless, which is likely why there has been a lack of purposeful discrimination holdings from the Eighth Circuit.[265] Moreover, in

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discrimination, but holding that the comparative juror analysis did not establish purposeful discrimination because it failed to demonstrate similarities).

264. Nicklasson v. Roper, 491 F.3d 830, 842 (8th Cir. 2007) (reasoning that instead of offering evidence based on the totality of the record, appellant relied solely on alleged inconsistent treatment of jurors who gave similar responses to questions asked during voir dire and that while such inconsistent treatment of jurors constitutes evidence of discrimination, by itself that conduct is not enough to satisfy the challenging party's burden of proof).

> Yokley was purportedly excused because, in response to a death qualification voir dire question asking whether she would automatically impose a life sentence if the defendant was convicted of first-degree murder, she responded "probably." A Caucasian venireperson, Janice Floyd, responded to the same question with "I believe so" and was not excused. . . .
>
> It is reasonable to contend that a potential juror answering "probably" would be more committed to a position than one answering "I believe so." "Probably" presents a predictive assessment cloaked in the objective garb of statistical language, whereas "I believe so" reflects a naked, subjective impression. Generally, objective or quantifiable evidence is more persuasive and comprehensible than subjective or qualitative evidence. The responses differ in their emphasis. This is a subtle distinction perhaps, but it has a direct bearing on a legitimate, reasonable, non-race-based trial strategy.

Id. at 841–42.

265. *Cf.* United States v. Rodriguez, 581 F.3d 775, 791–92 (8th Cir. 2009) (accepting the government's explanation that the venireperson was struck because of potential liberal bias evidenced by her holding a theater arts degree); Taylor v. Roper, 577 F.3d 848, 859 (8th Cir. 2009) (stressing that the venireperson who was struck and the one who remained did not have to be of the same race), *cert. denied*, 130 S. Ct. 3464 (2010); Williams v. Norris, 576 F.3d 850, 864 (8th Cir. 2009) (drawing a distinction between one's educational level and having the aptitude for grasping complex evidence); United States v. Booker, 576 F.3d 506, 511–12 (8th Cir. 2009) (concluding the defendant untimely claimed two similarly situated white jurors were not challenged on the same basis used to excuse two African American jurors), *cert. denied*, 130 S. Ct. 777 (2009); United States v. Walley, 567 F.3d 354, 358 (8th Cir. 2009) (denying the defendant's late argument that the Government failed to challenge prospective non-black jurors who were similarly situated to excluded prospective black jurors); United States v. Spotted Elk, 548 F.3d 641, 659 (8th Cir. 2008) (allowing the strike of a venireperson who was related to a potential witnesses for the defendant, while retaining a venireperson who had business relationships with witnesses for both sides); *Barnett*, 541 F.3d at 811–12 (construing the Government's reason for striking a venireperson was because she was "very young" and "single" as opposed to "a

reviewing the evidence for pretext, the court has noted that a challenging party cannot assert, for the first time on appeal, new evidence rebutting race-neutral reasons.[266] The court, however, has refused to answer whether a failure to rebut proffered reasons at the trial court level constitutes a complete waiver of a *Batson* claim.[267]

Overall, in reviewing a lower court's decision, the Eighth Circuit has been extremely deferential, holding that the trial court is not required to render factual findings when assessing the credibility of the striking party.[268] Instead, the court has held that the trial

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very young female who is single"); *Smulls*, 535 F.3d at 865 (rejecting the argument that compared jurors must be similar in all respects for accurate comparison); *Nicklasson*, 491 F.3d at 841–42 (justifying subtle differences in responses to death-penalty questions posed to a white venireperson who remained on the panel and to a black venireperson who was peremptorily excused); *Haskell*, 468 F.3d at 1071 (allowing the challenge of a non-white venireperson with a drug problem who had a pending court date while a white venireperson with drug problems and no court date went unchallenged); United States v. Rusan, 460 F.3d 989, 992 (8th Cir. 2006) (accepting the Government's prior non-discriminatory explanations in deciding that the challenged juror was "not similar in all legitimate factors to the three African-Americans struck by the Government" instead of making the Government respond to the defendant's claim of pretext); United States v. Davidson, 449 F.3d 849, 852–53 (8th Cir. 2006) (reasoning venirepersons claimed to be similarly situated were only similar by virtue of not being homeowners); *Swope*, 428 F.3d at 1155 (holding that the defendant failed to meet his burden of showing purposeful discrimination without reaching the issue of whether jurors were comparable); United States v. Meza-Gonzalez, 394 F.3d 587, 593 (8th Cir. 2005) (upholding the strike of a venireperson who identified herself as a teacher because she was in the "social work field" despite defendant's claims that other non-minority teachers on the panel were not peremptorily challenged).

266. *See Booker*, 576 F.3d at 512 (holding that explanations on appeal are untimely); *see also Walley*, 567 F.3d at 358 ("Our cases hold, however, that we will not consider claims of pretext based upon the failure to strike similarly situated jurors unless the point was raised in the district court.").

267. *Taylor*, 577 F.3d at 856 (refusing to conclude whether a challenging party waives its *Batson* claim by failing to rebut a striking party's race-neutral reasons). Missouri has modified the three-part *Batson* analysis to a "unitary procedure for the vindication of *Batson* claims," which does not require the challenging party to make a prima facie showing but does require the challenging party to rebut the striking party's proffered reasons. *Id.* at 855. In *Taylor*, the Eighth Circuit specifically refused to determine whether Missouri's unitary approach was constitutional. *Id.* at 856.

268. *See* Cook v. City of Bella Villa, 582 F.3d 840, 854 (8th Cir. 2009) ("This court has consistently concluded no specific factual findings are necessary."). *But see Smulls*, 535 F.3d at 872 (Bye, J., dissenting) ("[T]he inquiry is whether the trial court found the proffered reasons had a basis in fact. If an otherwise adequate reason has no factual basis, the strike is pretextual. The record here reflects the competing views offered by the prosecution and defense but is of no assistance in determining which was factually correct. In adhering to these principles, I refuse to ignore the lack of findings and the trial court's stubborn refusal to apply *Batson*.").

court's ruling itself is a factual determination.[269] In addition, the Eighth Circuit has limited the application of *Snyder* to demeanor-based challenges where the record lacks evidence that "the trial court found the proffered reasons had a basis in fact."[270] As a result, the Eighth Circuit has severely curtailed the implications of the Supreme Court's recent decisions to their respective facts, leaving little flexibility in the *Batson* framework.

2. Practical Application

In meeting *Batson*'s first step in the Eighth Circuit, an inference of discrimination can be drawn through extreme statistical disparities—e.g., exclusion rates equaling one hundred percent.[271] Non-numerical data, however, can be used to establish a prima facie case, including evidence derived from the *Miller-El II* factors. But if a challenging party is using comparative juror analysis to establish a prima facie case, the compared jurors must be similar in all respects except for their race.[272]

Next, if the striking party proffers a race-neutral explanation prior to completion of the first step, whether a prima facie case has been established is rendered moot and only steps two and three are considered.[273] At step two, the proffered reason need only be facially neutral and need not be persuasive.[274] The challenging party is not required to rebut the proffered reasons; however, such rebuttal should be undertaken because the Eighth Circuit explicitly prohibits the consideration of new evidence on appeal.[275]

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269. *Cook*, 582 F.3d at 854 (noting that the ruling itself is the factual determination and the court has repeatedly upheld such rulings despite any additional reasoning).

270. *Smulls*, 535 F.3d at 872 (Bye, J., dissenting); *accord id.* at 260–61 (distinguishing *Snyder* on the grounds that the non-demeanor based reason was "highly speculative" and thus there was an inadequate basis for credibility).

271. *See* Moran v. Clarke, 443 F.3d 646, 652 (8th Cir. 2006) ("[An] attempt to strike all of the black members of the venire and no one else constituted a pattern of using challenges that gave rise to an inference of discrimination.").

272. *See Taylor*, 577 F.3d at 859 ("[A] prosecutor's strike of a black juror should be compared with the prosecutor's treatment of 'otherwise-similar nonblack' jurors." (quoting Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 241 (2005))).

273. *See* United States v. Walley, 567 F.3d 354, 357 (8th Cir. 2009) (stating that, after a race-neutral reason is given and the court has ruled on the issue of purposeful discrimination, the prima facie issue is deemed moot).

274. *See* Elem v. Purkett, 64 F.3d 1195, 1197 (8th Cir. 1995) ("[I]f the reason is facially race-neutral, it must be deemed sufficient at this second stage, even if it bears no relation . . . [to] the person's ability to serve as a juror.").

275. *See* United States v. Booker, 576 F.3d 506, 512 (8th Cir. 2009) (noting that a

Moreover, if multiple reasons are given for a strike, the challenging party will need to compare jurors who share all of the proffered explanations. Otherwise, a finding of purposeful discrimination is unlikely.

Finally, a trial court in the Eighth Circuit is not required to make specific credibility findings on the record.[276] Therefore, it is of great import to secure a thorough and complete record for the purposes of appellate review.

I. *Ninth Circuit*

In recent years, the Ninth Circuit has evaluated *Batson* with a flexible and increasingly expansive attitude that focuses on the rights afforded to the parties, and has limited the deference typically afforded to the trial court.[277] Although *Johnson* was taken by appeal from the Ninth Circuit, since its issuance and the decisions in *Miller-El II* and *Snyder*, the court has liberally applied the protections secured by *Batson* and its progeny.[278]

1. Analysis of Recent *Batson* Holdings

In terms of *Batson*'s first step, the Ninth Circuit has recognized that statistical analysis is sufficient to raise an inference of discrimination.[279] The court has not specified the numerical data necessary to raise an inference of discrimination but has held that

"'similarly situated' *Batson* argument cannot be raised for the first time on appeal." (quoting United States v. Gibson, 105 F.3d 1229, 1232 (8th Cir. 1997))), *cert. denied*, 130 S. Ct. 777 (2009).

276. *See* Cook v. City of Bella Villa, 582 F.3d 840, 854 (8th Cir. 2009) (citing U.S. Xpress Enters., Inc. v. J.B. Hunt Transp., Inc., 320 F.3d 809, 814 (8th Cir. 2003)) (noting that the failure to include step three findings on the record did not constitute an error).

277. *See* Williams v. Runnels, 432 F.3d 1102, 1105 (9th Cir. 2006) ("[W]here the state court used the 'strong likelihood' standard for reviewing a *Batson* claim, the state court's findings are not entitled to deference and our review is de novo." (quoting Paulino v. Castro, 371 F.3d 1083, 1090 (9th Cir. 2004))). "Here, Williams established that he is African-American and that the prosecutor used three of his first four peremptory challenges to remove African-Americans from the jury." *Id.* at 1107.

278. *See, e.g.*, *id.* at 1106 ("[T]he first step [is not] to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination." (quoting Johnson v. California, 545 U.S. 162, 170 (2005)) (internal quotation marks omitted)).

279. *See* Paulino v. Harrison, 542 F.3d 692, 703 (9th Cir. 2008) (holding there was a "strong prima facie case" based on statistical analysis); *see also Williams*, 432 F.3d at 1107 (noting that the court has "held that a defendant can make a prima facie showing based on a statistical disparity alone").

statistics showing a "stark" racial disparity are sufficient.[280] The court, however, has required a challenging party to be of a cognizable racial group in order to have standing to assert a *Batson* challenge[281]—a requirement not mentioned in any of the Supreme Court's *Batson* opinions.

In establishing an inference of discrimination or purposeful discrimination, the Ninth Circuit has noted the utility of the *Miller-El II* factors, including juror comparative analysis as "a tool for conducting meaningful appellate review of whether a prima facie case has been established."[282] The court has also considered a failure "to 'engage in meaningful questioning of any of the minority jurors'" as indicative of discrimination.[283]

In evaluating whether race was the motive for exercising a peremptory strike, the Ninth Circuit has concluded that a failure to state a race-neutral reason at step two of *Batson* does not automatically render the strike pretextual.[284] Instead, the court

280. *See* United States v. Collins, 551 F.3d 914, 921 (9th Cir. 2009) ("We have found an inference of discrimination where the prosecutor strikes a large number of panel members from the same racial group, or where the prosecutor uses a disproportionate number of strikes against members of a single racial group."); *Paulino*, 542 F.3d at 703 (recognizing that an exclusion rate of 83%—five out of six peremptory strikes—constituted a "stark" racial disparity). "[T]he prosecutor's use of peremptory strikes created 'stark' statistical disparities. The prosecutor removed five of the six, or 83% of the potential African-American jurors." *Paulino*, 542 F.3d at 703 (citations omitted); *see also Williams*, 432 F.3d at 1109 (concluding there was an inference of discrimination where the striking party used three out of four peremptory strikes on African Americans). It should be noted that the *Williams* trial court analyzed the numerical data for the entire venire panel. *See Williams*, 432 F.3d at 1107 ("[I]t appears that only four of the first forty-nine potential jurors were African-American."). *But see* Hargrove v. Pliler, 327 F. App'x 708, 709 (9th Cir. 2009) (reasoning that the "statistical argument involving very small numbers" did not establish a prima facie case), *cert denied*, 130 S. Ct. 1136 (2010).

281. Yee v. Duncan, 463 F.3d 893, 898 (9th Cir. 2006) (stating that to establish a prima facie case the challenging party must be a member of a cognizable racial group).

282. *Collins*, 551 F.3d at 921–22 ("An inference of discrimination may arise when two or more potential jurors share the same relevant attributes but the prosecutor has challenged only the minority juror.").

283. *Id.* at 921 (noting that motive may be discerned from the questions and statements raised to the venire, thereby establishing an inference of discrimination (quoting Fernandez v. Roe, 286 F.3d 1073, 1079 (9th Cir. 2002))).

284. *See* Gonzalez v. Brown, 585 F.3d 1202, 1208 (9th Cir. 2009) (holding that "a failure of the prosecutor to give a valid reason for a strike does not result in a per se violation of *Batson* but instead the district court must consider all of the circumstances").

> We have found no precedent of the United States Supreme Court squarely addressing whether, when the prosecutor stands silent as to reason for one strike, but other circumstances—such as valid reasons for other strikes and the overall composition of the jury—suggest the absence of discrimination, the prosecutor's

has recognized that "[s]uch a failure ... is evidence of discrimination,"[285] but that the analysis still requires step three consideration of all relevant circumstances.[286] Thus, while the court "will not supply a reason for the ... exercised ... strike," the court will evaluate the totality of the circumstances to determine the existence of purposeful discrimination.[287]

In looking at the totality of the circumstances, the Ninth Circuit has noted that it typically affords "great deference" to lower court credibility determinations.[288] Consistent with *Snyder* and *Rice*, however, the court has extended such deference only where the record establishes that the lower court conducted a thorough credibility determination.[289] Thus, "[r]ul[ing] on the credibility of the [striking party's] reasons without citing to any material from

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inability to respond at step two requires a determination of violation of the rule of *Batson*.

Id. at 1208.

285. *Yee*, 463 F.3d at 900 (recognizing that a failure of the striking party to give a valid reason is evidence of purposeful discrimination but does not, in and of itself, render the strike pretextual).

286. *See Gonzalez*, 585 F.3d at 1207 ("If the prosecutor does not meet his or her burden at step two, the trial court must still decide, at step three, whether the defendant has met his ultimate burden of persuasion.").

> [S]tep two is an opportunity for the prosecution to explain the real reason for her actions. A failure to satisfy this burden to produce—for whatever reason—becomes evidence that is added to the inference of discrimination raised by the prima facie showing, but it does not end the inquiry. The trial court then moves on to step three where it considers all the evidence to determine whether the actual reason for the strike violated the defendant's equal protection rights.

Yee, 463 F.3d at 899.

287. *See Gonzalez*, 585 F.3d at 1207 (recognizing that *Miller-El II* prohibits the trial court from enunciating its own reasons for the peremptory strike).

288. Williams v. Rhoades, 354 F.3d 1101, 1109 (9th Cir. 2004) (quoting Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986)) (noting that deference is typically given to a trial court's assessment of the striking party's credibility).

289. *See* Brown v. Papa, 317 F. App'x 589, 593 (9th Cir. 2006) (holding that a trial court's defective fact-finding renders its credibility determination unreliable and no deference should be extended). It should be noted that the cases where deference was not extended were appeals from district court denials of habeas petitions under 28 U.S.C. § 2254(d)(1) and (2). *Id.* at 590; *see also* Kesser v. Cambra, 465 F.3d 351, 353 (9th Cir. 2006) (en banc) (declining to extend deference in an AEDPA appeal); Currie v. Adams, 149 F. App'x 615, 620 (9th Cir. 2005) (refusing to extend deference in an AEDPA appeal). The Ninth Circuit has not expressly delineated whether such deference would be denied in a direct appeal. *But see* Cook v. LaMarque, 593 F.3d 810, 816, 819 (9th Cir. 2010) (concluding there was deference owed on a direct appeal because the record supported the trial court's credibility determination).

the voluminous voir dire" is a "defective fact-finding process" warranting no deference.[290]

Where there has existed a defective fact-finding process, the Ninth Circuit has sua sponte conducted its own comparative juror analysis, holding that "comparative [juror] analysis is required even when it was not requested or attempted in the state court."[291] Notably, the court has implicitly required that lower courts conduct their own comparative juror analysis, recognizing that a failure "to consider comparative evidence in the record" can result in a lower court "unreasonably accept[ing] . . . nonracial motives as genuine."[292]

Through such requirements, the Ninth Circuit has treated the holdings in *Johnson*, *Miller-El II*, *Snyder*, and *Rice* as a jurisprudential floor. It has, consequently, expanded the typical analysis for a *Batson* claim brought before both the trial and reviewing courts.

2. Practical Application

Pursuant to *Batson* step one, a challenging party in the Ninth Circuit must first establish a prima facie case of discrimination.[293]

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290. *Brown*, 317 F. App'x at 593 (quoting *Kesser*, 465 F.3d at 371) (refusing to extend deference where the trial court failed to consider the full voir dire testimony and conduct comparative juror analysis).

> The third step of *Batson* imposes an "affirmative duty" on courts to evaluate the entire record to determine whether the prosecutor's proffered reasons are pretextual. "Under *Batson*'s third step, state courts must review the record to root out" any "pretextual, make-weight justifications for . . . race-based strikes." We have explained that, "[a]t a minimum, this procedure must include a clear record that the trial court made a deliberate decision on the ultimate question of purposeful discrimination."

Id. (citations omitted); *see also* Love v. Scribner, 278 F. App'x 714, 718 (9th Cir. 2008) (remanding for an evidentiary proceeding due to an incomplete record), *remanded to* No. 06-CV-640-WQH-RBB (S.D. Cal. Mar. 18, 2010) (granting certificate of appealability).

291. *Kesser*, 465 F.3d at 361; *see also* Ali v. Hickman, 571 F.3d 902, 910 (9th Cir. 2009) (disagreeing with the lower court's credibility determination because of revelations made by comparative juror analysis), *amended by* 584 F.3d 1174 (9th Cir. 2009), *cert. denied sub nom.* Cate v. Ali, 130 S. Ct. 2065 (2010); Boyd v. Newland, 467 F.3d 1139, 1151 (9th Cir. 2006) (noting that "comparative juror analysis is an important tool that courts *should* utilize on appeal" (emphasis added)).

292. *Kesser*, 465 F.3d at 358 (holding that the lower court's credibility determination lacked factual support as would have been dispositive by comparative juror analysis).

293. *See Cook*, 593 F.3d at 814 (setting out the three steps of the *Batson* test); *Ali*, 571 F.3d at 908 (reiterating step one of the *Batson* test); *Kesser*, 465 F.3d at 359 (detailing the steps required for a *Batson* challenge); *Boyd*, 467 F.3d at 1143 (acknowledging the first

This step can be accomplished through the use of statistical analysis that presents a "stark" racial disparity.[294] A prima facie case can also be established via non-numerical facts and circumstances that raise an inference of discrimination, such as disparate questioning or other evidence derived from the *Miller-El II* factors.[295]

Next, a striking party must proffer a reason that is facially neutral, but it need not be related to the matter at issue.[296] Following the striking party's explanation, the challenging party is not required to, but as a practical matter should, rebut the proffered reason.[297]

Finally, the trial court should consider the totality of the circumstances in determining purposeful discrimination,[298] and it must make specific factual findings for a credibility determination.[299] The failure to do so will result in no deference afforded to conclusory findings upon appellate review.[300] Thus, practitioners in the Ninth Circuit should pursue all facts supporting *Batson* allegations with the objective of persuading an appellate court focused on an almost *de novo* review rather than blind deference to the trial court rulings.

J. *Tenth Circuit*

The Tenth Circuit has adjudicated relatively few *Batson* claims in the last five years. Nonetheless, the court has recognized many of the same expansions and limitations adopted by its sister courts

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step required by *Batson*).

294. *See* Paulino v. Harrison, 542 F.3d 692, 703 (9th Cir. 2008).

295. *E.g.*, Williams v. Rhoades, 354 F.3d 1101, 1110 (9th Cir. 2004) (recognizing that treating similarly situated prospective jurors differently can create a pretext inference of pretext).

296. *Paulino*, 542 F.3d at 699 (stressing that the striking party bears the burden of providing a race-neutral explanation); *Williams*, 354 F.3d at 1107 (explaining that the reason for the strike must be race-neutral).

297. *E.g.*, Gonzalez v. Brown, 585 F.3d 1202, 1209 (9th Cir. 2009) (commenting on the defendant's lack of evidence to show racial discrimination following *Batson* step two).

298. *See id.* (holding that the trial court was not unreasonable in considering all of the circumstances regarding the juror challenges); *Kesser*, 465 F.3d at 359 (citing Hernandez v. New York, 500 U.S. 352, 363 (1991)) (stressing the importance of reviewing all of the pertinent facts).

299. *See Kesser*, 465 F.3d at 371 (faulting the lower court for ruling on the prosecutor's credible reasons "without citing to any material from the voluminous voir dire").

300. *See id.* (condemning the lower court for its reliance solely on the prosecutor's stated explanations for determining the prosecutor's credibility).

in light of *Batson* and its progeny.

1. Analysis of Recent *Batson* Holdings

The Tenth Circuit has noted that, with respect to step one, a "prima facie case articulated by the Supreme Court contemplates something more than simply establishing the minority status of the defendant and the exclusion of a single venire member who happens to be of the same race."[301] As a result, the court has impliedly allowed the use of statistics when the excluded rate equals one hundred percent.[302] Although the Tenth Circuit recently held that "numbers alone [cannot] establish discrimination,"[303] the court was likely concluding that statistics alone cannot establish purposeful discrimination under step three.[304] Thus, an exclusion rate of one hundred percent may still indicate an inference of discrimination in step one.

Additionally, the Tenth Circuit has noted the importance of the *Miller-El II* factors, including the use of a jury shuffle, comparative juror analysis, and disparate questioning.[305] The court, however,

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301. United States v. Abdush-Shakur, 465 F.3d 458, 470 (10th Cir. 2006) (concluding there was a prima facie case of racially motivated strikes based on statistical analysis).

302. *See id.* ("Striking two out of three minority panel members, however, is sufficient to satisfy a defendant's prima facie *Batson* claim, especially when the jurors were apparently the only two stricken.").

303. Dungen v. Estep, 311 F. App'x 99, 105 (10th Cir. 2009) (holding that the issue "is whether reasonable jurors could debate whether . . . Mr. Dungen had not made a prima facie case of discrimination"). After stating the issue was whether a prima facie case was established, the court looked to the factors established in *Miller-El I* and held that numbers alone were insufficient to show discrimination. *Id.*

304. *See id.* (noting that the "the only evidence of discrimination regarding the Hispanic jurors is the raw numbers" and that this evidence does not show "discrimination"). However, the Tenth Circuit does not make clear whether it is requiring proof of an inference of discrimination or proof of purposeful discrimination. *Id.*

305. *Id.*; *see also* United States v. Nelson, 450 F.3d 1201, 1207–08 (10th Cir. 2006) (reviewing the *Miller-El II* factors).

> To determine whether purposeful discrimination was present in the selection of a jury, we may consider a variety of factors, including: (1) the percentage of African American veniremembers who are the subject of the prosecutor's peremptory strikes; (2) "side-by-side comparisons of some black venire panelists who were struck and white panelists who were allowed to serve" . . . (3) the prosecutor's use of procedural mechanisms such as the Texas "jury shuffle" to move African American veniremembers to the back of the panel where they are less likely to be selected; (4) evidence of a contrast between the prosecutor's "*voir dire* questions posed respectively to black and nonblack panel members" . . . and (5) evidence of a systematic policy or practice within the prosecutor's office of "excluding minorities from jury service."

has not conducted a sua sponte analysis of *Miller-El II* factors, and more specifically, it has engaged in comparative juror analysis only when previously raised by the challenging party.[306] Importantly, the court has not deemed the failure to rebut a proffered reason as a waiver of a *Batson* claim, and it has properly limited waiver to only those instances where the challenging party seeks to raise a *Batson* challenge for the first time on appeal.[307] The Tenth Circuit has largely deferred to the credibility findings of lower courts, holding that credibility is ultimately a factual finding within the province of the trial court.[308] Consequently, the court has yet to apply the Supreme Court's recent holdings in *Snyder* and *Rice.*

2. Practical Application

To prevail on a *Batson* claim in the Tenth Circuit, an objection to the striking party's use of a peremptory strike must be raised before the jury is sworn.[309] The challenging party must establish a prima facie case of discrimination.[310] The prima facie case can be accomplished through facts or circumstances giving rise to an inference of racial discrimination, including evidence similar to that considered in *Miller-El II.*[311] Statistical data may be used if it presents an exclusion rate of one hundred percent.[312] The use of

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Nelson, 450 F.3d at 1207–08 (citations omitted).

306. *See, e.g.*, *Nelson*, 450 F.3d at 1208 (reviewing only those factors raised before the trial court, and noting that, where the voir dire proceedings took place within one day, there was no need for a detailed review of all of the factors on direct appeal).

307. *See* Sawyer v. Sw. Airlines Co., 145 F. App'x 238, 240–41 (10th Cir. 2005) (holding that a failure to raise a *Batson* challenge before the trial court results in waiver).

308. *Nelson*, 450 F.3d at 1207 ("The district court's answer to 'the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal,' because such a finding largely turns on the trial court's 'evaluation of the prosecutor's credibility.'" (quoting United States v. Sneed, 34 F.3d 1570, 1579 (10th Cir. 1994))).

309. *See, e.g.*, *Sawyer*, 145 F. App'x at 240–41 (holding that a failure to bring a *Batson* challenge in the district court constitutes a waiver of the right to bring the challenge on appeal).

310. *See* United States v. Smith, 534 F.3d 1211, 1225 (10th Cir. 2008) (outlining the three steps required by *Batson* for determining whether a peremptory challenge was race-based); *Nelson*, 450 F.3d at 1207 (setting out first step of the *Batson* process).

311. *See* Dungen v Estep, 311 F. App'x 99, 105 (10th Cir. 2009) (discussing the *Miller-El II* factors to be considered); *see also Nelson*, 450 F.3d at 1207 (explaining that the defendant challenging the prosecution's strike may show prima facie discrimination through the totality of the circumstances that raises such an inference).

312. *See* United States v. Abdush-Shakur, 465 F.3d 458, 469–70 (10th Cir. 2006) (conceding that striking the sole minority member from the venire panel may establish a

numerical data, however, should be combined with other factors.[313]

Under step two of *Batson*, the striking party must proffer its race-neutral reason.[314] After this reason has been asserted, the challenging party is not required to rebut it, but rebuttal evidence is advisable to sustain the challenging party's ultimate burden of persuasion.[315] Upon completion of steps one and two, the trial court will consider the totality of relevant circumstances in ruling on the *Batson* claim, but it is not required to provide specific findings regarding a credibility determination.[316]

K. *Eleventh Circuit*

In the past five years, the Eleventh Circuit has divided its focus on *Batson* to determining what constitutes an inference of discrimination and what constitutes purposeful discrimination. Through thoughtful analysis, the court has taken a case-by-case approach to determining whether a *Batson* claim exists. To the extent that a bright line can be drawn from the Eleventh Circuit's decisions, the court seems to be expansively applying *Batson* and its progeny.

1. Analysis of Recent *Batson* Holdings

While questionably holding that *Batson* does not retroactively apply to those "convictions and direct appeals [that] became final before the Supreme Court issued *Batson*,"[317] the Eleventh Circuit

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prima facie showing of discrimination).

313. *See Dungen*, 311 F. App'x at 105 ("[T]he numbers themselves were some evidence of discrimination ... however, ... numbers alone could [not] establish discrimination.").

314. *Nelson*, 450 F.3d at 1207 (setting out the State's burden to bring forth its race-neutral explanation for striking the panelist); *Abdush-Shakur*, 465 F.3d at 469 (describing step two as shifting the burden to the striking party to divulge a non-race-based reason for the strike).

315. *See, e.g.*, *Nelson*, 450 F.3d at 1209 (pointing out that the defendant failed to bring forth any additional evidence to rebut the prosecution's proffered reasons).

316. *See* United States v. Smith, 534 F.3d 1211, 1226 (10th Cir. 2008) (justifying the appellate court's reliance on the trial court's findings of credibility); *Nelson*, 450 F.3d at 1208 (denying the need to exhaustively review the *Miller-El II* factors when the record on direct appeal sufficed).

317. Ferguson v. Sec'y for Dep't of Corr., 580 F.3d 1183, 1215 (11th Cir. 2009) ("[T]he Seventh Circuit found that *Batson* did not establish a new rule under *Teague v. Lane*, and thus would not apply retroactively in capital decisions." (citations omitted) (citing Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion)), *cert. denied*, 130 S. Ct.

has noted that a prima facie case can be established through statistical analysis "where a party strikes all or nearly all of the members of one race on a venire."[318] The statistical analysis must be "coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck."[319]

The Eleventh Circuit has noted that, when race-neutral reasons are provided first, the question of a prima facie case is rendered moot.[320] After race-neutral reasons have been provided, the trial court engages in a credibility determination specific to the reasons provided by the striking party.[321] Although the trial court is not

3360 (2010). In *Teague v. Lane*, the Supreme Court explained its holding in *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam), that "the rule announced in *Batson* should not be applied retroactively on collateral review of convictions that became final before *Batson* was announced." *Teague*, 489 U.S. at 295 (citing *Allen*, 478 U.S. at 258. "[F]inal," as defined by the Supreme Court, means "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Batson v. Kentucky*." *Allen*, 478 U.S. at 258 n.1 (quoting Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965)) (internal quotation marks omitted). Thus, the rule in *Batson* is not applicable to decisions finalized prior to *Batson* where all collateral remedies had been exhausted. *See id.* at 258 ("We conclude that our decision in *Batson* should not be applied retroactively on collateral review of convictions that became final before our opinion was announced.").

318. Powell v. W&W Hauling, Inc., 226 F. App'x 950, 953 n.5 (11th Cir. 2007) (quoting Cent. Ala. Fair Hous. Ctr. v. Lowder Realty, 236 F.3d 629, 637 (11th Cir. 2000)) (internal quotation marks omitted) (finding no prima facie case because statistical analysis did not provide evidence of inference of discrimination); *see also* Parker v. Allen, 565 F.3d 1258, 1271 (11th Cir. 2009) (holding that a combination of statistics and comparative juror analysis may give rise to an inference of discrimination), *cert. denied*, 130 S. Ct. 1073 (2010).

319. United States v. Ochoa-Vasquez, 428 F.3d 1015, 1044 (11th Cir. 2005) (quoting *Lowder Realty*, 236 F.3d at 636–37) (internal quotation marks omitted) (holding that a pattern of strikes can only serve as an inference of discrimination when placed in context of the venire panel); *see also* Presley v. Allen, 274 F. App'x 800, 804–05 (11th Cir. 2008) (limiting the application of statistical data unless the analysis is performed in context).

320. *See* United States v. Campa, 529 F.3d 980, 998 (11th Cir. 2008) (noting that consideration of proffered race-neutral reasons without determining the existence of a prima facie case rendered step one of *Batson* moot); United States v. Edouard, 485 F.3d 1324, 1342–43 (11th Cir. 2007) ("'Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.'" (quoting Hernandez v. New York, 500 U.S. 352, 358 (1991) (plurality opinion))).

321. *See Parker*, 565 F.3d at 1271 ("The reasons stated by the prosecutor provide the only reasons on which the prosecutor's credibility is to be judged." (citing United States v. Houston, 456 F.3d 1328, 1335 (11th Cir. 2006))).

required to conduct a comparative juror analysis, or consider all of the *Miller-El II* factors, it is charged with considering the totality of the circumstances to determine purposeful discrimination.[322] The trial court's credibility determination is given deference by the Eleventh Circuit unless clearly erroneous.[323] In determining whether a trial court's credibility determination is clearly erroneous, the Eleventh Circuit has never engaged in sua sponte comparative juror analysis,[324] but it has considered only the arguments preserved in the record.[325] Notably, the court has refused to defer to a blanket denial of a *Batson* challenge. Instead, the court has applied *Snyder* and *Rice*, requiring an express explanation for denying a *Batson* challenge where the facts point to purposeful discrimination.[326] Thus, through its case-by-case approach to *Batson* claims, the Eleventh Circuit has implicitly applied the Supreme Court's recent *Batson* jurisprudence.

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322. *Id.* ("The credibility of the prosecution's explanation is to be evaluated considering the 'totality of the relevant facts,' including whether members of a race were disproportionately excluded." (quoting *Hernandez*, 500 U.S. at 363)).

323. McNair v. Campbell, 416 F.3d 1291, 1312 (11th Cir. 2005) (looking to the totality of the circumstances to determine whether the denial of a *Batson* challenge was clearly erroneous).

324. *See Houston*, 456 F.3d at 1338–39 (concluding that the challenging party's failure to raise a comparative juror analysis before the trial court precluded its consideration on appeal).

> Houston's attorney contended at oral argument that the Supreme Court's recent decision in *Miller-El* places a duty on the trial court to conduct an independent inquiry into the relevant facts and circumstances bearing on the credibility of the prosecution's stated reasons, including the duty to develop the factual record by questioning the attorneys. We find no basis for such a duty in *Miller-El*.

Id. (footnotes omitted).

325. *McNair*, 416 F.3d at 1312.

> *After a careful review of the record*, we cannot conclude that the totality of the circumstances provides clear and convincing evidence that the state court's finding of the absence of purposeful discrimination was incorrect, nor can we conclude that the court's corresponding factual determination was objectively unreasonable in light of the record before the court. As noted in the preceding discussion, McNair offers virtually no evidence to indicate that the prosecutor's articulated legitimate reasons for the individual strikes were pretextual.

Id. (emphasis added).

326. McGahee v. Ala. Dep't of Corr., 560 F.3d 1252, 1260 (11th Cir. 2009) (holding that the failure of the trial court to indicate whether it had engaged in a credibility determination was one of several factors leading to reversal of a denied *Batson* challenge). "The trial court did not react to the proffer of specific explanations. The trial court gave no indication that it determined whether the defendant had 'established purposeful discrimination.'" *Id.* (quoting Batson v. Kentucky, 476 U.S. 79, 98 (1986)).

2. Practical Application

In establishing a prima facie case under step one in the Eleventh Circuit, an inference of discrimination may be proven through numerical or non-numerical data.[327] If using numerical data, the challenging party must submit evidence of both the exclusion rate and the challenge rate. [328] If relying on non-numerical data, any fact or circumstance that raises an inference of discrimination is sufficient.[329]

If race-neutral reasons are provided prior to establishing a prima facie case, step one is rendered moot.[330] After race-neutral reasons have been proffered, the challenging party should rebut such reasons.[331] Although not required, submitting additional evidence of discrimination—e.g., evidence obtained through comparative juror analysis—helps meet the challenging party's ultimate burden of persuasion.[332] Finally, the trial court should balance the evidence of both sides in assessing credibility.[333] This

327. *See Parker*, 565 F.3d at 1271 (discussing how an inference of purposeful discrimination can arise from comparing similarly situated jurors); United States v. Ochoa-Vasquez, 428 F.3d 1015, 1044 (11th Cir. 2005) (acknowledging that statistical evidence may give rise to an inference of purposeful discrimination).

328. *Ochoa-Vasquez*, 428 F.3d at 1043–44 (requiring statistical information that could be used to implicitly determine the exclusion and challenge rate).

329. *See* Presley v. Allen, 274 F. App'x 800, 804 (11th Cir. 2008) (indicating that a prima facie showing of discrimination can be made by the defendant bringing forth "evidence sufficient to 'give rise to an inference of discriminatory purpose'" which will be considered by the court along with all other relevant information (quoting Johnson v. California, 545 U.S. 162, 168 (2005))); *Houston*, 456 F.3d at 1338 (acknowledging the need to consider comparable attributes of white and black venirepersons to determine whether explanations given for peremptory strikes were pretextual).

330. *See* United States v. Campa, 529 F.3d 980, 998 (11th Cir. 2008) ("We understand the district court to have ruled implicitly that the defendants had made a prima facie showing of racial discrimination because 'a district court cannot ignore the prima facie showing requirement.'" (quoting United States v. Allen-Brown, 243 F.3d 1293, 1297 (11th Cir. 2001))); *Houston*, 456 F.3d at 1335–36 (deciding review was limited to *Batson* steps two and three despite no explicit determination by the trial court that the defendant successfully established a prima facie case of discrimination).

331. *E.g.*, *McGahee*, 560 F.3d at 1263 (stating that the defendant provided "crucial facts" that should have been considered by the appellate court in its analysis during step three).

332. *See* United States v. Edouard, 485 F.3d 1324, 1341 n.6 (11th Cir. 2007) (describing additional types of evidence a defendant may use to make his prima facie case of discrimination in a *Batson* challenge); McNair v. Campbell, 416 F.3d 1291, 1312 (11th Cir. 2005) (considering evidence from the defendant regarding the district attorney's history of reversals based on *Batson*, yet ultimately denying the defendant's *Batson* challenge).

333. *See McGahee*, 560 F.3d at 1261–62 (admonishing the appellate court for failing to take into account "all relevant circumstances" in making its credibility determination).

credibility determination, however, need not be factually intensive.[334]

L. *D.C. Circuit*

The D.C. Circuit has reviewed only one *Batson* claim in the last five years and only one other claim since the *Batson* decision was handed down. As a result, the recent Supreme Court holdings have yet to be applied.

1. Analysis of the Recent *Batson* Holding

In *United States v. Watson*,[335] the only *Batson* claim reviewed in the last five years, the D.C. Circuit held that *Batson* did not apply to disabled individuals.[336] Noting that "the Supreme Court has declined to treat the disabled as a suspect class," the D.C. Circuit refused to engage in a *Batson* analysis.[337] In *United States v. Spriggs*,[338] the Circuit's only other *Batson* decision, the D.C. Circuit in 1996 recognized the three-step *Batson* analysis.[339] Affirming the denial of a *Batson* claim, the court deemed the striking party's proffered reasons more credible than the statistical analysis presented by the challenging party.[340] Thus, the D.C. Circuit has, at a minimum, established the basic framework of *Batson* and has noted the relevancy of statistical analysis. Because

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334. *See Houston*, 456 F.3d at 1338–39 (holding that *Miller-El II* does not require "the trial court to conduct an independent inquiry into the relevant facts and circumstances bearing on the credibility of the prosecution's stated reasons, including the duty to develop the factual record by questioning the attorneys").

335. United States v. Watson, 483 F.3d 828 (D.C. Cir. 2007) (denying a *Batson* challenge).

336. *Id.* at 833 (applying a rational basis of review to determine whether discrimination existed).

337. *Id.* at 832 (noting that "the States may have legitimate reasons for treating differently persons whose disabilities reduce their ability to perform certain functions").

338. United States v. Spriggs, 102 F.3d 1245 (D.C. Cir. 1996) (per curiam) (denying a party's claim after analyzing the strike under step three of *Batson*).

339. *Id.* at 1254–55.

> A *Batson* challenge first requires a prima facie showing of purposeful racial discrimination. The proponent of the strike must then offer a race-neutral explanation, which need not be "persuasive, or even plausible." If such an explanation is offered, the court must decide whether the opponent of the strike has proven purposeful discrimination.

Id. (citations omitted).

340. *Id.* at 1255 ("Appellants say that the Government used two thirds of its strikes on a racial group that constituted only 18% of the panel.").

the court has not had much opportunity to review *Batson* claims, however, a thorough analysis of the court's application of the Supreme Court's recent *Batson* jurisprudence would be premature.

2. Practical Application

Based on the D.C. Circuit's limited *Batson* holdings, to establish a prima facie case, a challenging party should only need to show an inference of discrimination. Given the court's prior recognition of statistical analysis in analyzing *Batson* step three, it appears statistical analysis may be useful in establishing an inference of discrimination. Otherwise, non-numerical evidence that raises an inference of discrimination should be sufficient.

After the striking party proffers a race-neutral reason, the challenging party may rebut it; however, there is no indication that such rebuttal is required in the D.C. Circuit. Upon completing steps one and two, the trial court should evaluate the totality of the evidence to determine the credibility of the proffered race-neutral reason.

IV. CONCLUSION

Striving to protect the fundamental right to equal protection under the law, the deceptively simple *Batson* three-step framework has garnered recent attention from the Supreme Court. The Supreme Court's pronouncements will undoubtedly be further clarified to answer such reappearing questions as:

May statistical analysis alone be used to establish a prima facie showing of discrimination and, if so, at what thresholds?

Does a challenging party have to rebut a proffered race-neutral reason to preserve a *Batson* challenge?

Do trial and reviewing courts have to engage in sua sponte consideration of *Miller-El II* factors?

Does a trial court have to specify factual findings for all credibility determinations?

What standard of review should an appellate court apply in reviewing trial court *Batson* determinations?

The circuit courts have each engaged in a pursuit to determine their own answers, often overlapping in their journey. Nonetheless, it is clear that the circuit courts lack uniformity in the application of *Johnson*, *Miller-El II*, *Rice*, and *Snyder*. Only time will tell whether uniformity will be achieved and how it will affect

the use of peremptory strikes. Until then, it is vital that practitioners recognize their respective Circuit's *Batson* jurisprudence when seeking to preserve their clients' rights under *Batson* and its progeny.