

FORSYTH COUNTY GEORGIA
FILED IN THIS OFFICE

IN THE SUPERIOR COURT OF FORSYTH COUNTY

MAY 26 2006

STATE OF GEORGIA

Raoules Bonella
CLERK SUPERIOR COURT

THE STATE OF GEORGIA

*

Case #06CR-0126

Vs.

*

*

Motion #95

JULIA LYNN WOMACK TURNER

*

**STATE'S RESPONSE TO DEFENDANT'S
MOTION NO. 95 REGARDING JURY STRIKES
PURSUANT TO BATSON V. KENTUCKY**

Comes now the State of Georgia, by and through counsel and responds as follows to defendant's above motion regarding defined procedures for setting forth challenges to jury strikes pursuant to *Batson v. Kentucky*:

1.

The procedure in Exhibit "A" to defendant's motion is objectionable in that it refers only to strikes by the state, and does not include objections by the state to defendant's strikes. A silent procedure of striking is acceptable to the State, whereby either side would have an opportunity to make any objections under *Batson* known to the Court for possible inquiry under the contemporaneous objection rule hereinafter discussed.

2.

The procedure for *Batson*¹ challenges to individual jurors through peremptory strikes is subject to the commands of the Equal Protection Clause, and therefore must be racially neutral. There is a three step process:

(1) the opponent of the challenge must establish a prima-facie case of racial discrimination, (2) the proponent of the challenge tenders a race-neutral explanation for striking the juror, and (3) the trial court decides whether the opponent has carried the burden of proving purposeful discrimination. *Purkett v. Elem*, 115 S. Ct. 1769, 514 U.S. 765 (1995). Accord, *Rice v. Collins*, 126 S. Ct. 969, 74 USLW 4095 (2006).

¹ *Batson v. Kentucky*, 106 S. Ct. 1712, 476 U.S. 79, 89 (1986)

The Expansion of *Batson*

Retroactivity –

Griffith v. Kentucky, 107 S. Ct. 708, 479 U.S. 317 (1987) made *Batson* retroactive to all cases pending on direct or not yet final when *Batson* was decided.

Not limited to race of challenger –

A defendant no longer need to be of the same race as the excluded juror. The Court in *Powers v. Ohio*, 111 S. Ct. 1364, 499 U.S. 400 (1991) held: “Under the equal protection clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race”.

Application to Ethnic and Gender –

Batson applies to all cases, even where the defendant and a prospective juror are of different racial groups. The prospective juror has a “right not to be excluded on the basis of race”, *Powers v. Ohio*, supra. The U.S. Supreme Court has extended *Batson* to ethnic background, *Hernandez v. New York*, 111 S. Ct. 1859, 500 U.S. 352 (1991), and gender, *J.E.B. v. Alabama*, 114 S. Ct. 1419, 511 U.S. 127 (1994).

Application to all Parties –

Batson now applies to all parties. Litigants in civil cases may not use peremptory challenges on account of race in violation of challenged jurors’ equal protection, *Edmons v. Leesville Concrete Co.*, 111 S. Ct. 2077, 500 U.S. 614 (1991); as well, the constitution prohibits a criminal defendant from engaging in racial discrimination in use of peremptory challenges, *Georgia v. McCollum*, 112 S. Ct. 2348, 505 U.S. 42 (1992).

Timeliness of Challenge –

A contemporaneous objection rule [The Sparks’ Rule² in Georgia] was incorrectly applied retroactively by the Georgia court in *Ford v. Georgia*, 111 S. Ct. 850, 498 U.S. 411 (1991). The Court further held that only a “firmly established and regularly followed state practice” may be interposed by a state to prevent subsequent review by the Court of a federal constitutional claim. The Court further said however that the procedure established by the Georgia Court that “[T]he requirement that any *Batson* claim be raised not only before trial, but in the period between the selection of the jurors and the

² *State v. Sparks*, 257 Ga. 97 (1987) holding that “[H]owever, we hold that hereafter any claim under *Batson* should be raised prior to the time jurors selected to try the case are sworn”.

administration of their oaths, is a sensible rule". Georgia courts are following the contemporaneous objection rule in holding such challenges are untimely when made after the jury was sworn, *Laney v. State*, 271 Ga. 194 (3), 515 SE2d 610(1999).

Batson Standards Interpreted –

In *Purkett v. Elem*, 514 U.S. 765, 115 S. Ct. 1769 (1995), the Court relaxed the standards regarding a prosecutor's explanation, holding: "The second step of this process does not demand an explanation that is persuasive, or even plausible". "At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral," citing *Hernandez*, 500 U.S., at 360. The prosecutor's proffered explanation in *Purkett* that he struck the juror because he had long, unkempt hair, a mustache and a beard, is race-neutral and satisfies the prosecution's step 2 burden of articulating a nondiscriminatory reason for the strike, saying "the wearing of beards is not a characteristic that is peculiar to any race", *Purkett*, at [3].

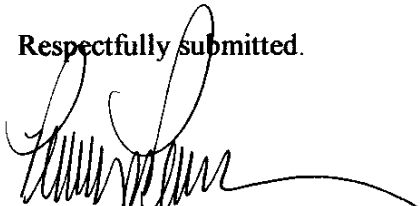
The Court in *Purkett* went on to explain that *Batson* requires the proponent to give a "clear and reasonably specific explanation of his legitimate reasons for exercising the challenges", and that the reason must be "related to the particular case to be tried". This warning was meant to refute the 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, *Purkett*, at [1][2]. [Prosecutor's proffer that juror was struck because of facial hair; the inquiry properly proceeded to Step 3 where the court found the strike was not motivated by discriminatory intent].

Further, "[I]t 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" [cits]. "At that state, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step 3 is quite different from saying that a trial judge must terminate the inquiry at step 2 when the race-neutral reason is silly or superstitious", *Purkett*, supra [1][2].

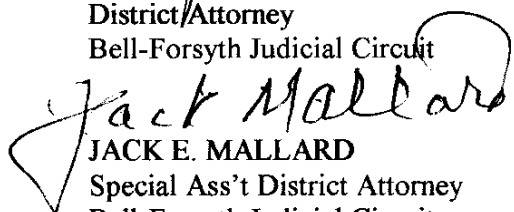
In *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005), prosecutors used peremptory strikes in this pre-*Batson*, Texas trial against 10 of the 11 qualified African-American venire persons, and the Court overturned the conviction, noting the following: (1) the disproportionate number of peremptory strikes used against black panelists; (2) the prosecution's disparate questioning of black and non-black panelists; (3) the prosecution's use of jury shuffles to minimize participation by black panelists; (4) the prosecutions' belated inclusion of a race-neutral justification; and (5) the prosecution's history of systematic exclusion of black panelists as evidenced by an office manual.

A prosecutor's stated concern that the stricken juror might, as a young and single citizen with no ties to the community, be too tolerant of drug crime with which defendant was charged was not unreasonable. *Rice v. Collins*, 126 S. Ct. 969, 74 USLW 4095 (2006).

Respectfully submitted.



PENNY A. PENN
District Attorney
Bell-Forsyth Judicial Circuit



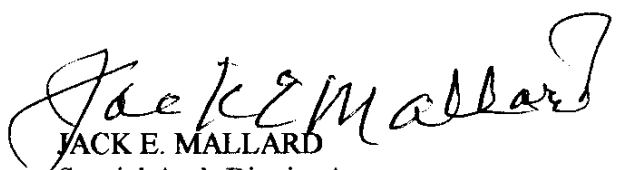
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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for defendant, Mr. Jimmy Berry, Attorney at Law, 236 Washington Avenue, Marietta, GA 30060, with copy of the foregoing response by the State to defendant's motion 95, by U.S. mail properly addressed.

This 26 day of May, 2006.



JACK E. MALLARD
Special Ass't District Attorney
Bell-Forsyth Judicial Circuit