CHAPTER 6
PEREMPTORY CHALLENGES
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I. OVERVIEW

A. PURPOSE – ASSURE FAIR TRIAL BY IMPARTIAL JURY

All accused persons are entitled to be tried by impartial and unbiased jurors and defendants have the right of peremptory challenges. Foreman v. State, 203 Ind. 324, 180 N.E. 291 (1932). The purpose of having peremptory challenges is to give litigants the opportunity to excuse those jurors who, for whatever reason, the lawyers feel would not be fair judges of the cause.

B. CREATED BY STATE STATUTE

Peremptory challenges "are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial." Georgia v. McCollum, 505 U.S. 42, 57, 112 S.Ct. 2348, 2358 (1992).

C. NEED NOT EXPLAIN REASON FOR EXCUSING

The party need not explain the reason for the challenge, except if it appears that the party is discriminating against a person because of the person's membership in a cognizable group, such as race. In such circumstances, it is appropriate to ask the court to require the giving of a race neutral explanation for the exercise of the challenge. See IPDC Trial Manual, Chapter 6 § II.B.3. below.

If it appears to the court that a particular peremptory challenge may have been used in a constitutionally impermissible manner, the court upon its own initiative may: (a) inform the parties of the reasons for its concern; (b) require the party exercising the challenge to explain its reasons for the challenge; and (c) deny the challenge if the proffered basis is constitutionally impermissible. Indiana Jury Rule 18.

D. NUMBER OF PEREMPTORIES

In felony cases, each side has 10. In death penalty and life without parole cases, each side has 20 and in all other criminal trials, each side has 5. Ind. Code 35-37-1-3. Multiple defendants must share the allocated number of strikes; if additional strikes are awarded the court may decide to give the State additional challenges as well. The number of peremptories available is per jury, not per charge. See II.A on page 6-2. Make sure you know the judge's methods and procedures BEFORE Voir Dire Begins.

There are many different methods of exercising peremptory challenges. Some judges require challenges to be exercised orally, some require challenges in writing. Some judges count it against both parties when both submit written challenges to the same juror. Other judges will only count it against one party. Some judges permit "back-striking" and some presume the juror is selected if not challenged at the first opportunity.

E. TO PRESERVE ERROR – EXHAUST ALL PEREMPTORIES

To preserve error concerning an unsuccessful challenge for cause, it is necessary to exhaust all of the peremptory challenges. See IPDC Criminal Trial Manual, Chapter 6 § II.D.4., below.

II. USING PEREMPTORY CHALLENGES

A. AVAILABLITY OF / NUMBER OF PEREMPTORIES

The Indiana Legislature has expressed desire that peremptory challenges be available in all criminal jury trials. Ind. Code § 35-37-1-3. Indiana Trial Rule 47(C) requires peremptory challenges be available to each side. The prosecutor and defense shall have the same number of peremptory challenges available to them. Ind. Code § 35-37-1-4 and Indiana Jury Rule 18(a).

The number of available peremptory challenges is per jury, not per charge. Mitchell v. State, 115 N.E.2d 595, 599 (Ind. 1953).

1. Number of peremptory challenges available

10 peremptory challenges available in non-capital Level 1-5 felonies. Ind. Code § 35-37-1-3(b); Indiana Jury Rule 18(a)(2).

20 peremptory challenges are available in capital and life without parole cases. Ind. Code § 35-37-1-3(a); Indiana Jury Rule 18(a)(1).

5 peremptory challenges are available in all other cases. Ind. Code § 35-37-1-3(c); Indiana Jury Rule 18(a)(3).

2. Judge has discretion to increase number

"Whenever there is a substantial likelihood that, due to pretrial publicity, the regularly allotted number of peremptory challenges is inadequate, the court should permit additional challenges to the extent necessary for the impaneling of an impartial jury." See *ABA Standards for Criminal Justice Fair Trial and Free Press 3d edition*, Standard 8-3.5(c) (1992).

Indiana courts are likely to award additional challenges to both sides, if at all.

3. No federal claim if state judge does not allow defendant to use all peremptory challenges available under state law

In the absence of a showing that a juror was biased or challengeable for cause, a state judge's failure to give a defendant all peremptory challenges provided by state law "is not a matter of federal constitutional concern." Rivera v. Illinois, 129 S.Ct. 1446 (2009).

Practice Pointer: Request additional challenges. Many state and federal courts grant defense more challenges than prosecution. See Fed. R. Crim. Proc. 24(b) (for non-capital felonies 10 strikes for defense and 6 for prosecution). This practice recognized as necessary to protect defendant's right to fair trial. See Van Dyke, *Jury Selection Procedures* (Cambridge, Mass.: Ballinger 1976), 282-83.

B. COURT'S DISCRETION TO DECIDE HOW PEREMPTORIES EXERCISED

1. Subject to reasonable regulation

Right to challenge peremptorily is subject to reasonable regulation by court. Nagy v. State, 505 N.E.2d 434 (Ind. 1987).

McBrady v. State, 459 N.E.2d 719, 722 (Ind. 1984) (court properly denied defendant's exercise of two challenges after jurors had been previously passed by both defendant and State: belated challenges impermissible under local court rule).

Fox v. State, 717 N.E.2d 957, 962 (Ind. Ct. App. 1999) (court's limiting peremptory strikes to before juror has been empaneled was not unreasonable even when defendant discovered juror's relationship with State's witness after juror was empaneled).

2. Court's options

Some options in use by various judges: (1) oral statement from counsel table; (2) oral statement at bench, out of hearing of jury; (3) written challenges (court may decide to count dual challenges for same juror against both sides, or against just one side); (4) sides alternate challenges; (5) if juror passed once, he or she is accepted; and (6) "back-striking" permitted.

Practice Pointer: Request a pre-trial conference to explore how peremptory challenges are to be exercised and counted. This is MANDATORY for all jury trials.

3. Court cannot have blanket policy of demanding justification of every peremptory challenge

(a) Peremptory challenge may be for no cause whatsoever

Peremptory challenge may be for no cause whatsoever. Bond v. State, 403 N.E.2d 812, 816 (Ind. 1980); Pfister v. State, 650 N.E.2d 1198, 1199 (Ind. Ct. App. 1995).

The essential nature of a peremptory challenge is that it be exercised without reason stated, without inquiry and without being subject to the court's control. J.E.B. v. Alabama, 511 U.S. 127, 148, 114 S.Ct.1419, 1431 (1994); Merritt v. State, 488 N.E.2d 340 (Ind. 1986); and Phillips v. State, 496 N.E.2d 87 (Ind. 1986).

Ai-Khuam v. Davis, 339 F.3d 521 (7th Cir. 2003) (Indiana trial court's misapplication of Batson violated defendant's 14th Amendment due process and equal protection rights. Trial court effectively converted peremptories into challenges for cause, violating defendant's substantial and legitimate expectation that he would be tried by a jury selected in accordance with Indiana state law and federal constitutional law, including those provisions guaranteeing his right to exercise peremptory challenges).

(b) Need not provide reasons for excusing juror, absent extraordinary circumstances

Courts should not require each side to present race-neutral justification for each peremptory; Courts should wait for objection by opposing party before deciding whether prima facie case made and demanding race-neutral explanation. Williams v. State, 669 N.E.2d 1372, 1382 (Ind. 1996), *habeas relief granted* at Aki-Khuam v. Davis, 339 F.3d 521 (7th Cir. 2003) (trial court's misapplication of Batson by requiring defendant and prosecutor to give race-neutral explanation for every peremptory challenge violated petitioner's Fourteenth Amendment due process and equal protection rights).

Pfister v. State, 650 N.E.2d 1198 (Ind. Ct. App. 1995) (denial of statutory right and reversible error where court placed burden on defendant to justify every exercise of peremptory challenges; defendant prejudiced by denial of peremptory because defendant did not show "some sort of conjunction to this case.").

However, Indiana Jury Rule 18(d) provides that: "[i]f it appears to the court that a particular peremptory challenge may have been used in a constitutionally impermissible manner, the court upon its own initiative may (a) inform the parties of the reasons for its concern; (b) require the party exercising the challenge to explain its reasons for the challenge; and (c) deny the challenge if the proffered basis is constitutionally impermissible.

(c) Intervention only authorized in exceptional cases

The court's intervention is proper when a prima facie case is abundantly clear with respect to a particular juror and both parties are subject to the same procedure, outside hearing of the jury. Williams v. State, 669 N.E.2d 1372, 1379 (Ind. 1996), *habeas relief granted* at Aki-Khuam v. Davis, 339 F.3d 521 (7th Cir. 2003) (trial court's misapplication of Batson by requiring defendant and prosecutor to give race-neutral explanation for every peremptory challenge violated petitioner's Fourteenth Amendment due process and equal protection rights).

C. TIMING OF PEREMPTORY CHALLENGES

1. Court cannot require party to strike or accept jurors without providing opportunity to consider other party's voir dire

Trial court may impose reasonable limitations on the exercise of peremptory challenges so long as neither party is required to strike or accept the prospective jurors without having had the opportunity to consider the other party's voir dire. Fox v. State, 717 N.E.2d 957, 962 (Ind.Ct.App. 1999).

Phillips v. State, 809 N.E.2d 335 (Ind.Ct.App. 2004) (at conclusion of defendant's voir dire, trial court erred by requiring defendant to either challenge or accept jury as then seated before State conducted voir dire upon venire men selected to replace those excused by defendant).

2. Court can require counsel to exercise peremptory challenges immediately after opposing party's examination, if at all

Marsh v. State, 272 Ind. 178, 396 N.E.2d 883 (1979) (reasonable for court to require defendant to exercise peremptory challenge immediately after having heard examination of prospective juror by the State).

3. Local rules control whether and when counsel can challenge after juror already accepted

Compare:

Wise v. State, 763 N.E.2d 472 (Ind. Ct. App. 2002) (no abuse of discretion in denying defendant's late application to exercise peremptory challenge on juror after he had already been accepted, even though counsel claimed he had inadvertently failed to exercise challenge - whether or not it is written, counsel acknowledged local procedure whereby once both parties have had opportunity to question proposed jurors and respective strikes have been exercised, any juror accepted is not subject to challenge and is ultimately impaneled).

And:

Dora v. State, 783 N.E.2d 322 (Ind. Ct. App. 2003) (no abuse of discretion in permitting State to exercise its second peremptory strike on potential juror that it had originally passed up - even though trial court had local rules in place that stated once party had made peremptory strikes from a panel, party could not go back and strike others, court's procedures are not necessarily inflexible and without exception; rather, whole process is subject to reasonable regulation by court).

4. Cannot use peremptory after jury sworn

Defendants are not entitled to challenge a juror peremptorily after the jury has been sworn. Stevens v. State, 357 N.E.2d 245 (Ind. 1976).

D. USES OF PEREMPTORY CHALLENGES

1. Unfettered right to exercise

Right to peremptory challenges matter of statutory grant which may not be expanded or restricted by judicial interpretation. Castro v. State, 580 N.E.2d 232 (Ind. 1991); Lund v. State, 264 Ind. 428, 345 N.E.2d 826 (1976).

Castro v. State, 442 N.E.2d 1141 (Ind. Ct. App. 1982) (defendant charged with Class D felony and limited to three peremptory challenges; record clearly reflects defendant not permitted to exercise fourth peremptory challenge to which he was entitled - new trial ordered).

(a) Exception – excluding legally cognizable groups

Only exception to counsel's unfettered right to exercise peremptory challenges is limitation on arbitrary use to exclude legally cognizable groups.

(b) Court must permit sufficient inquiry

"The defendants must, upon request, be permitted sufficient inquiry into background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges…Some questions may appear tangential to the trial but are actually so integral to the citizen juror's view of the case, especially one with publicly controversial issues, that they must be explored." United States v. Dellinger, 472 F.2d 340, 368 (7th Cir. 1972) HN 30, 31.

Practice Pointer: Be cautious about using up all peremptory challenges too early in selection process. You may encounter more objectionable jurors.

2. To obtain more representative jury

To obtain more representative jury, defense counsel may try to: (1) create sufficient doubt as to prosecutor's early conduct so judge will disallow any more use of peremptory challenges against group in question; (2) successfully challenge prosecutor's use of peremptory challenges to obtain a new venire; or (3) build the record for appeal.

3. Use where judge denies challenge for cause

Use peremptory challenges on those who are biased but who do not express bias in manner that convinces judge to excuse them.

4. Must exhaust to show defendant subjected to biased panel

Defendant required to exhaust peremptory challenges to show he or she has been subjected to biased panel. Lambert v. State, 643 N.E.2d 349, 352 (Ind. 1994).

E. SPECIAL ISSUES

1. Sharing peremptory challenges – multi-defendant cases

Co-defendants must share peremptory challenges. Ind. Code § 35-37-1-3(d) provides: "When several defendants are tried together, they must join in their challenges."

Peck v. State, 563 N.E.2d 554 (Ind. 1990) (defendant bound by co-defendant's use of two peremptory challenges that he did not agree with: sharing of peremptory challenges not reversible error absent showing of actual prejudice).

(a) Exception - demonstrate actual prejudice

If sharing of peremptory challenges prejudices co-defendants right to a trial by an impartial jury, parties may seek individualized determination of prejudice. Martin v. State, 262 Ind. 232, 317 N.E.2d 430, 432 (1974).

Ind. Code 35-34-1-11 provides for separate trial of defendants joined. Defendant must show that in light of what occurred at trial, denial of separate trial subjected him to actual prejudice. Hicks v. State, 536 N.E.2d 496 (Ind. 1989), *overruled on other grounds by* Ludy v. State, 784 N.E.2d 459, 462 (Ind. 2003).

(b) Not violation of equal protection or separation of powers

Defense gets a total of 10 peremptory challenges, whether lone defendant or co-defendants. Despite dissimilarity of treatment, the statute is not repugnant to equal protection clause or separation of powers.

> Martin v. State, 262 Ind. 232, 317 N.E.2d 430, 432 (1974) (statute granting lone defendant 10 peremptory challenges and co-defendants a total of 10 not invalid as repugnant to doctrine of separation of powers).

Limitation upon peremptory challenges maintains a number at a workable level and avoids waste of judicial resources and undue delay which result from granting each defendant 10 peremptory challenges and then perhaps giving the State an increased number in response. Martin v. State, 262 Ind. 232, 317 N.E.2d 430, 432 (1974).

Legislative decision to limit number of peremptory challenges dictated by need to fashion efficient and expeditious jury selection process and produce impartial jury. These needs are magnified in cases where more than one defendant is to be tried. Martin v. State, 317 N.E.2d 430, 432 (Ind. 1974).

2. State and defendant challenge same juror

Where State and defendant exercised the first two of their peremptory challenges on same prospective jurors, defendant not denied the right to 10 peremptory challenges. Hart v. State, 352 N.E.2d 712, 717 (Ind. 1976).

3. Forced to use peremptory where erroneous denial of challenge for cause

To preserve error, defendant bears the burden of demonstrating *that at the time she challenged the jurors for cause*, she had exhausted her peremptory challenges. Collins v. State, 464 N.E.2d 1286, 1289 (Ind. 1984).

You may have to show prejudice from judge's failure to discharge juror who was properly challenged for cause.

> Campbell v. State, 547 N.E.2d 843, 844 (Ind. 1989) (denial of fair and impartial jury where court refused to excuse juror challenged for cause where juror felt convicted criminals should be placed on fenced-in island in middle of ocean, and had participated in obtaining hundreds of names on petition espousing his views; reversal, even though juror indicated no personal prejudice to defendant and said he could decide guilt or innocence on basis of evidence presented).

Reversible error only if party has exhausted all peremptory challenges at the time the party challenges the juror for cause. Collins v. State, 464 N.E.2d 1286, 1289 (Ind. 1984).

> Collins v. State, 464 N.E.2d 1286, 1289 (Ind. 1984) (no error in denying defendant's challenge for cause for juror Kuzemka, at time challenge denied defendant had seven

peremptories remaining, one of which he used to excuse Kuzemka; defendant accomplished objective he sought).

4. On appeal – waiver if peremptories not exhausted

A new trial is required where the trial court's erroneous denial of challenge for cause forced defendant to use peremptory; defendant exercised all of allotted peremptory challenges and unsuccessfully attempted to use another. Campbell v. State, 547 N.E.2d 843 (Ind. 1989); Chanley v. State 583 N.E.2d 126 (Ind. 1991).

Morse v. State, 413 N.E.2d 885 (Ind. 1980) (defendants waived error on appeal by failing to show exhaustion of their peremptory challenges when alleging error in court's refusal to remove juror for cause).

III. DISCRIMINATORY USE OF PEREMPTORIES PROHIBITED

Federal Equal Protection Clause guarantees parties cannot exercise peremptory challenges in manner that systematically excludes cognizable groups. Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723 (1986), *as modified by* Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 HN 4 (1991); Currin v. State, 669 N.E.2d 976 (Ind. 1996); Cartwright v. State, 962 N.E.2d 1217 (Ind. 2012).

Improper grounds include: (1) race; (2) gender; or (3) others.

A. RACE

Purposeful exclusion of jurors on basis of race through exercise of peremptory challenges is prohibited by Equal Protection Clause. Batson v. Kentucky, 476 U.S. 79, 87, 106 S.Ct.1712, 1718 (1986). Although an individual juror does not have a right to sit on any particular petit jury, he or she does possess the right not to be excluded from a jury on account of race. Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 2349 (1992) (quoting Powers v. Ohio, 499 U.S. 400, 409, 111 S.Ct. 1364 (1991); Nicks v. State, 598 N.E.2d 520 (Ind. 1992)) (any race-based exclusion of jurors forbidden).

Villaruel v. State, 52 N.E.3d 834 (Ind. Ct. App. 2016) (court reversed defendant's convictions for intimidation and battery because trial court refused to engage in Batson analysis after State used peremptory challenge on the venire's only Hispanic, where trial court erroneously observed, "There is no Batson issue for Hispanics").

1. Must assume Black jurors impartial against Black defendant

Equal Protection Clause forbids prosecutor from peremptorily challenging potential jurors based on false assumption Black jurors unable to impartially consider State's case against Black defendant. Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719 (1986).

2. Where prosecutor implies race as a factor

Equal protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror. Benavides v. American Chrome & Chems., 893 S.W.2d 624, 627 (Tex. Ct. App. 1994).

Practice Pointer: Argue violation has occurred where prosecutor *implies* race was a factor.

3. Challenged jurors need not be of same race as defendant

To raise issue juror improperly excluded on basis of race, defendant and juror need not be of same race. Willoughby v. State, 660 N.E.2d 570, 578 (Ind. 1996); Campbell v. Louisiana, 523 U.S. 392, 397-403, 118 S.Ct. 1419, 1423-25 (1998).

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991) (White defendant may challenge prosecutor's striking of Black jurors).

Schumm v. State, 866 N.E.2d 781 (Ind. Ct. App. 2007) (defendant has standing to raise Batson challenge regardless of whether he is of same race as excluded juror).

B. GENDER

Exercise of peremptory challenges on basis of gender is prohibited. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994); Pfister v. State, 650 N.E.2d 1198 (Ind. Ct. App. 1996).

Koo v. State, 640 N.E.2d 95 (Ind. Ct. App. 1994), *disapproved on other grounds by* Floyd v. State, 650 N.E.2d 28, 34 (Ind. 1994) (based on deferential standard of review, cannot conclude court erred in refusing to allow defendant to exclude two prospective women jurors after State alleged defendant demonstrated pattern of striking six of eight women jurors; defendant's explanations for challenging two prospective women jurors were mixture of neutral reasons as well as gender bias).

NOTE: Barring of gender-based peremptory challenges in J.E.B. case does not apply retroactively to cases that became final before new rule announced.

1. May challenge class groups

Rule against purposeful exclusion of potential juror based on gender does not prevent challenge of group or class of people such as nurses or military people, even though it may disproportionately affect men or women. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994).

Other jurisdictions applied Batson to exclusion of any other identifiable group in community that may be subject to prejudice. Nicks v. State, 598 N.E.2d 520 (Ind. 1992).

C. OTHER GROUNDS

Race, national origin, and alienage are suspect classifications and are subject to "strict scrutiny." Prosecutors cannot remove prospective jurors based solely on these grounds. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).

Other classifications such as illegitimacy, gender and religion are "quasi-suspect" and subject to intermediate scrutiny. However, the court in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994), held that the discriminatory use of peremptory challenges based upon gender is subject to strict scrutiny.

If strict scrutiny standard of review applies to gender, arguably, it should apply to illegitimacy and religion.

Davis v. Minnesota, 511 U.S. 1115, 114 S.Ct. 2120 (1994) (although certiorari was denied, Justices Thomas and Scalia posit that because Batson applies to gender it would necessarily include religion and other intermediate scrutiny categories).

1. Religious beliefs

U.S. Supreme Court has not addressed whether other quasi-suspect classification based on religious affiliation comes under Batson.

In Highler v. State, 854 N.E.2d 823 (Ind. 2006), the Indiana Supreme Court held that religious affiliation, like race and gender, is an impermissible basis for striking a prospective juror and violates the juror's right to equal protection of the laws. However, a prosecutor may strike a juror due to his religious occupation that makes him more sympathetic to defendants generally or his religious beliefs that prevent the juror from following the law. If

the prosecutor cites multiple reasons for striking a potential juror, some of which are permissible and others not, a Batson violation is established.

2. Disabilities

Arguably, prosecutor cannot exercise peremptory on basis of disability; it is unlawful to discriminate on basis of mental or physical disability. 42 U.S.C.A. § 12101, *et seq.*

3. Age

Age is not improper basis of challenge. Bigsbee v. State, 975 N.E.2d 415 (Ind. Ct. App. 2012).

D. PRACTICE POINTERS

1. Presumption favors State striking less than two group members

Not likely prosecutor's use of peremptory challenges can be successfully challenged if no more than two members of cognizable group are in venire. Decision to strike one or two people can often be justified.

Morse v. State, 593 N.E.2d 194 (Ind. 1992) (presumption prosecution used peremptory challenges to obtain fair and impartial jury).

2. Group over-represented in venire

If cognizable group statistically over-represented in venire, then try to minimize the number of group members excluded. New venire likely to be less favorable than old in terms of community representativeness.

E. PREPARING FOR VOIR DIRE

These suggestions are from Bruce P. Hackett's and Rob Eggert's Batson: *Prosecutors Always Seem to Have Good Enough Reasons, So What's Left to Litigate?* Presented at the Kentucky Department of Public Advocacy's 23rd Annual Public Defender Training Conference June 4-6, 1995. Reprinted with permission.

(1) Find out how prosecutor and judge conduct voir dire and exercise strikes.

(2) What kind of "neutral" explanations has prosecutor given in other cases? (Use this information to show judge that prosecutor uses same excuses at each trial).

(3) Have someone record race, gender, and physical appearance of each juror. Note each time a juror says something (get attorney, paralegal, law clerk, secretary, or investigator to keep records).

(4) Formulate voir dire questions designed to bring out feelings on race and gender.

(5) Make sure voir dire is recorded.

Practice Pointer: Also consider: (1) composition of initial venire; (2) predicted composition of any new one that might be called; (3) sophistication of prosecutor; (4) court's receptivity to challenges; and (5) attitude of appellate court toward erroneous denial of motion.

F. RECORD DISCRIMINATORY INFORMATION

"Without a record of the voir dire proceedings, we cannot undertake the analysis specified in Batson." McQuay v. State, 566 N.E.2d 542, 543 (Ind. 1991). Indiana Jury Rule 12 provides that, "[u]nless otherwise agreed by the parties, jury selection shall be recorded including all sidebar conferences."

Short v. State, 539 N.E.2d 939 (Ind. 1989) (nothing to support claim of discrimination where transcript of voir dire examination does not reveal racial characteristics of jurors struck by either side, jury questionnaires and peremptory challenge sheets do not contain any information on racial background of jurors, transcript of voir dire does not reveal any objection by defense counsel, and jury accepted by both State and defense without comment).

Practice pointer: Record should include: (1) facts and motivation behind State's challenges. Holifield v. State, 572 N.E.2d 490, 493 (Ind. 1991) (case remanded to conduct full hearing where both sides have opportunity to examine facts and motivation behind peremptory challenges of Black prospective jurors); (2) racial composition of initial group seated and final jury panel sworn; (3) number of peremptory strikes allowed each side; (4) race of those who were struck or excused from jury panel throughout voir dire (on whatever basis); (5) order of strikes; and (6) who exercised strikes.

1. Here's how

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(1) Secure court reporter;

(2) Put on record which jurors belong to protected class;

(3) Before commencing voir dire, request prosecution put on record the body language or non-verbals of jurors: (a) sleeping; (b) inattentive; or (c) cold or distant;

(4) Say to jurors who are members of protected class, "I noticed you were paying close attention during prosecution's voir dire";

(5) Make contemporaneous objection after each of prosecutor's strikes: (a) identify jurors who belong to protected class; (b) responses indicated juror can be fair and impartial; or (c) prosecution struck jurors on basis of race, gender, religion, disability;

(6) Request that you be allowed to cross-examine prosecutor;

(7) Request prosecutor's notes be immediately copied, sealed and made part of record;

(8) Request juror information card and/or questionnaires be made part of record;

(9) Did prosecutor fail to strike similarly situated jurors? (prior record, married, kids);

(10) Request Batson remedy – strike not be allowed.

2. Make contemporaneous objection or move to strike panel

Proper time for objection immediately after peremptory challenges made. Timely objection allows trial court to follow Batson, make determination regarding intent of challenges, and preserves issue for review on appeal. Brown v. State, 417 N.E.2d 333, 338 (Ind. 1981).

Hickman v. State, 515 N.E.2d 511 (Ind. 1987) HN 1 (defendant raised no objection to jury's composition at voir dire or trial and record does not indicate race of excused person, nor does it disclose whether defendant or prosecutor exercised peremptory challenge; first claim of discrimination raised upon appeal and prosecutor had no opportunity to offer neutral explanation).

(a) Set forth specific reason for objection on record

Make sure you are on the record when objecting. Articulate facts that suggest prosecutor used peremptory improperly. Offer evidence and call witnesses.

Weekly v. State, 496 N.E.2d 29 (Ind. 1986) (court cannot require prosecutor to explain his right of peremptory challenges upon defendant's mere objection to jury and unsubstantiated claims of discrimination; only information given in record is that defendant objected to jury, no reason set forth).

(b) Waiver

McQuay v. State, 566 N.E.2d 542 (Ind. 1991) (defense counsel consenting to court reporter's absence during voir dire waives Batson issue).

Chambers v. State, 551 N.E.2d 1154 (Ind. Ct. App. 1990) (failure to make contemporaneous objection to prosecutor's challenges waives Batson claim).

But cf. Addison v. State, 962 N.E.2d 1202 (Ind. 2012) (even though defendant offered no substantive rebuttal to State's race-neutral explanation, Court reviewed defendant's Batson claim for fundamental error, finding State's explanation pre-textual because non-Black potential jurors with similar testimony were not removed and prosecution mischaracterized what removed juror had stated; held, remanded for new trial).

(c) Proper motion: strike panel or mistrial?

Voir dire is not part of trial; proper motion would be to strike or discharge jury panel or to challenge array. Roller v. State, 602 N.E.2d 165, 168 (Ind. Ct. App. 1992).

Minniefield v. State, 539 N.E.2d 464, 466 (Ind. 1989) (error not to grant mistrial at end of voir dire upon prosecutor's inability to give neutral explanation for striking five of six Black venire men);

Isom v. State, 585 N.E.2d 1347 (Ind. Ct. App. 1992) (motion for mistrial appropriate means to challenge purposeful exclusion of jurors based on race but does not preserve issue for appeal).

3. Insist on full hearing

Inquiry by the trial court is required when defendant points out conduct which gives rise to an inference of discriminatory purposes. Rather than speculating, the judge should make an inquiry of the party who exercised the challenge. The appropriate inquiry should include both the inference raised by the objector and the response made to it. Johnson v. California, 546 U.S.162, 125 S.Ct. 2410 (2005).

Insist on as extensive a hearing as necessary. McKinon v. State, 547 So.2d 1254 (Fla. App. 1989).

Practice Pointer: Point out: (1) prosecutor's claims about juror are false; (2) although prosecutor's claims are true, similar claims can be made about non-excluded jurors who are not in cognizable group; and (3) claims about juror, although true, are such irrational reason for striking that they may be pretext for some undisclosed discriminatory reason.

(a) Have prosecutor testify

Defense counsel should have prosecutor testify under oath. Trial court's ruling rests largely on assessment of prosecutor's credibility. Nicks v. State, 598 N.E.2d 520 (Ind. 1992).

Holifield v. State, 572 N.E.2d 490, 494 (Ind. 1991) (prosecutor cross-examined at length by four defense attorneys).

Nettles v. State, 565 N.E.2d 1064, 1068 (Ind. 1991) (police officer testified

peremptory challenge used to strike Black prospective juror because his testimony in previous trial indicated he was prejudiced against State, counsel disputed officer's recollection).

(b) Recall juror for questioning

After prosecutor states apparently neutral explanation for strike, defense has opportunity to make additional comments or present evidence to impeach or rebut explanation. Argue that due process requires you be given opportunity to present any relevant evidence. Recall juror to impeach prosecutor's reason for strike.

This section excerpted from Batson: Prosecutors Always Seem to Have Good Enough Reasons, So What's Left to Litigate? by Bruce P. Hackett and Rob Eggert. Prepared for Kentucky Department of Public Advocacy's 23rd Annual Public Defender Training Conference. June 4 - 6, 1995. Reprinted with permission.

IV. PROVING PURPOSEFUL DISCRIMINATION

Indiana Supreme Court adopted requirements for purposeful racial discrimination found in Batson. Chubb v. State, 640 N.E.2d 44, 49 (Ind. 1994); Brown v. State, 684 N.E.2d 529, 537 (Ind. Ct. App. 1997).

Under Batson jurisprudence: (1) defendant makes out prima facie case of discrimination establishing strikes used in prohibited way; (2) State comes forward with race-neutral explanation for strikes (race-neutral explanation need not be persuasive or plausible); and (3) court decides whether defendant has proved purposeful discrimination. Johnson v. California, 546 U.S.162, 125 S.Ct. 2410, 2416 (2005); Purkett v. Elem, 514 U.S. 1170, 115 S.Ct. 1769, 1770-71 (1995); Douglass v. State, 636 N.E.2d 197, 198-99 (Ind. Ct. App. 1994).

The standard of appellate review is "clearly erroneous," but the appealing defendant wins if he can show just one race-based challenge that should have been upheld under Batson. See Snyder v. Louisiana, 522 U.S. 472 (2008).

A. DEFENDANT MUST MAKE PRIMA FACIE CASE

To show violation of Equal Protection Clause, defendant must show: (1) defendant is member of cognizable group; (2) prosecutor peremptorily challenged members of cognizable group; and (3) these facts and other relevant circumstances raise inference prosecutor excluded venire men due to their membership in that group. Hawkins v. State, 626 N.E.2d 436 (Ind. 1993); Splunge v. State, 526 N.E.2d 977, 980 (Ind. 1988) (*disapproved on other grounds by* Wheeler v. State, 749 N.E.2d 1111, 1114 (Ind. 2001)).

1. Cognizable group

To establish a cognizable group, the challenging party must: (1) show group definable and limited by some clearly identifiable factor; (2) show common thread of attitudes, ideas or experiences run through group; and (3) exist community of interests among members such that group interests cannot be adequately represented if group excluded from jury selection process. United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987).

United States v. Campione, 942 N.E.2d 429, 432-33 (7th Cir. 1991) (reviewing numerous cases from other circuits holding that ethnic groups, such as Italian-Americans, are not necessarily excluded from 'cognizable group' status, but that in each case defendant failed to establish prima facie showing to support such a claim).

United States v. Campione, 942 N.E.2d 429, 433 (7th Cir. 1991) (given examination process available in voir dire, spelling of person's surname is insufficient - standing alone - to show that he or she belongs to a particular ethnic group).

(a) Race

The Supreme Court has expressly recognized African Americans and Latinx under the category of race as a cognizable group for Batson purposes. Hernandez v. New York, 500 U.S. 352, 355 (1991).

Other circuits have extended this to Native Americans and Asian Americans as well, although there aren't any 7thCircuit cases on point. See Kesser v. Cambra, 465 F.3d 351 (9thCir. 2006); U.S. v. Roan Eagle, 867 F.2d 436, 551 (8thCir. 1989); U.S. v. Murillo, 288 F.3d 1126, 1135 (9th Cir. 2002); or U.S. v. Lorenzo, 995 F.2d 1448, 1453-54 (9th Cir. 1993).

Italian Americans are not necessarily considered a "cognizable group" for Batson challenges, although other circuits have held to the contrary. U.S. v. Campione, 942 F.2d 429, 433 (7th Cir. 1991).

The Supreme Court has held that identifiable groups are those historically singled out for discriminatory treatment or different treatment not based on some reasonable classification. Hernandez v. Texas, 347 U.S. 475, 478 (1954). To this end, White men, or "reverse-Batson" challenges have not historically been recognized as a "cognizable group" for Batson purposes, although some lower federal courts have found so.

(b) Gender

Exercise of peremptory challenges on basis of gender is prohibited. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Chimney v. State, 6 S.W.3d 681, 691 (Tex. Ct. App. 1999); and Pfister v. State, 650 N.E.2d 1198 (Ind. Ct. App. 1996).

(c) Age

Age has consistently been rejected as a cognizable group under Batson. See U.S. v. Helmstetter, 479 F.3d 750, 754 (10th Cir. 2007).

(d) Sexual Orientation

Although the Supreme Court has yet to address whether sexual orientation is considered a cognizable class for Batson purposes, many circuits and some states have held that sexual orientation is a cognizable group and have extended Batson to bar challenges based on sexual orientation. People v. Douglas, 22 Cal.App.5th 1162 (2018); SmithKline Beecham Corp. v. Abbott Labs, 740 F.3d 471 (9th Cir. 2014).

(e) Socio-Economic Status

The Supreme Court has held that "daily wage earners" count as a cognizable group for Batson purposes. Thiel v. Souther Pac. Co., 328 U.S. 217, 221-22 (1946).

2. "Other relevant circumstances"

Defendant must show circumstances raise inference prosecutor used challenges to exclude venire member because of race, gender, or other prohibited ground. Circumstances which might give rise to inference of purposeful discrimination: (1) a pattern of strikes against Black juror included in particular venire; and (2) prosecutor's questions and statements during voir dire and in exercising challenges.

Miller-El v. Cockrell, 537 U.S. 322 (2003) (disparate questioning of prospective jurors may indicate that questions are designed to find responses to justify removal of minorities from panel).

Love v. State, 519 N.E.2d 563, 565 (Ind. 1988) (circumstances gave rise to possibility of purposeful discrimination where prosecutor used peremptory challenges to remove two Black prospective jurors after asking one question each: (1) will you hold State to its burden of proof no matter what color defendant?; and (2) can you judge case based on evidence even though you and defendant are Black? Court seated another Black woman, and prosecutor used peremptory to remove her). See also Holifield v. State, 572 N.E.2d 490, 494 (Ind. 1991).

McCormick v. State, 803 N.E.2d 1108 (Ind. 2004) (State used racially based peremptory challenge in stating that only African American venire person on panel would find it difficult "passing judgment on a member of one's own in community"; this racially-based peremptory challenge tainted three other nondiscriminatory reasons State proffered).

Race of the defendant and the victim is also relevant in figuring out if the defendant has made a prima facia for Batson purposes. U.S. v. Stephens, 421 F.3d 503, 515 (7th Cir. 2005).

Note: For excellent analysis of types of evidence used to raise inference of discrimination, see Ex parte Branch, 526 So.2d 609 (Ala. 1987).

3. Based solely on evidence at defendant's trial

Batson standard allows defendant to establish prima facie case solely on evidence concerning prosecutor's exercise of peremptory challenges at defendant's trial. Love v. State, 519 N.E.2d 563, 565 (Ind. 1988).

(a) No showing of systematic exclusion

Batson overruled Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965), to the extent Swain required defendant to show prosecutor exercised peremptory challenges against Black people in case after case in order to make out prima facie case of discrimination. Batson v. Kentucky, 476 U.S. 79 (1986).

Defendant may establish a prima facie case of purposeful racial discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at defendant's trial without showing repeated instances of such discriminatory conduct over a number of cases. Phillips v. State, 496 N.E.2d 87 (Ind. 1986).

Nettles v. State, 565 N.E.2d 1064 (Ind. 1991) (no reversible error, although Black defendant tried by all-White jury as a result of peremptory challenge of prospective juror, as nothing in record indicated State *systematically* removed Black people from jury);

Highler v. State, 834 N.E.2d 182 (Ind. Ct. App. 2005), *summarily aff'd,* 854 N.E.2d 823 (Ind. 2006) (defendant provided no evidence that County jury pools systematically exclude African Americans & there is no requirement that a particular group be represented on every jury as long as system used to choose jurors is impartial & not arbitrary);

Bond v. State, 925 N.E.2d 773 (Ind. Ct. App. 2010) (fact that jury venire was all white and not representative of community did not establish a sixth amendment violation without evidence of systematic exclusion);

Harvey v. State, 621 N.E.2d 362 (Ind. Ct. App. 1993) (absence of Black persons on jury venire did not require granting of Black defendant's motion to strike venire

because defendant presented no evidence of deliberate attempt to exclude certain groups);

Morse v. State, 593 N.E.2d 194 (Ind. 1992) (burden of proof did not shift to State where defendant showed he was Black and that potential venire man was Black, but provided no other evidence to support argument State had engaged in exclusion of potential jurors based on race). See also Barnett v. State, 637 N.E.2d 826 (Ind. Ct. App. 1994).

Harrington v. State, 755 N.E.2d 1176 (Ind. Ct. App. 2001) (although race-neutral explanation was questionable for juror strike, there was no purposeful discrimination in State's use of peremptory strike because two African American jurors remained on panel; state struck potential juror because he was a science teacher and they "like to add things up," and because he had previously worked with learning-disabled students which may have made him more sympathetic to defendant).

Graham v. State, 738 N.E.2d 1096 (Ind. Ct. App. 2000) (where defendant made prima facie showing of racial discrimination by State in exercising its peremptory challenges, trial court erred in not allowing State to give race-neutral reasons for its challenges; defendant met his burden of showing prima facie evidence of discrimination by showing that State had used peremptory strikes against only two African American potential jurors and there was only one other person on panel who was not Caucasian).

Note: Dissenting opinion in Morse, above, asserts majority of court committed federal constitutional error, because Batson v. Kentucky wrote the word "systematic" out of equal protection law. Prima facie showing all that is required to cast burden on State to give neutral grounds. Pattern of strikes or voir dire examination may suffice to raise this initial, necessary inference of purposeful discrimination. Because the prosecutor gave his reasons during federal habeas proceedings, the misstep in Morse "presented nothing more than a no-harm, no-foul situation." Morse v. Hanks, 172 F.3d 983, 985 (7th Cir. 1999).

4. Relationship between number of challenges and number of jurors in cognizable group

(a) Peremptory challenge to remove only member(s) of cognizable group sufficient to raise inference of discrimination

Indiana courts have held that removal of the only prospective juror of a cognizable group raises an inference of discrimination. McCants v. State, 686 N.E.2d 1281, 1284 (Ind. 1997).

McCants v. State, *supra* (removal of only prospective Black juror from panel of 18 prospective jurors raised inference of discrimination). See also Forrest v. State, 757 N.E.2d 1003, 1005 (Ind. 2001); Ashabraner v. Bowers, 753 N.E.2d 662, 667-68 (Ind. 2001) (prima facie case of racial discrimination shown by fact that only Black venire man was removed by peremptory challenge even though juror gave neutral answers similar to answers given by other venire men who were not removed);

McBridge v. State, 785 N.E.2d 312, 315-16 (Ind. Ct. App. 2003) (removing only member of particular race, let alone only two members, raises inference of discrimination and neutral explanation must be shown by State). See also Jones v. State, 859 N.E.2d 1219 (Ind. Ct. App. 2007). But cf. Lindsey v. State, 916 N.E.2d 230 (Ind. Ct. App. 2009), *trans. denied* (removal of Black juror does not, by itself, raise inference of racial discrimination); and Boney v. State, 880 N.E.2d 279 (Ind. Ct. App. 2008), *trans. denied* (prosecutor provided race-neutral reason; reviewing court

will not infer pretext from prosecutor's failure to strike White jurors for the same reason he struck Black jurors)

Holifield v. State, 572 N.E.2d 490, 493 (Ind. 1991) (peremptory challenges to remove only three Black prospective jurors sufficient to raise inference of discrimination).

Robertson v. State, 9 N.E.3d 765 (Ind. Ct. App. 2014) (trial court erred in overruling defendant's Batson challenge because the State's peremptory challenge of the only Black member of the venire established a prima facie case of racial discrimination).

(b) One juror from cognizable group remaining after voir dire does not negate claim of discrimination, but is factor to consider

Inquiry of facts and circumstances giving rise to indication of purposeful race discrimination will not be narrowed simply because final jury includes one or more Black jurors. However, number of Black jurors remaining after voir dire is at least one factor in determination. Andrews v. State, 588 N.E.2d 1298 (Ind. Ct. App. 1992). Removal of most, but not all minority jurors by use of peremptory challenges does not by itself show discriminatory intent. Phillips v. State, 496 N.E.2d 87, 88-89 (Ind. 1986).

Minniefield v. State, 539 N.E.2d 464 (Ind. 1989) (although one Black juror remained on jury, prosecutor's use of peremptory challenges against five Black and only one White prospective jurors raised inference of racially discriminatory intent).

Practice Pointer: If the prosecution challenges all Black prospective jurors but one, counsel should argue that Phillips and Sutton v. State, 562 N.E.2d 1310 (Ind. Ct. App. 1990) (no prima facie showing of discrimination where two Black prospective jurors challenge and one left on jury) have been overruled by more recent cases, such as those listed in subsection (1), *supra*. Phillips and Sutton were based on presumption that removal of two or three Black jurors, standing alone, does not raise inference of discrimination, and that holding has been overruled by McCants, McBridge, *et al.* Those cases, along with Minniefield, *supra*, provide convincing argument that if multiple prospective jurors of one race are removed and only one remains, defendant has shown prima facie case of discrimination.

5. Prosecutor's "justifications" part of defendant's prima facie case

Prosecutor's "justifications" can constitute part of defendant's prima facie case. Nicks v. State, 598 N.E.2d 520 (Ind. 1992).

6. Examples – failure to establish prima facie case

Use of peremptory challenges to exclude Black people does not, by itself, raise inference of purposeful discrimination. Roach v. State, 624 N.E.2d 524 (Ind. Ct. App. 1993).

Hawkins v. State, 626 N.E.2d 436 (Ind. 1993) (no prima facie case where prosecutor stated juror's long-standing acquaintance with defendant and defendant's family, and record shows at time State attempted to exclude juror, other African Americans remained in venire; no other facts or circumstances in record support inference that State's peremptory challenge purposefully discriminatory).

Andrews v. State, 588 N.E.2d 1298 (Ind. Ct. App. 1992) (failure to make prima facie case where jury deciding defendant's case included two Black jurors; other facts and circumstances fail to suggest racial discrimination: five out of 35 prospective jurors were Black; one Black juror excused for cause and two peremptorily challenged, remaining peremptory challenges used to exclude White jurors; questions posed on voir dire to and

responses given by peremptorily challenged White jurors were essentially same questions posed to and responses given by peremptorily challenged Black jurors).

Boney v. State, 880 N.E.2d 279 (Ind. Ct. App. 2008) (reviewing court will not infer pretext from prosecutor's failure to strike White jurors for the same reason he struck Black jurors).

B. STATE MUST EXPLAIN CHALLENGE

Once prima facie showing has been established, burden shifts to State to present explanation for challenging such jurors. Batson v. Kentucky, 476 U.S. 79, 97 (1986); Hawkins v. State, 626 N.E.2d 436, 440 (Ind. 1993). One invalid explanation for the peremptory strike will taint any valid explanations given. McCormick v. State, 803 N.E.2d 1108 (Ind. 2004).

If defendant fails to show facts and other relevant circumstances to raise an inference of purposeful racial discrimination, the burden of providing neutral explanation does not shift to the prosecutor. Douglass v. State, 636 N.E.2d 197, 198 (Ind. Ct. App. 1994).

1. Explanation must be facially valid

Prosecutor's explanation for peremptorily striking juror will be deemed race neutral, unless discriminatory intent inherent in explanation. Willoughby v. State, 660 N.E.2d 570, 578 (Ind. 1996).

Flowers v. Mississippi, 139 S.Ct. 2228 (2019) (considering all relevant facts and circumstances taken together, trial court at defendant's sixth trial for murder committed clear error in concluding the State's peremptory strikes of Black prospective jurors were not motivated in substantial part by discriminatory intent).

(a) Clear and reasonably specific explanation

Indiana Supreme Court held explanation must give clear and reasonably specific reasons for exercising peremptory. (Test taken from Batson v. Kentucky, 476 U.S. 79, 98 n.20 106 S.Ct. 1712, 90 L.Ed.2d 69, 88 (1986)).

Williams v. State, 669 N.E.2d 1372, 1380 (Ind. 1996) (explanation relying on "impressions" without reference to particular answer or action does not meet standard of "clear and reasonably specific" explanation).

Aki-Khuam v. Davis, 339 F.3d 521 (7th Cir. 2003) (trial court's misapplication of Batson by requiring defendant and prosecutor to give race-neutral explanation for every peremptory challenge violated petitioner's Fourteenth Amendment due process and equal protection rights).

Miller-El v. Dretke, 545 U.S. 231 (2005) (Supreme Court reversed murder conviction finding that purported race neutral explanations accepted by state trial and appellate courts were a sham and not entitled to deference).

(b) Not persuasive or plausible

U.S. Supreme Court backed away from Batson test, holding race-neutral explanation need not be persuasive or plausible, but only valid on its face. Purkett v. Elem, 514 U.S. 765115 S.Ct. 1769 (1995).

Note: Persuasiveness of reason or possibility of pre-textual exclusion becomes relevant at the third step. Purkett v. Elem, 514 U.S. 765 (1995).

Brown v. State, 751 N.E.2d 664, 668-9 (Ind. 2001), *overruled in part on other grounds*, D.M. v. State, 949 N.E.2d 327 (Ind. 2011) (prosecutor's reason for striking

African American juror need not rise to level of justifying challenge for cause or even be "particularly persuasive").

2. More than mere denial – must relate to case

Prosecutor's explanation must relate to particular case to be tried but need not rise to level justifying exercise of a challenge for cause. Weekly v. State, 496 N.E.2d 29, 31 (Ind. 1986); Boney v. State, 880 N.E.2d 279 (Ind. Ct. App. 2008).

Explanation must be more than a mere denial of discriminatory motive. Love v. State, 519 N.E.2d 563, 565 (Ind. 1988).

Stamps v. State, 515 N.E.2d 507, 509 (Ind. 1987) (explanation wholly failed to provide sufficient particulars explaining any neutral basis for challenges where prosecutor stated he "did not believe it would be appropriate to have these individuals on the jury," and that "[i]t had nothing to do with their race."; defendant did not demonstrate inference that potential jurors were excluded because of race).

3. Invalid race neutral reasons

Explanations that have a disproportionate effect may be invalid when they are proxies for discrimination or unrelated to the case. Williams v. Chrans, 957 F.2d 487 (7th Cir. 1992) (prosecutor's explanation that excluding Black jurors because of their home or place of work being within a gang area has the disproportional impact of excluding for such a reason, absent gang involvement in the case).

(a) Prosecutor "unsure" whether juror wants to accept responsibility for making decision

Evans v. State, 566 N.E.2d 1037, 1040 (Ind. Ct. App. 1991) (court denied peremptory challenge where prosecutor indicated he was "unsure whether Mr. Young [juror] feels like or wants to accept the responsibility of making a decision in this case.").

(b) Reasons will become apparent during course of trial, or for strategy purposes

Minniefield v. State, 539 N.E.2d 464, 466 (Ind. 1989) (error in not granting mistrial at end of voir dire, prosecutor struck five Black venire men and unable to give neutral explanation other than reasons would become apparent in course of trial; also, error in not granting mistrial at close of evidence after prosecutor gave race-based explanation, he said he struck Black jurors because he was not certain how they might be affected by racist jokes found in victim's pant pocket; facts raise inference prosecutor excluded five Blacks because of race).

(c) Prosecutor "had his reasons as a lawyer"…"persons not of type State wanted to have"

Andrews v. State, 588 N.E.2d 1298, 1300 (Ind. Ct. App. 1992) (prosecutor failed to give neutral reasons where he said challenges not based on race of juror, that he had his own reasons as a lawyer, and persons were not type of juror State wanted to have).

(d) Nervousness/demeanor with no findings on record

Snyder v. Louisiana, 522 U.S. 472, 128 S.Ct. 1203 (2008) (in addressing prosecutor's assertion that struck juror seemed nervous during voir dire, court noted that trial judge made no reference to demeanor or nervousness and simply allowed strike without explanation).

Roach v. State, 79 N.E.3d 925 (Ind. Ct. App. 2017) (remand was required for trial court to make findings regarding prosecutor's demeanor-based reason for striking Black

prospective juror).

United Rentals N. Am., Inc. v. Evans, 608 S.W.3d 449 (Tex. App. 2020) (prosecutor's statement that he didn't like venireman's "attitude, his demeanor" were pretextual when his verbal answers failed to show hostility, and prosecutor "never mentioned any specific body language, or any other non-verbal actions which led him to believe the venireman was biased against his case").

(e) Single mother living on public aid without reliable babysitter

Undecided whether exclusion of single mother with six-month-old baby who was living on public aid and had no reliable babysitter constitutes purposeful discrimination. Roach v. State, 624 N.E.2d 524, 525 (Ind. Ct. App. 1993).

4. Valid race-neutral reasons

(a) Difficulty sitting in judgment of another

Race-neutral reason where juror acknowledges she would find it difficult to sit in judgment of another person. Taylor v. State, 615 N.E.2d 907, 912 (Ind. Ct. App. 1993); Williams v. State, 830 N.E.2d 107, 110-11 (Ind. Ct. App. 2005).

(b) Previous involvement with criminal justice system -prospective juror or family member

Challenged prospective juror or family member has had previous involvement with criminal justice system. Nicks v. State, 598 N.E.2d 520, 523 (Ind. 1992).

Cartwright v. State, 962 N.E.2d 1217 (Ind. 2012) (potential juror or an immediate family member had been charged with or convicted of a crime); Cornell v. State, 139 N.E.3d 1135 (Ind. Ct. App. 2020).

McCants v. State, 686 N.E.2d 1281(Ind. 1997) (facially race-neutral explanation where juror had previously served on criminal panel & voted to acquit & that juror spends her spare time watching soap operas).

Willoughby v. State, 660 N.E.2d 570, 578 (Ind. 1996) (race neutral explanation where prosecutor explained he used peremptory challenge to strike Black juror because juror had "three or four brothers who have criminal records that are known throughout" the county).

Thorne v. State, 519 N.E.2d 566, 567 (Ind. 1988) (valid, non-racial basis for exercising peremptory where juror "had been up state", was currently on probation, and doubted his own ability to judge case; record reveals juror could permissibly have been excused for cause).

Douglas v. State, 636 N.E.2d 197, 199 (Ind. Ct. App. 1994) (State articulated legitimate reason by explaining prospective juror's child had been prosecuted and prospective juror "uncomfortable" with prosecutor's decision to file charges).

Felkner v. Jackson, 131 S.Ct. 1305 (2011) (prosecutor gave a race neutral reason for a challenge by stating that the juror said she was a social worker who had interned at the county jail).

Gray v. State, 871 N.E.2d 408 (Ind. Ct. App. 2007) (prosecutor gave a race neutral reason by stating juror was struck because she was an employee of a state agency and the State had investigated and charged a number of people working at the agency).

(c) Prospective juror knows defendant or defendant's family

Daniel v. State, 582 N.E.2d 364, 372 (Ind. 1991) (race-neutral and sufficiently non-pretextual where prosecutor struck juror who claimed defendant looked familiar and "was trying to figure out where I know him from.").

Taylor v. State, 615 N.E.2d 907, 912 (Ind. Ct. App. 1993) (valid race-neutral reasons where potential juror admitted she knew defendant's family and she would find it difficult to sit in judgment of another person; no error in overruling defendant's objection).

Patterson v. State, 729 N.E.2d 1035, 1049 (Ind. Ct. App. 2000) (explanation that prospective juror knew defendant was neutral reason).

Isom v. State, 585 N.E.2d 1347, 1351 (Ind. Ct. App. 1992) (sufficient race-neutral reasons where one potential juror acquainted with defendant, and other struck venire man had prior involvement with criminal justice system and criminal history; no error in sustaining prosecutor's challenges to only two Black venire members).

(d) Social worker acquainted with defendant's family

Daniel v. State, 582 N.E.2d 364, 372 (Ind. 1991) (reason sufficient where State struck potential juror because he was social worker acquainted with members of defendant's family who were in courtroom).

(e) Knows co-defendant in related case

Atkins v. State, 561 N.E.2d 797, 800 (Ind. Ct. App. 1990) (valid reason to exclude prospective juror because members of her family had knowledge of and had made statements concerning co-defendant's family).

(f) Difficulty following proceedings and passing judgment

Cartwright v. State, 962 N.E.2d 1217 (Ind. 2012) (trial court erred in finding defendant did not make prima facie case re: Black juror State struck but State offered race-neutral explanations; potential juror had health issues, did not want to serve on the jury, and was not a good listener; also, he or an immediate family member had been charged with or convicted of a crime).

Nicks v. State, 598 N.E.2d 520, 523 (Ind. 1992) (reasons sufficient to negate claim of discriminatory intent where prosecutor explained he challenged juror because juror had difficulty following proceedings and had indicated moral reservations regarding passing judgment on others).

Forrest v. State, 757 N.E.2d 1003, 1005 (Ind. 2001) (trial court did not err in finding neutral reason where prosecutor argued in part that prospective juror had had only 45 minutes rest night before).

Jones v. State, 859 N.E.2d 1219 (Ind. Ct. App. 2007) (juror properly struck because she stated she could not convict someone based on testimony alone).

Childress v. State, 96 N.E.3d 632 (Ind. Ct. App. 2018) (adequate race-neutral explanation where prospective juror insisted that beyond a reasonable doubt meant no doubt).

(g) Juror's age

It is well-settled that age is not an impermissible basis for using a peremptory challenge. Price v. State, 725 N.E.2d 82 (Ind. 2000).

Bigsbee v. State, 975 N.E.2d 415 (Ind. Ct. App. 2012) (State struck older African

American man from panel because he seemed confused and to be asleep at one point and struck 18-year-old African American woman because she did not think there was a drug problem in the area).

(h) Juror's spouse acquainted with reformatory personnel

Holifield v. State, 572 N.E.2d 490, 493-94 (Ind. 1991) (in case where inmate had been attacked by four other inmates, prosecutor offered race neutral reason by saying it was bad policy to have prospective juror pass on guilt or innocence of inmates when her husband repaired telephones inside reformatory and had become acquainted with reformatory personnel).

(i) Juror's perceived bias against State

Nettles v. State, 565 N.E.2d 1064, 1068 (Ind. 1991) (policeman said prospective juror excluded because of testimony in previous trial, his testimony not consistent and indicated he believed police were wrong in that case; defense counsel disputed policeman's recollection of juror's former testimony, but nothing in record indicates challenge not based upon prospective juror's perceived bias against State).

Forrest v. State, 757 N.E.2d 1003, 1005 (Ind. 2001) (trial court did not err in finding neutral reason where prosecutor argued in part that prospective juror appeared to favor defense counsel because she "responded very well" to jokes defense counsel told during voir dire).

Williams v. State, 818 N.E.2d 970 (Ind. Ct. App. 2004) (sufficient race-neutral explanation for peremptory strike where prospective juror appeared too jovial by laughing and joking considering seriousness of charges, and fact State did not use peremptory challenges on other African Americans).

Jones v. State, 859 N.E.2d 1219 (Ind. Ct. App. 2007) (juror struck because of what State felt was an indifferent attitude "regarding temporal justice" on juror's part; defendant offered no argument as to why State's explanation for striking juror should be disbelieved and found to be pretext, masking a discriminatory intent for State).

Felkner v. Jackson, 131 S.Ct. 1305 (2011) (race neutral reason for challenge where juror said he had been stopped frequently by the police because of his race and age).

United States v. Elizondo, 21 F.4th 453 (7th Cir. 2021) (Black prospective juror's negative past experiences with law enforcement was sufficient race-neutral reason for peremptory strike).

Pinkston v. State, 821 N.E.2d 830 (Ind. Ct. App. 2004) (juror stated that she was the only African American on this jury and that she felt like she had a duty to protect defendant from the other jurors).

Rice v. Collins, 126 S.Ct. 969 (2006) (race neutral reason to strike juror who rolled her eyes in response to a question from the trial court).

(j) Juror familiar with prospective defense witness

Explanation satisfactory to rebut presumption of purposeful racial discrimination where potential juror removed due to familiarity with minister designated as prospective defense witness. Chubb v. State, 640 N.E.2d 44, 50 (Ind. 1994).

(k) Attorney-client relationship

Attorney-client relationship legitimate reason to challenge prospective juror. Within court's discretion to determine juror's competence upon challenge.

Williams v. State, 507 N.E.2d 997, 998 (Ind. Ct. App. 1987) (existence of attorney-client relationship neutral explanation where State challenged potential juror because she had been represented by defendant's attorney).

(l) Curt answers and wouldn't make eye contact

Pfister v. State, 650 N.E.2d 1198, 1199-1200 (Ind. Ct. App. 1995) (satisfactory race-neutral explanation where prospective juror removed because "very curt with his answers" and would not look defendant nor attorney "in the eye").

Palmer v. State, 654 N.E.2d 844, 846 (Ind. Ct. App. 1995) (satisfactory explanation where State said prospective juror was musician and would not make eye contact).

Lindsey v. State, 916 N.E.2d 230 (Ind. Ct. App. 2009) (State's reason for strike was facially race-neutral where prosecutor noted that juror sat stone-faced, seemed uninvolved in process & was using his Blackberry during voir dire).

Williams v. State, 818 N.E.2d 970 (Ind. Ct. App. 2004) (no error in allowing peremptory strike based on prospective juror's dismissive attitude and fact State did not use peremptory challenges on other African Americans).

(m) "Lawyer's experienced hunches and educated guesses"

"In Pfister v. State, 650 N.E.2d 1198, 1199-1200 (Ind. Ct. App. 1995), we agreed that the reason for the removal of a juror may well be based upon the juror's "bare looks and gestures," or often may be for reasons the attorney cannot state beyond the lawyer's "experienced hunches and educated guesses." Palmer v. State, 654 N.E.2d 844, 847 (Ind. Ct. App. 1995).

(n) Previously served on criminal jury

Prior jury service sufficiently race-neutral explanation to overcome prima facie showing of racial discrimination. Currin v. State, 669 N.E.2d 976, 978 (Ind. 1996).

(o) Not serious during voir dire & predisposed against death penalty

Thaler v. Haynes, 130 S.Ct. 1171 (2010) (trial court properly accepted prosecutor's explanation that a peremptory challenge was made because a prospective juror was humorous and not serious during voir dire and had a predisposition against the death penalty).

C. JUDICIAL INQUIRY

Once State has come forward with a race-neutral explanation for the peremptory challenge, the trial court must then determine whether defendant established purposeful discrimination. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986); Chubb v State, 640 N.E.2d 44, 49 (Ind. 1994).

"[T]rial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against Black jurors." Stamps v. State, 515 N.E. 2d 507, 510 (Ind. 1987).

1. If circumstances raise possible inference that challenge was based on racial bias, trial judge should not speculate

Inquiry by the trial court is required when defendant points out conduct which gives rise to an inference of discriminatory purposes. Rather than speculating, the judge should make an inquiry of the party who exercised the challenge. The appropriate inquiry should include both the inference raised by the objector and the response made to it.

Johnson v. California, 546 U.S. 162, 125 S.Ct. 2410 (2005) (practice of requiring an objector to show "that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias", before a Batson inquiry is required does not pass constitutional muster).

2. Assessment of credibility of witnesses and prosecutor

Resolution of a Batson issue is purely factual and will turn largely on assessing the credibility of both the witnesses and prosecutor. Nicks v. State, 598 N.E.2d 520, 523 (Ind. 1992).

Splunge v. State, 526 N.E.2d 977, 980 (Ind. 1988) *disapproved on other grounds by* Wheeler v. State, 749 N.E.2d 1111, 1114 (Ind. 2001) (prosecutor opined juror did not exhibit sufficient comprehension of standard of proof; judgment for court to make).

Roach v. State, 79 N.E.3d 925 (Ind. Ct. App. 2017) (remanded to trial court to assess credibility of demeanor-based explanation for peremptory challenge against Black juror).

Richardson v. State, 122 N.E.3d 923 (Ind. Ct. App. 2019) (trial court, who was in the best position to consider stricken juror's demeanor and parties' argument and credibility did not clearly err in denying defendant's Batson challenge).

3. Doubts resolved in favor of accused

If court has doubts about whether defense showed *prima facie* case, court should resolve doubt in favor of complaining party. Sampson v. State, 542 So.2d 434 (Fla. App. 1989).

4. Prosecutor's invalid explanation for peremptory strike taints any valid explanations

Regardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with purpose of Batson and taints entire jury selection process.

McCormick v. State, 803 N.E.2d 1108 (Ind. 2004) (applying a "tainted" approach and rejecting the "dual motivation" analysis in Batson context, court held that State's impermissible racially based peremptory challenge tainted any nondiscriminatory reasons it may have proffered; thus, State failed to meet its burden under second prong of Batson to come forward with race-neutral explanation for its peremptory strike).

5. Factors showing pretext

Presence of any of factors below tends to show State's reasons either impermissible pretext or unsupported by record:

(1) reason given not related to facts of case;

(2) lack of questioning to challenged juror, or lack of meaningful questions;

(3) persons with same or similar characteristics as challenged juror not struck;

(4) questioning challenged juror so as to evoke certain response without asking same question of other panel members; and

(5) explanation based on group bias where group trait not shown to apply to challenged juror specifically.

See Whitsey v. State, 796 S.W.2d 707, 713 (Tex. Crim. App. 1989); Smith v. State, 814 S.W.2d 858, 860-61 (Tex. App. 1991).

Further, other factors may include:

- History of discriminatory strikes by the responding party. Miller-El v. Dretke, 545 U.S. 231 (2005).
- Strike proponent's demeanor. Hernandez v. New York, 500 U.S. 352 (1991).
- Implausible or fantastic explanations. Purkett v. Elem, 514 U.S. 765 (1995).
- Whether the proffered rational has some basis in accepted trial strategy. Miller-El v. Dretke, 545 U.S. 231 (2005).
- Number and pattern of strikes. Miller-El v. Dretke, 545 U.S. 231 (2005).
- Use of "laundry list" explanations. Foster v. Chatman, 136 S.Ct. 1737 (2016).

People v. Richie, 217 A.D.2d 84, 635 N.Y.S.2d 263 (1995) (consider: (1) whether particular questions were asked of only one group of jurors, and not of others; (2) whether particular reason was applied to only one group of jurors and not to others; and (3) whether reason proffered was based upon "hard data" or was purely intuitive);

Snyder v. Louisiana, 522 U.S. 472 (2008) (prosecutor's proffered excuses were implausible where judge made no finding regarding juror's nervousness and record revealed that prosecutor did not strike other prospective jurors who are White, even though they expressed similar concerns about missing work due to jury service; pre-textual explanation for strike gave rise to inference of discriminatory intent). See also Killebrew v. State, 925 N.E.2d 399 (Ind. Ct. App. 2010).

6. Comparative Juror Analysis

Following the Supreme Court's opinion in Snyder v. Louisiana, 522 U.S. 472 (2008), many courts have begun using the comparative juror analysis method for determining Batson issues during step 3. Comparative juror analysis involves a side-by-side comparison of similarly situated jurors. Miller-El v. Dretke, 545 U.S. 231 (2005). However, similarly situated jurors are not identical in all respects, so an exact match is not required *per se*. Id. If the reason for a strike applies just as well to an otherwise similar juror, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. Id.

7. After party offers explanation and court rules, prima facie showing moot

Issue of *prima facie* showing is moot once party offers neutral explanation for strikes and court rules on ultimate question of discrimination. Koo v. State, 640 N.E.2d 95 (Ind. Ct. App. 1994), disapproved on other grounds by Floyd v. State, 650 N.E.2d 28, 34 (Ind. 1994) See also Pfister v. State, 650 N.E.2d 1198 (Ind. Ct. App. 1996).

McCormick v. State, 803 N.E.2d 1108, 1111 (Ind. 2004) (once the striking party gives an explanation for the strike, any issue about whether objecting party actually made out a prima facie case is moot).

8. Circumstances where explicit findings are required

Generally, a court is not required to make explicit findings in ruling on a Batson challenge. Addison v. State, 962 N.E.2d 1202, 1210 (Ind. 2012). However, when an explanation rests on a prospective juror's demeanor, some circumstances require a judge to explicitly find the explanation is credible. Snyder v. Louisiana, 552 U.S. 472, 485-86 (2008). Snyder required such a finding because the prospective juror was one of dozens the lawyers questioned and

was not challenged until the next day, making it reasonably possible the trial judge might not have remembered the juror's demeanor. Even in cases where the State seeks to peremptorily strike a potential juror based partially on the juror's demeanor and the defense raises a Batson challenge, trial courts are encouraged to make factual findings regarding its observations of the juror's demeanor when making its ruling. Whitfield v. State, 127 N.E.3d 1260 (Ind. Ct. App. 2019).

Blackmon v. State, 47 N.E.3d 1225 (Ind. Ct. App. 2015) (in denying defendant's Batson challenge, trial court was not required to explicitly find that the prosecutor's race-neutral explanation was credible, even where his other explanation raised an inference of discriminatory intent, because he would have struck the juror based on the race-neutral explanation alone; unlike in Snyder, voir dire occurred within one morning and there were only fourteen panelists).

Richardson v. State, 122 N.E.3d 923 (Ind. Ct. App. 2019) (Crone, J., reluctantly concurring in result with separate opinion urging Indiana Supreme Court to require trial courts to make explicit findings when prosecution justifies a peremptory strike based on a juror's demeanor, "to promote both fairness and judicial economy").

Whitfield v. State, 127 N.E.3d 1260 (Ind. Ct. App. 2019) (trial court had a "sound basis" for rejecting defendant's Batson challenge to prosecutor's peremptory challenge to a venireperson based on her race, even without a specific finding on the demeanor-based reasons for the strike).

9. Finding accorded great deference

Trial court's finding accorded great deference on appeal. Batson v. Kentucky, 476 U.S. 79 98 n.21, 106 S.Ct. 1712, 1724 n.21 (1986); Splunge v. State, 526 N.E.2d 977, 980 (Ind. 1988), (disapproved on other grounds by Wheeler v. State, 749 N.E.2d 1111, 1114 (Ind. 2001).

Snyder v. Louisiana, 522 U.S.472 (2008) (clarifying that standard of appellate review is "clearly erroneous," but appealing defendant wins if he can show just one race-based challenge that should have been upheld under Batson; here, prosecutor's reasons for striking Black juror were unsupported in record and deference to trial judge was not appropriate because he granted the challenge without explanation).

Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317 (2005) (Supreme Court reversed murder conviction finding that purported race neutral explanations accepted by state trial and appellate courts were a sham and not entitled to deference. Court considered statistical analysis of race of jurors stricken, the nature of the different questions asked of different-race prospective jurors, a jury selection manual outlining reasoning for excluding minorities from jury service and practice of prosecutors noting race of prospective jurors as demonstrative of a race-based selection process by prosecution). See also Collier v. State, 959 N.E.2d 326 (Ind. Ct. App. 2011).

Cf. Rice v. Collins, 546 U.S. 333 (2006) (under Anti-Terrorism and Effective Death Penalty Act of 1996, a federal reviewing court must presume that trial court's factual findings were correct; federal court is not free to substitute its judgment as to the facts, absent clear and convincing evidence that state court's finding was erroneous).

Before appellate court finds error in trial court rejecting peremptory challenge, necessary to conclude defense counsel's neutral explanation was sufficiently *clear and reasonably specific explanation* of counsel's legitimate reasons for exercising challenge that it overcomes great deference. Williams v. State, 669 N.E.2d 1372, 1379-80 (Ind. 1996), *habeas relief granted* at

Aki-Khuam v. Davis, 339 F.3d 521 (7th Cir. 2003) (trial court's misapplication of Batson by requiring defendant and prosecutor to give race-neutral explanation for every peremptory challenge violated petitioner's Fourteenth Amendment due process and equal protection rights).

Caveat: Williams v. State, 669 N.E.2d 1372, 1379-80 (Ind. 1996), uses *clear and reasonably specific explanation* test from Batson v. Kentucky, 476 U.S. 79, 98 n.20 (1986). However, the United States Supreme Court backed away from this test in Purkett v. Elem, 514 U.S. 765115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995).

D. RELIEF

This section excerpted from Batson: Prosecutors Always Seem to Have Good Enough Reasons, So What's Left to Litigate? by Bruce P. Hackett and Rob Eggert. Prepared for Kentucky Department of Public Advocacy's 23rd Annual Public Defender Training Conference. June 4-6, 1995. Reprinted with permission.

Any of the following:

(1) mistrial;

(2) venire discharged and new panel assembled;

(3) prosecutor loses all peremptory challenges and all persons struck put back on panel, and defense given additional challenges equal to number of challenges lost by prosecutor;

(4) improperly eliminated jurors placed on jury;

(5) all prosecution strikes returned to panel and defense given opportunity to redo its strikes; or

(6) any other relief you can think of.

1. Punish prosecutor

Seek to have prosecutor punished for illegal discrimination. If only relief granted is loss of improperly used peremptory, then it may well be worth it for prosecutor to continue to discriminate and take the risk of getting caught.

2. If new venire has fewer members of group

Object on ground prosecution has achieved indirectly what it failed to accomplish by direct misuse of peremptory challenges.

Commonwealth v. Reid, 424 N.E.2d 495, 500 (Mass. 1981) (prosecutor should not be permitted to benefit from his or her misconduct by securing more favorably composed venire as consequence of abuse of peremptory challenge process).

3. Reversal

Reversal of conviction for retrial where court fails to make findings on sufficiency of prosecutor's explanations and fails to conduct inquiry into basis of each peremptory. Cleveland v. State, 888 S.W. 2d 629, 632 (Ark. 1994); McCormick v. State, 803 N.E.2d 1108 (Ind. 2004); and Miller-El v. Dretke, 125 S.Ct. 2317 (2005) (remedy on appeal is new trial if purposeful discrimination is found).

V. STATE CHALLENGES DEFENDANT'S USE OF PEREMPTORIES

Defendant subject to same constraints as State on use of peremptory challenges.

A. DEFENDANT MAY NOT PURPOSEFULLY DISCRIMINATE

Defendant may not engage in purposeful racial discrimination in exercise of peremptory challenges. Georgia v. McCollum, 505 U.S. 42 (1992); Jeter v. State, 888 N.E.2d 1257 (Ind. 2008).

Practice Pointer: Be prepared to defend use of any of your peremptory challenges if challenged by prosecutor. Justify challenge by uncovering specific bias during voir dire.

B. PROCEDURE

In order to prove defendant engaged in purposeful discrimination:

(1) State must make out prima facie case of discrimination;

(2) Defendant must come forward with neutral explanation;

(3) Court must decide whether State has proved purposeful discrimination.

See Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995); Palmer v. State, 654 N.E.2d 844, 846 (Ind. Ct. App. 1995).

1. Explain *in camera* – confidential communication or trial strategy

If explanation for challenge entails confidential communication or would reveal trial strategy, *in camera* discussion can be arranged. Georgia v. McCollum, 505 U.S. 42 (1992).

2. Defendant's explanation need not be persuasive or plausible

Unless discriminatory intent inherent in defendant's explanation, reason offered will be deemed race neutral. Palmer v. State, 654 N.E.2d 844, 846 (Ind. Ct. App. 1995).

Purkett v. Elem, 514 U.S. 765 (1995) (second step of process does not demand persuasive or even plausible explanation; issue is facial validity of explanation).

Pfister v. State, 650 N.E.2d 1198, 1199-1200 (Ind. Ct. App. 1995) (satisfactory race-neutral explanation where defendant said he removed juror because juror was "very curt with his answers" and would not look defendant or attorney "in the eye").

Williams v. State, 669 N.E.2d 1372 (Ind. 1996) clear and reasonably specific explanation required for exercising peremptory, *habeas relief granted* at Aki-Khuam v. Davis, 339 F.3d 521 (7th Cir. 2003) (trial court's misapplication of Batson by requiring defendant and prosecutor to give race-neutral explanation for every peremptory challenge violated petitioner's Fourteenth Amendment due process and equal protection rights).

Caveat: Williams v. State, 669 N.E.2d 1372, 1379-80 (Ind. 1996) uses *clear and reasonably specific explanation* test from Batson v. Kentucky, 476 U.S. 79, 98 n.20 (1986). However, the United States Supreme Court backed away from this test in Purkett v. Elem, 514 U.S. 765 (1995).

Persuasiveness of reason relevant only at third step when court determines whether opponent of strike has carried burden of proving purposeful discrimination. Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 1771 (1995).

3. Trial court not bound to believe Defendant's proffered explanation for striking juror

Even if the defendant's proffered reasons for striking a juror is race neutral as a matter of law, the trial court is not bound to believe the defendant's proffered explanation was the real motivation behind the challenge. Miller-El v. Dretke, 545 U.S. 231 (2005). See also Collier v. State, 959 N.E.2d 326 (Ind. Ct. App. 2011).

Jeter v. State, 888 N.E.2d 1257 (Ind. 2008) (trial court did not err in concluding that defendant's attempt to peremptorily challenge a prospective juror violated Batson v. Kentucky, where defendant had previously used his first nine peremptory challenges to strike White men, and defendant's pretrial motion to dismiss death penalty was premised on argument that White men jurors would be detrimental to defendant receiving a fair trial).

C. POTENTIAL IMPACT

If prosecution's motion denied, defense stands to lose only if jurors: (1) heard prosecutor's objection; (2) are convinced defense counsel misused its challenges; and (3) hold this against defendant during jury deliberations.

D. EXAMPLE OF INVALID EXPLANATION

Based on deferential standard of review, cannot conclude court erred in refusing to allow defendant to exclude two prospective women jurors after State alleged defendant demonstrated pattern of striking six of eight women jurors; explanations for challenging two prospective women jurors were mixture of neutral reasons and gender bias. Koo v. State, 640 N.E.2d 95 (Ind. Ct. App. 1994) (disapproved on other grounds by Floyd v. State, 650 N.E.2d 28, 34 (Ind. 1994)).