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Jury Practice and Jury Reform

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JURY REFORM AND JURY PRACTICE

“[T]he jury...may be regarded as a gratuitous public school ever open, in which every juror learns his rights,... and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passion of the parties...I look upon the [jury] as one of the most efficacious means for the education of the people which society can employ.”¹

A Brief History

As early as the 1940s, there were attempts to create guides or aides to jury members to help them understand the legal system and the trial process.² However, at that time, neither the legal practitioners nor the judiciary saw any need for the materials. During the 1960s and 1970s reforms were made in several states to improve the efficiency of jury selection and service. Administrative charges, such as the “one day/one trial” policy and call-in systems were enacted. Also, there were challenges to jury representativeness and randomness, calling for use of more inclusive practices and diversity within the juror pool.³ In 1978, a task force of representatives reviewed jury practices nationwide. This led to the American Bar Association’s publication of Standards Relating to the Juror Use and Management in 1983.⁴

Within the last decade, major reforms in jury practice have taken place across the country. This recent trend has many causes, including the increase of hung juries and jury nullification instances; over-inflated monetary awards by juries; the decrease of citizen willingness/availability to serve as jurors. The current leaders in the jury reform effort are the states of Arizona, California and New York.⁵

¹ Alexis de Tocqueville, *Democracy in America*, 295-296 (vintage ed. 1945).

² In 1946, Chicago judge Julius Miner proposed that jurors should be given a “primer” on how to deliberate, including common-sense tips on how to make deliberations more open, efficient and inclusive. The judge’s colleagues completely rejected this idea. See Roger G. Boatright & Beth Murphy, “*Behind Closed Doors:*” *Assisting Jurors with their Deliberations*, 83 JUDICATURE 52 (1999).

³ See G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216 (1996).

⁴ As of 1996, fourteen states had adopted standards based on the ABA Standard (including Virginia) four were in “substantial compliance” with the Standards, and ten were working toward the adoption of the Standards. The Standards may be found at www.abanet.org/litigation/home.html.

⁵ For a general discussion on jury reform, see Mark Curriden, *No One Agrees on whether the System is Broken, but Everyone is Trying to Change It*, 81 A.B.A.J. 72 (1995).

TYPES OF JURY REFORM

Administrative Reform⁶

Each year, approximately 15 million Americans are summoned to jury duty; only about one-third report to serve as jurors.⁷ To combat this problem, states have employed several means to make jury service a more comfortable experience.

- Increase in jury pay and parking reimbursement⁸
- Use of driver license and voter registration lists⁹
- Restructure of the jury duty exemption scheme¹⁰
- “One day/one trial” jury systems¹¹
- Employment of a court liaison to assist jury members with any problems or concerns¹²

Structural Reform

While the administrative reforms worked to improve jury duty turnout, they imposed a larger cost on the courts. These costs, along with a rise in the number of hung juries,¹³ led to structural reforms to the jury system as well.

- Reduction in jury size¹⁴

⁶ In *Reshaping the Bedrock of Democracy: American Jury Reform during the Last 30 Years*, authors G. Thomas Munsterman and Paula L. Hannaford use the three categories here – administrative, structural and procedural – to discuss recent jury reform. G. Thomas Munsterman and Paula L. Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform during the Last 30 Years*, 36 JUDGES’ JOURNAL 5 (1997).

⁷ See David Schneider, *Jury Deliberations and the Need for Jury Reform*, 4 JUDGES’ JOURNAL 23 (1997).

⁸ See Munsterman and Hannaford, *supra* note 6.

⁹ New York passed a law to include people receiving welfare and unemployment benefits on jury rolls. The state also reached out to African-American churches to increase the number of minorities in the jury pool. Other states have been just as creative: Arizona considered adding names from the phone book, from city water hookups, and from welfare and unemployment rolls; in California, reformers looked to add names from the tax and Social Security rolls. See Jeff Barge, *Reformers Target Jury Lists*, 81 A.B.A.J. 26 (1995).

¹⁰ New York had a record twenty automatic occupational exemptions for jury duty. It was also the only state in which people were permanently eligible for jury duty unless their qualifications changed, including those who had already served. See Mark Hansen, *New York Tackles Jury Standards*, 80 A.B.A.J. 22 (1994).

¹¹ See Munsterman and Hannaford, *supra* note 6.

¹² To better serve its jurors, New York instituted an ombudservice, available to anyone appearing for jury duty in the state courts in Manhattan, and a 24-hour telephone helpline. See Mark Hansen, *Complaining Jurors get a Hearing: Manhattan Ombudservice Designed to Make Jury Duty Less Trying*, 81 A.B.A.J. 24 (1995).

¹³ In 1994, hung jury rates exceeded 15 percent in California; in 1996, the D.C. Superior Court reported a hung jury rate of 11 percent. These numbers have indicated to commentators that the hung jury is a form of jury nullification and that reforms are in order. See Paula Hannaford et al., *How Much Justice Hangs in the Balance?* 83 JUDICATURE 59 (1999).

¹⁴ The Supreme Court ruled that the reduction in jury size was constitutionally permissible in *Williams v. Florida*, 399 U.S. 78 (1970). Following this ruling, most federal courts and thirty-eight state courts reduced the size of their

- Non-unanimous verdicts¹⁵
- Analysis of peremptory strikes and *Batson* challenges¹⁶

Procedural Reform

Finally, with the growing complexity of legal issues and ever-increasing diversity of jurors' perspectives, the courts have sought ways to improve the jury's problem-solving ability. These reforms consist of two major categories. The first set allows the court to exert more control over the jury by using other means of fact-finding. The second group seeks to improve the jury's comprehension of complex evidence and applicable law.

Greater Control over Jury Decision-making¹⁷

- Caps on jury awards and restrictions on the availability of punitive damages
- "Blue ribbon" juries¹⁸
- Joint expert testimony/use of court-appointed experts¹⁹

civil juries as well. See Munsterman and Hannaford, *supra* note 6.

¹⁵ Non-unanimous verdicts were held to be constitutional in *Apodaca v. Oregon*, 406 U.S. 404 (1972); however, only Oregon and Louisiana permit non-unanimous verdicts for felony criminal trials. See Munsterman and Hannaford, *supra* note 6.

¹⁶ Courts have struggled to increase the number of minority candidates for jury selection using many of the administrative reforms previously discussed. However, another perceived problem is the use of peremptory strikes, which may be further eliminating any possibility of minority jury members. These strikes caused a surge in the number of *Batson* challenges. See Michael Higgins, *Few are Chosen*, 85 A.B.A.J. 50 (1999) (discussion of Maryland Fourth Circuit case where plaintiff complained of lack of African-Americans serving on the jury panel); but see, Randall L. Kennedy, *Would Color-Conscious Jury Selection Help? No: Drawing Racial Lines has a Toxic Effect on Society*, 81 A.B.A.J. 37 (1995) ("[T]he presence of racial minorities on juries may add a dimension of experience or perspective useful to the search for truth and justice, and may add to the perceived legitimacy of a jury's conclusions.... [m]y fear is that race-based efforts to ensure racially diverse juries in each and every case... will reinforce race consciousness.").

¹⁷ For a discussion of these reform efforts, see Munsterman and Hannaford, *supra* note 6.

¹⁸ A "blue ribbon" jury is a jury of specialized knowledge, *i.e.*, patents.

¹⁹ In their article, *Beyond Note Taking: Innovations in Jury Reform*, Paula L. Hannaford and G. Thomas Munsterman explain a new method of presenting expert testimony:

A significant obstacle to juror comprehension of expert testimony is that disagreement among opposing experts often rests on subtle differences in their conclusions. Because opposing experts testify at different stages during the trial, they often present their conclusions without truly debating the differences in their reasoning. As a result, jurors often find it difficult to determine the extent of real difference between the experts and the degree to which each could defend his or her conclusions in a dialogue with the other.

One remedy is to reorder the sequence of proof so that opposing experts offer their testimony consecutively. Or opposing experts can offer joint testimony at trial or at a conference in front of the jury during which they identify points on which they agree or disagree and the basis for their conclusions. This technique permits the jury to determine the extent of real difference between

- Use of interrogatories and special verdict forms

Improving Jury Comprehension²⁰

- Jury note-taking and notebooks²¹
- Questions to the witnesses²²
- Preliminary instructions²³
- Juror tutorials²⁴
- “Plain English” jury instructions²⁵
- Discussion of evidence prior to deliberations²⁶

experts and to compare these differences side by side.

Paula L. Hannaford and G. Thomas Munsterman, *Beyond Note Taking: Innovations in Jury Reform*, TRIAL-MAG, July 1, 1997 (No page available) 1997 WL 9957730.

²⁰ Arizona has implemented each of these procedural reforms in hopes of improving jury service and deliberations. Arizona Superior Court Judge B. Michael Dann has become a nationally-recognized proponent of the jury reform effort. In an interview with TRIAL MAGAZINE Editor Donald C. Dilworth, Judge Dann explains how the reforms in Arizona have led to happier, more productive juries. *See Waking up Jurors, Shaking up Courts*. TRIAL-MAG, July 1, 1997 (No page available). *See also*, Hannaford and Munsterman, *supra* note 18.

However, improving jury comprehension need not be a major reform effort. In his article, *Jurors: The Forgotten People*, Judge Stanley Klein walks through the major stages of a trial (voir dire, opening statement, presentation of the evidence and closing statements) and offers simple yet practical tips on how to better communicate to the jury panel. *See Stanley Klein, Jurors: The Forgotten People*, JOURNAL OF VIRGINIA TRIAL LAWYERS ASSOCIATION, Spring 1999 (attached at Appendix).

²¹ *See* Hannaford and Munsterman, *supra* note 18.

²² Jury questioning is perhaps one of the most controversial reform efforts, since it seemingly interrupts the traditionally adversarial nature of our legal system. However, studies have shown very beneficial results using this process. *See* A. Barry Cappello and James G. Strenio, *Juror questioning: the verdict is in*, TRIAL-MAG, June 1, 1997 at 44.

²³ *See* Hannaford and Munsterman, *supra* note 18.

²⁴ *See id.*

²⁵ Studies have found that jury members incorrectly translate a great deal of “legalese”: “Many jurors don't know what it means to ‘draw an inference’ . . . They confuse ‘proximate’ cause with ‘approximate’ cause. They think ‘circumstantial evidence’ refers to weak evidence. More troubling are capital case jurors who weigh ‘aggravating’ factors and sometimes give the word its common meaning, which is to annoy. Others don't know the word ‘mitigating’ at all.” Michael Higgins, *Not so Plain English*, 84 A.B.A.J. 40 (1998).

²⁶ *See* Hannaford and Munsterman, *supra* note 18.

CURRENT FEDERAL & VIRGINIA RULES REGULATING JURIES

To better understand the impact of the Virginia Task Force recommendations on jury reform and current jury practice in the federal courts and the Commonwealth, the existing rules governing juries and jury practice should be reviewed. Accordingly, a brief summary of the rules and excerpts thereof are provided below.

Federal Rules

The Federal Rules of Civil Procedure govern general rules regarding juries in civil trials. Rule 47²⁷ discusses the processes for voir dire, including peremptory challenges, and Rule 48²⁸ sets parameters for the number of jurors that are to be seated.

Chapter 121 of Title 28, Judiciary and Judicial Procedure, also sets forth rules for juries and trials by jury. Chapter 121 touches upon a wide range of jury issues including random jury selection (§ 1863), qualifications for jury service (§ 1865), how much jurors are paid for service (§ 1871), and protection of jurors (§ 1877). The rules also involve discrimination²⁹ and peremptory challenges.³⁰

²⁷ Fed. R. Civ. P. 47, 28 U.S.C.A.:

Rule 47. Selection of Jurors

- (a) **Examination of Jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.
- (b) **Peremptory Challenges.** The court shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870.
- (c) **Excuse.** The court may for good cause excuse a juror from service during trial or deliberation.

²⁸ Fed. R. Civ. P. 48, 28 U.S.C.A.:

Rule 48. Number of Jurors – Participation in Verdict

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

²⁹ 28 U.S.C. § 1862:

§ 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin or economic status.

³⁰ 28 U.S.C. § 1870:

§ 1870. Challenges

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

Virginia Rules

The Rules of Virginia Supreme Court and the Virginia Code govern jury practice in the Commonwealth. Rule 3A:14 of the Rules of Virginia Supreme Court discusses the voir dire examination of jurors,³¹ and Rule 3A:16(a) addresses instructions given to jurors before deliberations.³² The Virginia Task Force on jury reform made proposals regarding the issues of these two rules.

Chapter 11 of the Virginia Code deals entirely with juries. Sections 8.01-336 through 8.01-363 including rules about who is liable to serve as jurors (§ 8.01-337), how names are put in the jury box (§ 8.01-347), voir dire examination (§ 8.01-358) and special juries (§8.01-362). Pertinent to the issues of jury reform are voir dire (§ 8.01-358)³³ and jury selection (§ 8.01-359).³⁴ In

³¹ Rules of Virginia Supreme Court 3A:14:

Rule 3A:14. Trial Jurors.

(a) *Examination.* – After the prospective jurors are sworn on the voir dire, the court shall question them individually or collectively to determine whether anyone:

- (1) Is related by blood or marriage to the accused or to a person against whom the alleged offense was committed;
- (2) Is an officer, director, agent or employee of the accused;
- (3) Has any interest in the trial or the outcome of the case;
- (4) Has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect his impartiality in the case;
- (5) Has expressed or formed any opinion as to the guilt or innocence of the accused;
- (6) Has a bias or prejudice against the Commonwealth or the accused; or
- (7) Has any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

Thereafter, the court, and counsel as of right, may examine on oath any prospective juror and ask any question relevant to his qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

(b) *Challenge for Cause.* – The court, on its own motion or following a challenge for cause, may excuse a prospective juror if it appears he is not qualified, and another shall be drawn or called and placed in his stead for the trial of that case.

³² Rules of Virginia Supreme Court 3A:16:

Rule 3A:16. Instructions.

(a) *Giving of Instructions.* – In a felony case, the instructions shall be reduced to writing. In all cases the court shall instruct the jury before arguments of counsel to the jury.

³³ Code of Virginia § 8.01-358:

§ 8.01-358. Voir dire examination of persons called as jurors. – The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.

³⁴ Virginia Code § 8.01-359:

§8.01-359. Trial; numbers of jurors in civil cases; how jurors selected from panel. – A. Five persons from a panel of eleven shall constitute a jury in a civil case when the amount involved exclusive and interest and costs does not exceed the maximum jurisdictional limits as provided in § 16.1-77 (a). Seven persons from a panel of thirteen shall constitute a jury in all other civil cases except that when a special jury is allowed, twelve persons from a panel of twenty shall constitute

addition to Chapter 11 of the Virginia Code, Title 19.2 regulates trials by juries in criminal cases. These rules not only include how many jurors there may be and how they are selected (§ 19.2-262), but also regulate contact between judges and jurors (§ 19.2-263.1),³⁵ sequestering juries (§ 19.2-264),³⁶ and views by juries (§ 19.2-264.1).³⁷

the jury.

B. The parties or their counsel, beginning with the plaintiff, shall alternatively strike off one name from the panel until the number remaining shall be reduced to the number required for a jury. Where there are more than two parties, all plaintiffs shall share three strikes between them and all defendants and third-party defendants shall share three strikes between them.

C. In any case in which there are two or more parties on the same side, if counsel or the parties are unable to agree on the full number to be stricken, or, if for any other reasons a party or his counsel fails or refuses to strike off the full number of jurors allowed such party, the clerk shall place in a box ballots bearing the names of the jurors whose names have not been stricken and shall cause to be drawn from the box such number of ballots as may be necessary to complete the number of strikes allowed the party or parties failing or refusing to strike. Thereafter, if the opposing side is entitled to further strikes, they shall be made in the usual manner.

D. In any civil case in which the consent of the plaintiff shall be entered of record, it shall be lawful for the plaintiff to select one person who is eligible as a juror and for the defendant to select another, and for the two so selected to select a third of like qualifications, and the three so selected shall constitute a jury in the case. They shall take the oath required of jurors, and hear and determine the issue, and any two concurring shall render a verdict in like manner and with like effect as a jury of seven.

³⁵ Virginia Code § 19.2-263.1:

§ 19.2-263.1. Contact between judge and juror prohibited. – No judge shall communicate in any way with a juror in a criminal proceeding concerning the juror’s conduct or any aspect of the case during the course of the trial outside the presence of the parties or their counsel.

³⁶ Virginia Code § 19.2-264:

§ 19.2-264. When jury need not be kept together in felony case; sufficient compliance with requirement that jury be kept together. – In any case of a felony the jury shall not be kept together unless the court otherwise directs. Whenever a jury is required to be kept together, it shall be deemed sufficient compliance although the court for good cause permits one or more of such jurors to be separated from the others; provided all such jurors, whether separated or not, be kept in charge of officers provided therefor.

³⁷ Virginia Code § 19.2-264.1:

§ 19.2-264.1. Views by juries. – The jury in any criminal case may, at the request of either the attorney for the Commonwealth or any defendant, be taken to view the premises or place in question, or any property, matter or thing relating to the case, when it shall appear to the court that such view is necessary to a just decision.

PROPOSED JURY REFORMS MADE BY THE VIRGINIA SUPREME COURT

In 1997, the Judicial Council of Virginia adopted the ABA Standards Related to Juror Use and Management. A special task force was created in 1998 to investigate jury service and trial practice in the Commonwealth. In December 1999, the task force presented their recommendations, which are currently under Council review.

Below are brief descriptions of the Task Force recommendations.³⁸ The recommendation number is bolded to the left.

Administrative

- 1.** *Expansion of the Jury Source List:* The master jury list should be derived from the Office of the Executive Secretary list, which has already merged voter registration lists and the drivers' license lists. Also, citizens should be able to volunteer for jury duty.
- 2.** *Eligibility for Jury Service:* All exemptions from jury service should be eliminated. Release from service by excuse or deferral should be based on true hardship only; deferral would be the preferred alternative to release.
- 3.** *Term of Jury Service:* A juror's term of service should be limited to one trial. If not selected for a jury, a person would fulfill their term by remaining available for one week under a telephone call-in system.
- 15.** *Juror Orientation Materials:* The Court should provide a guidance to jurors with no experience with the deliberation process. This guidance should include such information as the role of a foreperson, how to participate in the deliberation discussion, and what to do when the jury is deadlocked.
- 17.** *Jury Coordinators:* At the end of trial, the judge or a designated official should "debrief" jurors and inform them of their rights and responsibilities post-trial. In situations where jurors may have experienced severe emotional distress, a volunteer psychologist or social worker should speak with the jurors as well.

Structural

- 7.** *Ability to Strike Juror:* The trial judge should have the ability to strike a juror if any reasonable doubt exists as to whether the juror can be fair and impartial. Moreover, judges should not rehabilitate a challenged juror.
- 8.** *Higher Burden of Proof to Overcome Batson Challenge:* After a prima facie showing that a party has based a challenge (for cause or peremptory) on a juror's race or gender, the court should not allow the challenge unless it finds that, beyond a reasonable doubt, there is a valid, non-discriminatory basis for the challenge.³⁹

³⁸ The official list of Task Force recommendations, with commentary, may be found in the Appendix.

³⁹ A detailed review of *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, is located *infra* pp. 12-22.

9. *Additional Challenge for Each Criminal Defendant in a Joint Trial*: Each defendant should have one additional peremptory challenge to be exercised without consultation with the other defendants.
18. *No Jury Sentencing*: To maintain sentencing trends and guidelines, judges should impose sentencing in all cases.
19. *Cost of a Jury Trial no Longer Assessed against Criminal Defendants*: To eliminate any “chilling” or “coercive” effect on a defendant’s right to waive trial by jury, this cost should no longer be imposed on a defendant.

Procedural

4. *Preliminary Instructions prior to Voir Dire*: The trial judge should provide jurors with specific information, such as the issues to be addressed, the nature of the evidence, and the basic relevant legal principal applicable to the case.
5. *Individualized Voir Dire*: Judges should conduct the initial examination of the jury panel and exercise their discretion to identify situations where individualized voir dire may be more appropriate.
6. *Opportunity to Challenge Jurors out of the Presence of the Panel*: So that the jury is not aware of any challenges to a specific juror, the mandatory practice should be to challenge jurors outside the presence of the panel.
10. *Expanded use of Preliminary Instructions and Interim Summaries*: Judges should issue preliminary instructions which focus on the elements of the charge or cause of action that are most likely to be addressed by the evidence.
11. *Jury Note-taking*: Jurors should be permitted to take notes whenever they deem it necessary, not at the court’s discretion.
12. *Procedures Governing Juror Note-taking*: The judge should instruct the jurors as to how their notes will be handled during the trial and deliberations, and should explain that the notes must be destroyed at the end of the trial.
13. *Juror Questioning of Witnesses*: Juror questions should be permitted, but not encouraged.
14. *Jury Discussion of Evidence prior to Deliberations*: The court should allow jurors to discuss evidence prior to deliberations among themselves and when all are present.
16. *Invitation for Additional Instruction to a Deadlocked Jury*: If a jury reports that it is at an impasse, the court should offer to address any questions the jury may be having about the evidence or the final instruction to help break the deadlock.

20. *Plain Language Jury Instructions:* An inter-disciplinary study group should redraft the Virginia model jury instructions into “plain language” to better communicate legal principles to the jury members.

BATSON V. KENTUCKY – FEDERAL & VIRGINIA PROGENY

One of the recommendations of the Virginia Task Force on jury reform is to raise the standard of proof in *Batson v. Kentucky*.⁴⁰ To understand the implications of this recommendation and the impact the case has had nationally, an overview of *Batson* and its progeny is provided below.

***Batson v. Kentucky*: Requiring prosecutors to provide a non-discriminatory reason for peremptory strikes once a prima facie case that strikes were racially motivated is demonstrated**

James Kirkland Batson, a black man, was convicted of second degree burglary and receipt of stolen goods. Batson appealed the trial court's failure to rule on his motion to discharge the jury for violating his 6th and 14th Amendment rights.

During voir dire in the Kentucky trial court, the prosecutor used four peremptory strikes to strike all four black jurors from the venire. Batson challenged the strikes saying that the prosecutor based his decision upon the race of the veniremen. Batson claimed it was a violation of his 6th Amendment right to have a jury drawn from a cross section of the community, and his 14th Amendment right to equal protection of the laws. Batson requested a hearing on the motion to strike the jury and, without ruling on that motion, the trial judge stated that the parties were entitled to "strike anybody they want to."

The case was appealed to the Kentucky Supreme Court, which affirmed the decision of the trial court. It relied on the ruling in *Swain v. Alabama*,⁴¹ which recognized that a state's deliberate action to deny jury participation based on race violates the 14th Amendment. However, the 14th Amendment equal protection claim must be based on a state's systematic denial of jury participation. That is, the removal of a race from the jury pool, based on non-qualification or some other grounds before they even reach voir dire.

The main issue of the case was whether the trial court could deny a challenge to suspected racially-motivated peremptory strikes, without requiring the striking party to give a non-discriminatory reason for those strikes. The Court answered that question in the negative. Justice Powell's majority opinion stated that trial courts must require the striking party to articulate non-discriminatory reasons for the strikes.

Powell began his analysis with reference to *Stauder v. West Virginia*,⁴² which recognized that racial discrimination in jury selection offends the Equal Protection Clause. And while the defendant has no right to a petit jury with members of his race, it does guarantee the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria. Selection procedures that purposefully exclude black persons from juries "undermine public confidence in the fairness of our system of justice."⁴³ So, the trial court should consider all relevant

⁴⁰ 476 U.S. 79 (1986). See Task Force recommendation #8.

⁴¹ 380 U.S. 202 (1965).

⁴² 100 U.S. 303 (1880).

⁴³ *Batson*, 476 U.S. at 87.

circumstances and determine whether the petitioner has established a prima facie case.⁴⁴ Powell also noted that the Constitution does not guarantee a right to peremptory challenges, and that even *Swain* conceded that their use is ultimately subject to the strictures of equal protection.

Powell's opinion was joined by Justices Brennan, White, Marshall, Blackmun, Stevens and O'Connor, with Justices White and Marshall writing concurring opinions. Marshall's concurrence credits the decision as a terrific step towards reducing racial discrimination in the jury selection process. However, he cautions that the decision alone is not capable of ending discrimination in jury selection. According to Marshall, the only way to accomplish the goal of ending racial discrimination in jury selection is to entirely eliminate the peremptory challenge.⁴⁵

Marshall's concurrence pointed to two limitations to the majority's approach. First, it would effectively require a showing of flagrant discrimination to demonstrate the prima facie case and justify explanation. This would leave prosecutors free to continue to discriminate as long as they keep it at a "reasonable" level. Second, it is difficult to determine the veracity of the

⁴⁴ One circuit court's approach to establishing a prima facie case is *U.S. v. Allison*, 908 F.2d 1531 (11th Cir. 1990). The *Allison* case involves a black defendant convicted of conspiracy to possess with intent to distribute cocaine. During voir dire of a forty-person venire, which included six blacks, the prosecutor used three of his six peremptory strikes to remove blacks from the jury. Three blacks were ultimately chosen for the jury. The conviction was appealed from the U.S. District Court of for the Middle District of Florida to 11th Circuit Court of Appeals. On appeal, Allison argued that 1) he demonstrated a prima facie case of discrimination in the jury selection, and 2) that the explanations offered by the prosecutor were insufficient to survive the challenge. The district court never expressly ruled on whether or not Allison established a prima facie case, however, it did ask the prosecutor to explain why he struck the black jurors. The prosecutor denied that the strikes were racially motivated, and generally alluded to several factors that he considered, like age, education and type of employment, but did not specifically give the reason that the jurors were struck. The district court denied the Allison *Batson* challenge.

The appellate court opined that it was not possible to determine the basis for the district court's denial of the *Batson* challenge. The court acknowledged that the trial court ordinarily makes the determination of whether a prima facie case is established. *See id.* at 1537. However, the court determined that Allison failed to present evidence sufficient to establish a prima facie case. *See id.* The court relied on *U.S. v. Dennis*, 804 F.2d 1208 (11th Cir. 1986), in making its determination. The *Dennis* Court found that a prima facie case of discrimination was not met under circumstances where the prosecutor did not remove as many blacks from the venire as they could. Relying on similar reasoning in this case, the appellate upheld the denial of Allison's *Batson* challenge, not by evaluating the prosecutor's articulation of a non-discriminatory reason for the strike, but because a prima facie case was not established.

Circuit Judge Hatchett wrote a dissenting opinion. Judge Hatchett's dissent argued first, that contrary to the opinion of the majority, the trial court did determine that a prima facie case was made. Because an inquiry into the reasoning of the prosecutors exercise of his peremptory strikes is contingent upon the establishment of a prima facie case, the trial court must have found that Allison's burden to establish that prima facie case was met. Second, the dissent argued that the *Dennis* case, on which the majority relied, should be overturned. According to Hatchett, to place such weight on a prosecutor's abstention from eliminating as many blacks as he could have, would not prevent prosecutors from discriminating on the basis of race. Such an outcome would still violate the *Batson* rule because "[u]nder *Batson*, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown." 908 F.2d at 1539 (quoting *U.S. v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986)).

How does *Allison* reflect the concerns expressed in Justice Marshall's *Batson* dissent? Would adopting the approach of the Allison dissent, without completely eliminating the peremptory challenge as Marshall suggests, lead to a result that where in cases with black defendants, exempt black jurors from peremptory challenge? Or would it simply relieve the petitioner of his burden of establishing a prima facie case? If the removal of any black person could satisfy the prima facie case requirement, what effect would Virginia's suggested jury reform # 8 have on the peremptory challenge? Would that effectively exempt blacks from peremptory challenges?

⁴⁵ *See id.* at 103.

prosecutor's explanation for the strike. If easily-generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court may be illusory.⁴⁶

Marshall continued to suggest that the use of peremptory challenges be completely abolished. He reasoned that the right to peremptory challenge is not constitutional. Therefore, where the choice is between preserving the right to peremptories and the right of Equal Protection, Equal protection should always prevail. Consequently he concluded that the Court should ban the use of peremptory challenges by prosecutors and allow the states to eliminate the defendant's peremptories as well.⁴⁷

Chief Justice Burger and Justice Rehnquist filed dissenting opinions. The Chief Justice dissented for two reasons. First, the majority's decision was based on 14th Amendment Equal Protection, which was not argued by the Petitioner. The Petitioner argued the 6th Amendment to the Kentucky Supreme Court and was not even prepared to argue the 14th Amendment on *certiorari*. Second, the Chief Justice dissented because he believed the ruling will necessarily take away a criminal defendant's right to strike jurors whom he has intuitively perceived as prejudiced against him, when he cannot assign a specific reason for his dislike. The peremptory challenge system had worked in the common law for hundreds of years and deserved more deference. Chief Justice Berger believed a diversion from the current system deserved more consideration than what was given by the majority, and should at least be put off until the Court's next term.⁴⁸

According to Justice Marshall, the majority's approach would lead to prosecutors continuing to strike for racially discriminatory reasons, but at a lower frequency to prevent challengers from making a prima facie case. Is that an accurate prediction of *Batson* progeny? Do prosecutors continue to eliminate blacks from juries, while being cautious not to strike all of them to avoid a *Batson* challenge? Does the value added to the goal of achieving non-biased jury participation outweigh the interests of the litigants being able to remove jurors that they instinctively feel will not be impartial but do not have enough information about to dismiss for cause?

Batson's Federal Progeny

***Powers v. Ohio*⁴⁹ Extending *Batson* regardless of defendant's race**

The defendant, a white male, was convicted of aggravated murder amongst other charges. During jury selection at his state court trial, Powers objected to the State's use of peremptory challenges to remove seven black venire persons from the jury. Powers based his objections on *Batson v. Kentucky*.⁵⁰ The trial court denied repeated requests that the prosecutor be compelled to explain on the record his reasons for excluding a black person. On appeal, Powers argued the 14th Amendment's Equal Protection Clause prohibited the state's discriminatory use of

⁴⁶ See *id.* at 105–06.

⁴⁷ See *id.* at 107–08.

⁴⁸ See *id.* at 79.

⁴⁹ 499 U.S. 400 (1991).

⁵⁰ 476 U.S. 79 (1986).

peremptory challenges regardless of the defendant's race. The Ohio Court of Appeals affirmed his conviction.

The *Powers* Court held the fact that Power's race differs from the excluded jurors is irrelevant to his standing to object to discriminatory use of peremptory challenges. This landmark ruling provides the criminal defendant standing to raise third-party claims of jurors who have been excluded by the state because of race.

The Supreme Court recognized three important principles in *Powers* for the lower courts to consider when extending standing to criminal defendants to raise third party equal protection claims of jurors regardless of the defendant's race. First, the defendant has an interest in challenging the use of peremptory strikes because discriminatory use of the strikes causes injury to the accused, and also because racial discrimination in jury selection challenges the integrity and fairness of the judicial process.⁵¹ Second, the defendant's race is irrelevant because both the jurors and the accused have an interest in ending racial discrimination in the courtroom. The defendant will no doubt be motivated to raise the claim because proof of racially-motivated peremptory strikes may lead to reversal of conviction.⁵² Finally, standing should be extended because it is unlikely a juror dismissed because of race will possess the incentive to vindicate his or her own rights through the courts given the costs of litigation.⁵³

The Jury Reform Task Force in Virginia has recommended that a standard of reasonable doubt be applied once a defendant has made a prima facie case that the opposing party exercised a peremptory challenge based on race or gender. The court must determine beyond a reasonable doubt that the peremptory challenge is related to the circumstances of the case and is not based on race or gender. Given the recommendation, how does a challenge for cause differ from the peremptory challenge in this situation?

***Hernandez v. New York*:⁵⁴ Declining extension of *Batson* to jurors with cultural backgrounds**

Bad facts make bad law. In this case, the defendant challenged the state's use of peremptory challenges to remove two Hispanic-speaking Latino prospective jurors. In this case however, the prosecutor stated the peremptory challenges were used because the jurors indicated through questioning and behavior that it may be difficult to ignore the Spanish testimony and listen *only* to the English translation. Furthermore, the victim and most of the state's witnesses were Latino and the Supreme Court agreed with the state trial court and the New York Court of Appeals in rejecting the defendant's *Batson* claims. All three courts found that the prosecutor provided a race-neutral explanation for the peremptory challenges.

The Supreme Court, however, was careful to point out that this decision does not imply that exclusion of bilinguals from jury service is wise, or even constitutional in all cases.⁵⁵ English

⁵¹ See *Powers*, 499 U.S. at 411.

⁵² See *id.* at 414.

⁵³ See *id.* at 415.

⁵⁴ 500 U.S. 352 (1991).

⁵⁵ *Id.* at 369.

language ability is required for federal jury service.⁵⁶ This does not mean that you must encounter disqualification just because one may speak another language as well. “ Mere knowledge of [a foreign] language cannot reasonably be regarded as harmful. Heretofore it has commonly been looked upon as helpful and desirable.”⁵⁷ The Court went on to explicitly say that the *Hernandez* Court is not resolving the difficult question of how far to extend the definition of race for equal protection purposes.⁵⁸

Given the suggestion of a reasonable doubt standard of proof for peremptory challenges based on race, would a mini-trial need to take place to determine whether the standard has been met? How much would the prosecutor have to do to meet his burden of reasonable doubt in the *Hernandez* case? Where does race end and culture begin?

***Edmonson v. Leesfield Concrete*:⁵⁹ Extending *Batson* to all civil litigants**

A black construction worker was injured on the job. During voir dire, the defendant used two of three peremptory challenges to remove black jurors. The plaintiff objected to the peremptory challenges based on *Batson*. The district court denied the plaintiff’s requests to have the defendant articulate a race-neutral reason for peremptory challenges. The Court of Appeals for the Fifth Circuit reversed and remanded. However, on rehearing en banc, the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court reversed and remanded the case for determination of whether the plaintiff established a prima facie case of racial discrimination, such that defendant would need to provide race-neutral explanations for the peremptory challenges.

In a two-part holding, the *Edmonson* Court extended *Batson* to civil litigants. First, the court reasoned that discrimination based on race when selecting venire persons in a civil trial is no less harmful to the juror than exclusion from a criminal jury because of race.⁶⁰ The equal protection analysis for jurors is extended to jurors in civil as well as criminal trials because the violation is the same in either venue. Second, the Court extended the right of a private litigant to raise the equal protection claims of a juror that the opposing party has excluded from jury service on the account of race. Using the three-pronged analysis from *Powers*, the Court found that all three of the requirements for third-party standing exist in the civil context.

Should reasonable doubt be the standard of proof required when a litigant has demonstrated a prima facie case for a *Batson* challenge in a civil trial? What are the ramifications of this raised standard of proof in civil cases?

⁵⁶ See 28 U.S.C. §§ 1865(b)(2), (3).

⁵⁷ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

⁵⁸ *Hernandez*, 500 U.S. at 371.

⁵⁹ *Id.* at 614.

⁶⁰ *Id.* at 619.

***J.E.B. v. Alabama*.⁶¹ Expanding *Batson* to cases of gender discrimination**

The petitioner, a putative father, appealed from a jury verdict that declared him to be the father of a minor child. During voir dire, the state used 9 of its 10 peremptory strikes to remove male jurors for the jury pool and consequently, all the selected jurors were female. Petitioner argued unsuccessfully at trial that the peremptory strikes were made solely on the basis of gender and were in violation of the 14th Amendment's Equal Protection Clause. The trial court's finding, that *Batson* does not extend to gender-based peremptory challenges, was affirmed by the Alabama Court of Civil Appeals. Following the Supreme Court of Alabama's denial of *certiorari*, the U.S. Supreme Court granted *certiorari*.

Justice Blackmun delivered the opinion of the Court, from which, Justices Scalia, Rehnquist, and Thomas dissented. Blackmun's majority opinion phrased the question presented on appeal as "whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race."⁶² The Court answered this question by reaffirming the axiom that, "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where ... the discrimination serves to ratify and perpetuate invidious, archaic and overbroad stereotypes about the relative abilities of men and women."⁶³

Defending against arguments that gender deserves less protection than racial minorities, Blackmun acknowledged the differences between gender and racial discrimination, but argued that the similarities between the experiences of the two groups overpower the differences.⁶⁴ Additionally, the availability of voir dire allows the parties to determine actual bias of the venire men and women, instead of relying upon stereotypical expectations of the juror's opinions.⁶⁵ Therefore, the Court found that the 14th Amendment protections articulated in *Batson* do extend gender-based peremptory strikes.

Just Rehnquist argued in dissent, that race and sex discrimination are different and are generally afforded different levels of protection for that reason.⁶⁶ He discussed the additional costs of extending *Batson* set forth by Justice O'Connor in her concurring opinion, including, lengthier trials, increased complexity of appeals, and a diminished ability of parties to act on accurate gender based assumption.

Justice Scalia criticized the majority opinion for giving great attention to discrimination against women, while the case at hand involved discrimination against men.⁶⁷ Scalia continued to state that if stereotypes about men and women are incorrect, as the majority argued, then men and women are fungible, so that the exclusion of men from the jury caused no injury to the petitioner. Therefore, because no injury existed, the trial court's denial of the challenge was purely harmless error.⁶⁸

⁶¹ 511 U.S. 127 (1994).

⁶² *Id.* at 130.

⁶³ *Id.* at 130-31.

⁶⁴ *See id.* at 135.

⁶⁵ *See id.* at 143.

⁶⁶ *See id.* at 154.

⁶⁷ *See J.E.B. v. Alabama*, 511 U.S. 127, 156 (1994).

⁶⁸ *See id.* at 159.

Do differences between gender discrimination and racial discrimination justify the 14th Amendment protection of one but not the other during jury selection?

***Purkett v. Jimmy ELEM.*:⁶⁹ Race- neutral explanations need not be persuasive or plausible**

Defendant was convicted of second-degree robbery in a Missouri court. During jury selection, the defendant objected to the state's use of peremptory challenges to strike two black men from the jury panel based on *Batson*. The prosecutor explained his strikes:

“I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also had a mustache and goatee type beard. Those are the only two people on the jury...with the facial hair...And I don't like the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.”⁷⁰

The United States District Court for the Eastern District of Missouri denied relief, and petitioner appealed. The United States Circuit Court of Appeals for the Eighth Circuit reversed and remanded. *Certiorari* was granted. The Supreme Court reversed the court of appeals without the benefit of a full hearing and briefing.

The *Purkett* Court held that a race-neutral reason tendered by the proponent of the peremptory challenge need not be persuasive or even plausible. The Court stated a “legitimate reason” does not need to make sense; it is merely a reason that does not deny any equal protection.⁷¹

Using a *Batson* analysis, the Court went through the three-pronged test. Step one is establishing a prima facie case of racial discrimination, which was done in the present case. The burden of production then shifts to the proponent of the strike in step two, which requires a race-neutral explanation. Once the race-neutral explanation has been provided, step three requires the trial court to decide whether the opponent of the strike has proved purposeful racial discrimination.⁷² Thus, the burden of production returns to the opponent of the strike. Here, the court held the explanation provided by the state passed the three-pronged *Batson* test. A strong dissent by Justice Stevens and Justice Breyer admonished the majority for announcing a law-changing decision without ordering a full briefing and argument on the merits of the case.⁷³

What are the practical ramifications of *Purkett* in *Batson* challenges? Should all people with facial hair be excluded, why not extend equal protection rights to individuals with facial hair? Why not do away with peremptory strikes all together?

⁶⁹ 514 U.S. 765 (1995).

⁷⁰ *Id.* at 766.

⁷¹ *Id.* at 768.

⁷² *See id.* at 766.

⁷³ *See id.* at 770.

Batson's Virginia Progeny

After the Supreme Court decided the seminal case of *Batson v. Kentucky*,⁷⁴ peremptory challenges became a big issue for Virginia courts to grapple with. Thousands of cases involving *Batson* challenges have been heard over the course of 14 years since the Supreme Court outlined the procedure for challenging discriminatory peremptory strikes. In light of the proposed change to the standard of proof for *Batson* challenges by the Virginia Task Force on jury reform, this section will highlight some of the Virginia cases and show the direction the Virginia courts have taken regarding this issue.

Taitano v. Commonwealth⁷⁵

Taitano v. Commonwealth was decided one year after *Batson*. The *Taitano* Court defined and illustrated the standard for rebutting a prima facie case of purposeful discrimination. The Virginia Court of Appeals stated that “a neutral explanation related to the particular case to be tried” must be articulated for striking each juror.⁷⁶ In this particular case, the prosecutor explained that she struck two black men because they lived in high crime areas and were about the same age as the defendant; a third black juror was struck because he lived eight blocks from the defendant, was close to the same age as the defendant, and came to court poorly dressed; and a fourth juror was stricken because he lived close to where the defendant was arrested and near member’s of the defendant’s family.⁷⁷ All of these reasons were deemed “neutral” and “related to the case” by the district court and was upheld by the court of appeals.⁷⁸ Since *Taitano*, many explanations have been accepted by the courts as “neutral” and “related to the case.”⁷⁹ The wide range of acceptable excuses may be one of the reasons why the Supreme Court of Virginia is considering raising the standard of proof for lawyers who make peremptory strikes.

⁷⁴ 476 U.S. 79 (1986).

⁷⁵ 4 Va. App. 342 (1987).

⁷⁶ *Id.* at 347.

⁷⁷ *See id.* at 345.

⁷⁸ *See id.* at 346-49.

⁷⁹ Age has long been deemed an acceptable reason to strike jurors. *See Chambliss v. Commonwealth*, 9 Va. App. 267 (1989); *Barksdale v. Commonwealth*, 17 Va. App. 456, 460 (1993) (court found that prosecutor’s reason for his peremptory strikes, “young jurors or jurors who appeared not to be homeowners or people with not as big as stakes [sic] in the community as other people” was sufficiently race-neutral and related to the case). In a gender discrimination *Batson* challenge, strikes based on being “single,” “not a parent,” and disinterest in the case were all deemed acceptable reasons to strike males from a jury. *See Robertson v. Commonwealth*, 18 Va. App. 635, 638 (the court of appeals stated, “. . . disinterested jurors should be identified whenever possible, irrespective of race or gender.”). Education, employment and demeanor during voir dire may also constitute race-neutral explanations for peremptory strikes. *See Stockton v. Commonwealth*, 241 Va. 192, 208-09 (1991); *Goodson v. Commonwealth*, 22 Va. App. 61, 81 (1996). More recently, in *Kasi v. Commonwealth*, the court of appeals affirmed the Fairfax Circuit Court’s decision that striking the only juror of color because she was the only member of the entire panel who had never read anything about the high-profile case or heard anything about the case was a justifiable excuse to strike her. *See Kasi*, 256 Va. 407, 421 (1998) (“Striking a juror because she had not even read or heard anything about a well-publicized case clearly is a race-neutral reason.” *Id.* (citing *Spencer v. Murray*, 5 F.3d 758, 763-64 (4th Cir. 1993))). Just in June of this year, the court of appeals upheld a trial court’s determination that a strike based upon the fact that a defendant had attended Portsmouth public schools and the stricken juror was employed by the same school system, *even though the juror did not know the defendant*, was a non-pretexual, race-neutral reason for striking the juror. *See Drummond v. Commonwealth*, 2000 WL 724017 at *1 (Va. App. June 6, 2000).

Jackson v. Commonwealth⁸⁰

In *Jackson v. Commonwealth*, the Virginia Court of Appeals began to define what may or may not establish a “prima facie case of purposeful discrimination.” The court decided that the fact that members of a cognizable racial group remain on the impaneled jury does not mean that the defendant has failed to establish a prima facie case of racial discrimination.⁸¹ If an attorney uses a disproportionate number of challenges to strike black jurors, the court stated that is a relevant circumstance that must be considered in assessing a *Batson* challenge.⁸²

The *Jackson* court also articulated the circuit court’s role in evaluating *Batson* challenges, specifically for determining whether a “racially neutral, non-pretexual” reason has been given for excluding black persons.⁸³ The court stated, “*Batson* requires the trial judge to evaluate the credibility of the asserted reasons based upon the totality of the circumstances of the case, as reflected in the record.”⁸⁴ Further, the trial courts must not “rubber stamp” approval of nonracial explanations, but rather independently evaluate the reasons as he or she would any disputed fact.⁸⁵ Finally, the court instructed “the record must contain *findings* by the trial judge, not just a conclusion, in order to facilitate both the initial inquiry and appellate review.”⁸⁶ This instruction to circuit courts demonstrates what many circuit judges fear will become “mini-trials” on *Batson* challenges.⁸⁷

Broady v. Commonwealth⁸⁸

Broady v. Commonwealth is an important case because it curtailed the use of blanket “acceptable reasons” to strike jurors, *i.e.*, age. In *Broady*, the prosecutor struck three black men from the jury. After the defendant made a *Batson* challenge to the strikes, the prosecutor stated that he struck the jurors because of their age.⁸⁹ After the prosecution gave its reasons for striking the three black men, the defense protested that there were white men of the same age group that had

⁸⁰ 8 Va. App. 176 (1989).

⁸¹ *Id.* at 182.

⁸² *Id.* at 184. However, a recent case held that a prima facie case for discriminatory peremptory strikes was not met where the prosecutor struck five black jurors from the panel, because the jury was predominantly black (the jury panel was consisted of ten African Americans, one Hispanic, and three Caucasians). *See Johnson v. Commonwealth*, 529 S.E.2d 769, 780 (Va. App. 2000) (finding that the prosecutor’s “use of her peremptory strikes did not raise an inference that these strikes were made to exclude potential jurors based on their race”).

⁸³ *Jackson*, 8 Va. App. at 185.

⁸⁴ *Id.* (citing *State v. Slappy*, 522 So.2d 18, 22 (Fla.)).

⁸⁵ *See Jackson*, 8 Va. App. at 185.

⁸⁶ *Id.* (emphasis added) (citing *Stanley v. State*, 542 A.2d 1267, 1277 (1988)).

⁸⁷ *Winfield v. Commonwealth* further identifies the burden that *Batson* places upon the trial courts: *Batson* places upon the trial courts the burden of weighing the explanations tendered by prosecutors justifying their use of peremptory strikes, assessing their genuineness, and determining whether they bespeak discriminatory motives. . . . The trial judges, in weighing [explanations], have the opportunity of observing their proponents, of hearing rebuttal by the defense, and of considering the general circumstances of the case.

Winfield v. Commonwealth, 12 Va. App. 446, 453 (1991).

⁸⁸ 16 Va. App. 281 (1993).

⁸⁹ *See id.* at 284. The prosecution thought that jurors of the same age group as the defendant might be more sympathetic to him.

not been stricken.⁹⁰ The court of appeals held that “when it is further demonstrated that facially non-racial reasons are applied systematically to blacks but not whites, the Commonwealth has not overcome the presumption that the strikes were racially motivated.”⁹¹

Buck v. Commonwealth⁹²

Buck v. Commonwealth explains that the burden still lies with the *Batson* challenger to prove purposeful discrimination of a strike.⁹³ Even if race-neutral reasons are given by a lawyer seeking to strike a juror, the reasons may be challenged by the *Batson* proponent as pretextual.⁹⁴ The court of appeals stated that the pretext arguments must be made before the trial judge, however, and refused to overturn the trial court's ruling that the reasons for striking the jurors were not discriminatory even though at oral argument, several new arguments were made that negated the prosecutor's reasons.⁹⁵ The court of appeals further stated that it is not the trial court's responsibility to find inconsistencies with the proposed racially-neutral reasons and facts contained in the jury list.⁹⁶

This case reiterates that the burden of proof lies with the defendant to prove that the peremptory strikes are used for purposeful discrimination against jurors, and is part of the controversy surrounding the proposed rule to increase the burden of proof to the striking lawyer.

Commonwealth Transportation Commissioner of Virginia v. Thompson⁹⁷

With *Edmonson v. Leesville Concrete Co., Inc.*,⁹⁸ the U.S. Supreme Court extended *Batson* to civil cases. A Virginia court took that indication and expanded the application of *Batson* to Commission panels in *Commonwealth Transportation v. Thompson*. This case demonstrates the importance that Virginia courts place on maintaining the integrity of the judicial system, no matter what level of the trial process.⁹⁹

⁹⁰ See *id.* at 285.

⁹¹ *Id.* (citations omitted).

⁹² 247 Va. 449 (1994).

⁹³ See *id.* at 451 (citing *Batson*, 476 U.S. at 98).

⁹⁴ See *Buck*, 247 Va. at 451 (citing *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991)).

⁹⁵ See *Buck*, 247 Va. at 452.

⁹⁶ See *id.* One of the proposed reasons for striking a juror was because of his address. The prosecutor stated that the juror lived in Petersburg (an area with a significant drug problem) when the jury list indicated that he lived in Richmond (where several other jurors that were not struck lived).

⁹⁷ 249 Va. 292 (1995).

⁹⁸ 500 U.S. 614 (1991).

⁹⁹ The Virginia Supreme Court quoted *Edmonson* in its opinion:

[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

Thompson, 249 Va. at 295 (quoting *Edmonson*, 500 U.S. at 628).

Riley v. Commonwealth¹⁰⁰

Riley v. Commonwealth was decided after the Supreme Court extended *Batson* to challenges not only based upon race, but also gender in *J.E.B. v. Alabama ex rel. T.B.*¹⁰¹ After the defendant made a *Batson* challenge to the prosecutor's elimination of four, older women from the panel, the prosecutor stated that she wanted to strike jurors who were "most unlike" the rape victim in the case – older women. Although it is permissible to strike jurors based upon age, the court stated that "the prosecutor's explanation clearly references his intention to strike only women – albeit older women – from the jury panel. The fact that the Commonwealth used age to identify which women to strike does not overcome the constitutional infirmity."¹⁰² With the extension of *Batson* to gender discrimination, the possibility that other suspect classifications, such as religion, may be included under the *Batson* umbrella remains an open question.¹⁰³

¹⁰⁰ 21 Va. App. 330 (1995).

¹⁰¹ 511 U.S. 127 (1994).

¹⁰² *Riley*, 21 Va. App. at 335-36.

¹⁰³ See KEVIN F. O'MALLEY, JAY E. GREENIG, HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS 168 n.17 (5th ed., West 2000 § 4.07ff).