

Steps for mounting a *Batson* challenge:

- 1) Defendant must make out a prima facie case, which requires showing:
 - (A) The prospective juror is a member of a protected class (race/sex);
 - (B) The prosecutor used a peremptory strike against the prospective juror; and
 - (C) The totality of the circumstances raises an inference that the strike was motivated by the protected status (i.e., race or gender).
United States v. Collins, 551 F.3d 914, 919 (9th Cir. 2009).

This initial burden only one of production and it is not particularly onerous. *Collins*, 551 F.3d at 920. While statistics can help satisfy a prima facie case, such a showing is not *required* since only one instance of discrimination is required to violate the Equal Protection Clause. *Cochran v. Herring*, 43 F.3d 1404 (11th Cir. 1996). Furthermore, it may often be the case that only one member of a given race is on a venire.

- 2) Burden shifts to prosecution to provide a neutral explanation. A prosecutor's explanation need not be "persuasive or even plausible." *Purkett v. Elem*, 514 U.S. 765 (1995).
- 3) After receiving the prosecutor's explanation, the trial court must determine whether the defendant has shown purposeful discrimination. It is at this point that the persuasiveness of the prosecutor's justification becomes relevant. *Purkett*, 514 U.S. at 768. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* "[O]nce it is shown that a discriminatory intent was a substantial or motivating factor ..., the burden shifts to the party defending the action to show that this factor was not determinative." *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008).

Factors relevant to the court's final determination:

- A comparative juror analysis is the most important type of inquiry. *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). "An inference of discrimination may arise when two or more potential jurors share the same relevant attributes but the prosecutor has challenged only the minority juror." *United States v. Collins*, 551 F.3d at 922.
- A comparative analysis should look not only to the juror's attributes, but also to how the prosecutor questioned the jurors – i.e. were members of the protected class subjected to a different type of questioning?
- Statistics can tend to show purposeful discrimination. "Happenstance is unlikely to produce [significant] disparity." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). Furthermore, the fact that the prosecution kept a juror in a protected class is of little persuasive value if the juror was retained late in the game, when few peremptories were left, and, at which point, the government may feel compelled to obscure an otherwise consistent pattern of discrimination. *Miller-El v. Dretke*, 545

U.S. at 249-50.

- An inaccurate recitation of the record can be evidence of discrimination. *Miller-El v. Dretke*, 545 U.S. at 244 (prosecution’s misstatement about the juror’s stated attitude towards the death penalty indicated purposeful discrimination); *Ali v. Hickman*, 584 F.3d 1174, 1192 (9th Cir. 2009).
- A new explanation, provided after the defendant points out the flaws in an initial explanation, “reeks of afterthought” and is not entitled to much credit. *Miller-El v. Dretke*, 545 U.S. at 246.
- When bias identified by the prosecutor would actually benefit the government, the sincerity of the prosecutor’s motives are doubtful. *Ali v. Hickman*, 584 F.3d 1174, 1184 (9th Cir. 2009).
- A lack of follow-up questions suggests that a prosecutor was not really concerned about a given area of purported bias. *Ali v. Hickman*, 584 F.3d at 1188.
- If the prosecutor cites multiple reasons for the strike, several which are deemed pretextual, then additional reasons are given less weight. *Ali v. Hickman*, 584 F.3d at 1192.
- Fact that one of the prosecutor’s strikes fails the *Batson* test suggests that other strikes of individuals in the same protected class are also discriminatory. *Ali v. Hickman*, 584 F.3d at 1193.
- Types of purported bias that considered facially suspect/unconvincing:
 - Mere fact that the juror has had prior involvement with the criminal justice system (e.g. as a witness). *Ali v. Hickman*, 584 F.3d at 1189.
 - Juror’s statement that she or he holds attorneys to high professional standards. *Ali v. Hickman*, 584 F.3d at 1190-91.
 - Juror’s stated willingness to re-evaluate prior positions. *Ali v. Hickman*, 584 F.3d at 1194.
 - A juror’s perceived “casual manor.” “[A] casual or lighthearted demeanor” does not, by itself, make someone unfit for jury service. *Ali v. Hickman*, 584 F.3d at 1195.