PEREMPTORY CHALLENGES IN JURY SELECTION IN LOUISIANA—WHEN A "GUT FEELING" IS NOT ENOUGH

Bobby Marzine Harges

"The purpose of voir dire examination is to develop the prospective juror’s state of mind not only to enable the trial judge to determine actual bias, but to enable counsel to exercise his intuitive judgment concerning the prospective jurors' possible bias or prejudice."

Since Batson v. Kentucky was decided by the United States Supreme Court in 1986, courts have continually attempted to define how lawyers can exercise peremptory challenges during jury selection for trials. In Batson, the Supreme Court fashioned a new approach to address racial discrimination during voir dire. This new approach prohibited the exercise of peremptory challenges based solely on race. The Court held that the Equal Protection Clause of the Fourteenth Amendment prevents a prosecutor from challenging jurors solely due to their race.

In subsequent decisions, the Court expanded Batson to prohibit peremptory challenges based on gender and ethnic origin in both criminal and civil cases, whether or not the peremptory challenge is exercised by the prosecutor, plaintiff’s attorney, or defense attorney. Following the United

* Bobby Marzine Harges is the Adams and Reese Distinguished Professor of Law II at Loyola University New Orleans College of Law. He successfully mediated to a settlement Alex v. Rayne Concrete Serv., 05-1457 (La. 1/26/07), 951 So. 2d 138, the case upon which this Article is based, after it was tried three times to a jury. This author wishes to thank Etheldra Scoggin, Rachel Walsh, Ed Ready, and Kim Sassine for their excellent research assistance on this Article.

1. Alex v. Rayne Concrete Serv., 05-1457 (La. 1/26/07); 951 So. 2d 138.
3. Id.
States Supreme Court's lead, the Louisiana Supreme Court has attempted to interpret the *Batson* decision and provide guidance to Louisiana trial lawyers regarding the proper exercise of peremptory challenges that do not run afoul of the United States and Louisiana constitutions. The Louisiana Supreme Court has discussed the limitations of *Batson* in both the civil context and in criminal cases.

This Article will examine Louisiana's approach to jury selection in the shadow of *Batson* and its progeny. First, the *Batson* decision will be analyzed followed by an analysis of subsequent Supreme Court decisions that discuss the *Batson* decision. Then the Article will turn to Louisiana by discussing the Louisiana Supreme Court's most recent pronouncement on *Batson*: Alex v. Rayne Concrete Service, a decision that applies the *Batson* principles in a civil case. Finally, the Article will discuss the practical implications of the *Alex* decision.

### I. BATSON v. KENTUCKY

In *Batson v. Kentucky*, the United States Supreme Court provided a workable method for attacking racial discrimination in the use of peremptory challenges. Though *Batson* has been extended to cover other aspects of discrimination in the last two decades, the Court's decision in *Batson* produced a framework that could be used to combat the conscious racism that had existed in the courts during jury selection. In *Batson*, the Supreme Court explained that it was not undoing the ideals of *Swain v. Alabama* and its precedents, but rather incorporating a new three-pronged test to replace the unworkable and unjust requirements of *Swain*—particularly the required showing of a history of discrimination. In *Swain*, decided over twenty years earlier, the Court held that a black defendant could make out a prima facie case of purposeful discrimination only on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the

---

5. *Alex*, 951 So. 2d at 138.
7. *Swain v. Alabama*, 380 U.S. 202 (1965). In *Swain*, the Court held that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. *Id.* at 224. Evidence offered by the defendant in *Swain* did not meet that standard because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. *Id.* It was a step that was considered incomplete by the Court in that did not allow for racism occurring at that moment to be shown, but only by a long history of it. The Court in *Batson* decided that this was unjust.
8. *Id.* at 224.
defendant in *Swain* did not meet that standard because it did not demonstrate that prosecutors in Alabama were responsible for striking black jurors beyond the facts of the defendant's case. The Court in *Batson* considered *Swain*'s holding incomplete in that it failed to allow for a showing of racism at the moment without showing a long history of racism over a series of cases. Because *Swain*, as interpreted by some lower courts, placed a crippling burden of proof on defendants, the Court in *Batson* found that prosecutors’ peremptory challenges were largely immune from constitutional scrutiny under the *Swain* standard. The Court then rejected *Swain*'s evidentiary formulation, finding it an unjust and an inappropriate method for assessing a prima facie case under the Equal Protection Clause.

Batson, an African-American male, was discriminated against because of his race during his criminal trial in a Kentucky state court when the judge allowed the prosecutor to use his peremptory challenges to strike all four black persons on the venire, ultimately resulting in a jury composed only of white persons. Batson’s attorney moved to discharge the jury on the basis that Batson’s Sixth and Fourteenth Amendment rights to a jury selected from a cross-section of the community and his right to equal protection of the laws under the Fourteenth Amendment were violated when the prosecutor removed the black venire men. Without expressly ruling on Batson’s request for a hearing, the trial judge denied the motion, and the jury ultimately convicted Batson. The appeal reached the Kentucky Supreme Court, where it was affirmed based on the rules promulgated by *Swain*.

When the case reached the United States Supreme Court, the Court addressed whether *Swain* provided a workable method with which to attack discrimination in jury selection and answered in the negative. Specifically, the *Batson* Court held:

Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black

---

11. *Id.*
12. *Id.* at 83.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 92-93.
jurors as a group will be unable impartially to consider the State’s case against a black defendant.\(^{17}\)

Thereafter, the Court promulgated a new rule to ensure compliance with the Equal Protection Clause, thereby overruling the rule announced in \textit{Swain}.\(^{18}\) The Court first reaffirmed the historic principles it had begun to embrace a century earlier in \textit{Strauder v. West Virginia}, which held that racism has no place in the courts.\(^{19}\) \textit{Strauder} announced the principle that a black defendant is denied equal protection by the State when he is put before a jury from which the prospective jurors of his race were purposefully excluded.\(^{20}\) The Court in \textit{Batson} then restated its belief that purposefully excluding black persons from juries undermines public confidence in the fairness of our system of justice.\(^{21}\) To prevent this purposeful exclusion of black persons, the Court then explained the method by which the principle first announced in \textit{Strauder} would be effectively applied.

In applying this principle, the \textit{Batson} Court developed a three-step inquiry for determining whether the State has discriminated in jury selection. First, the defendant must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove members of the defendant’s race from the venire.\(^{22}\) Second, the defendant may rely on the fact that peremptory challenges are a jury selection practice that permits “those to discriminate who are of a mind to discriminate.”\(^{23}\) Finally, the defendant must prove that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on the basis of their race.\(^{24}\) Once the defendant makes this prima facie showing of racial discrimination, the burden shifts to the State to provide a neutral explanation for challenging black jurors.\(^{25}\) At this point, the trial court must determine if the defendant has established purposeful discrimination.\(^{26}\)

When a defendant makes a claim of purposeful racial discrimination in jury selection, the trial judge must have a hearing to determine if pur-
poseful racial discrimination occurred. The defendant no longer has to make a prima facie showing of purposeful racial discrimination in selection of the venire by showing a pattern over a series of cases—rather he can rely solely on the facts concerning jury selection in his particular case. The *Batson* Court dismissed the State of Kentucky's concerns that the holding would eviscerate the fair trial values served by the peremptory challenge. Noting that the United States Constitution does not guarantee a right to peremptory challenges and emphasizing their important position in our trial procedures, the Court nonetheless acknowledged that peremptory challenges, at times, were used to discriminate against black jurors. Debunking the State of Kentucky's argument, the Court found that the new guidelines would require trial courts to be sensitive to the racially-motivated use of peremptory challenges, and that the three-part framework would enforce the mandate of equal protection and further the ends of justice.

Moreover, the Court did not share the concerns of Justice Thurgood Marshall, who concurred in the decision, but averred that the majority opinion failed to fashion a remedy adequate to eliminate discrimination against blacks in jury selection. Justice Marshall advocated the complete elimination of peremptory challenges as the only means by which racial discrimination in jury selection could be eradicated. The majority dismissed the argument, stating that it had no reason to assume that prosecutors would continue to use peremptory challenges illegitimately or that trial judges, in supervising jury selection, would fail to identify a prima facie case of purposeful racial discrimination. Finding that the peremptory challenge is a historic trial practice that has long served an important purpose in the selection of an impartial jury, the Court refused to abolish its use despite Justice Marshall's concerns.

**II. BATSON'S PROGENY**

After the United States Supreme Court's landmark ruling in *Batson*, the Court went on to refine and expand its peremptory challenge jurisprudence in a series of cases that completely reshaped the use of peremptory challenges in many types of litigation. The following sections outline this

---

28. Id. at 98-99.
29. Id.
30. Id. at 99.
31. Id. at 99 n.22.
32. Id. at 103.
33. Id. at 99 n.22.
34. Id.
gradual reform of the peremptory challenge procedure and the Court’s attempts to bring the process within the strictures of the United States Constitution.

A. POWERS v. OHIO

In Powers v. Ohio,\(^35\) the United States Supreme Court expanded the rule of Batson to prevent racial exclusions of potential jurors, regardless of whether the potential jurors and the defendant were of the same race.\(^36\) In Powers, the defendant was a white man on trial for two counts of aggravated murder and one count of attempted aggravated murder.\(^37\) During jury selection, the prosecution used peremptory challenges to remove the six potential black jurors.\(^38\) The defendant repeatedly objected, requesting the prosecution to provide reasons for these exclusions.\(^39\) However the judge overruled the objections and the defendant was convicted.\(^40\) The conviction was affirmed on appeal, and the state supreme court dismissed the appeal finding no constitutional question.\(^41\)

The Supreme Court “granted Powers’ petition for certiorari limited to the question of whether, based on the Equal Protection Clause, a white defendant may object to the prosecution’s peremptory challenges of black venirepersons.”\(^42\) Before the United States Supreme Court, the State of Ohio sought to limit Batson to its facts, arguing that a white defendant could not object to the exclusion of prospective black jurors.\(^43\) Rejecting this argument, the Court emphasized that “[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.”\(^44\) The Court also rejected the view that because all races are subject to the same risk of similar discrimination—that is, white jurors face the same risk of peremptory challenges based on race that all other jurors face—there is no equal protection violation.\(^45\) This view, according to the Court, has no place in contemporary equal protection jurisprudence because racial classifications cannot become

\(^{36}\) Id. at 416.
\(^{37}\) Id. at 402.
\(^{38}\) Id. at 403.
\(^{39}\) Id.
\(^{40}\) Id.
\(^{41}\) Id.
\(^{42}\) Id. at 404.
\(^{43}\) Id. at 406.
\(^{44}\) Id. at 409.
\(^{45}\) Id. at 410.
legitimate on the simple assumption that all persons suffer them to an equal degree.\textsuperscript{46}

The Court further recognized that while in the general case a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties, a criminal defendant, regardless of racial identity, has standing to claim a violation of a juror's equal protection rights.\textsuperscript{47} However, three important criteria must be met.\textsuperscript{48} First, the defendant must show that he suffered a cognizable injury, giving him an interest in challenging the act.\textsuperscript{49} Such a showing can be made when members of a race are excluded, placing the fairness and lawfulness of a trial at risk.\textsuperscript{50} Second, the defendant must share a close relation with the juror, allowing the defendant to advocate for the juror.\textsuperscript{51} Finally, there must exist some difficulty preventing the juror from bringing such an objection on his own behalf.\textsuperscript{52}

The defendant met the first criterion in \textit{Powers}—the litigant’s suffering an injury in fact—because the prosecution’s discriminatory use of peremptory challenges causes harm to a criminal defendant since racial discrimination during voir dire “casts doubt on the integrity of the judicial process.”\textsuperscript{53} Thus, the defendant in \textit{Powers} exhibited a concrete interest in challenging this practice. The defendant in \textit{Powers} also met the second criterion—a close relation between the defendant and the juror—because both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination in the courtroom.\textsuperscript{54} Just as a juror who is excluded because of discrimination may lose confidence in the court and its verdicts, so might a defendant whose objections to discrimination are not heard.\textsuperscript{55} The third criterion—the difficulty of the excluded venirepersons to assert their own rights and interests—was present in \textit{Powers} because dismissed jurors rarely bring suit alleging racial discrimination in jury selection.\textsuperscript{56} Moreover, the barriers to bringing these types of suits are enormous because the excluded jurors are not parties to the jury selection process and

\textsuperscript{46} \textit{Powers}, 449 U.S. at 410.
\textsuperscript{47} \textit{Id.} at 410-15.
\textsuperscript{48} \textit{Id.} at 410-11.
\textsuperscript{49} \textit{Id.} at 411.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 411.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 411 (internal citations omitted).
\textsuperscript{54} \textit{Id.} at 413.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
thus have no chance to be heard at the time of their exclusion.\(^{57}\) Additionally, the small financial stake of jurors' discrimination claims together with the large costs to pursue such litigation act as barriers to jurors' suits.\(^{58}\) After finding that Powers had standing to object to the prosecution's use of peremptory challenges to exclude potential black jurors, the Supreme Court reversed and remanded the case to the trial court for further proceedings consistent with its ruling.\(^{59}\)

**B. EDMONSON v. LEESVILLE CONCRETE CO., INC.**

In *Edmonson v. Leesville Concrete Co., Inc.*,\(^{60}\) the Court extended the procedural approach set forth in *Batson* to civil proceedings by stating that parties are prohibited from exercising peremptory challenges based solely on the race of the prospective juror. Edmonson, a black man, sued Leesville Concrete Co. alleging that Leesville's negligence caused him personal injury.\(^{61}\) During voir dire, Leesville used two of its three peremptory challenges to remove black persons from the jury.\(^{62}\) Edmonson requested that Leesville articulate a race-neutral justification for the exercise of its peremptory challenges; but Leesville argued that the principles set forth by *Batson* applied only to criminal proceedings, and the trial court agreed, refusing to require Leesville to give race-neutral reasons for its challenges.\(^{63}\) The Fifth Circuit Court of Appeals initially reversed the trial court's decision but affirmed on rehearing.\(^{64}\) The United States Supreme Court ultimately granted certiorari and extended *Batson* to civil proceedings, holding that a private litigant in a civil case cannot use peremptory challenges to exclude jurors solely due to race.\(^{65}\)

Recognizing the "impropriety of racial bias in the court room," the Supreme Court held that race-based exclusions violate the equal protection rights of challenged jurors.\(^{66}\) Moreover, the Court held that a civil litigant has standing to raise the equal protection claim of a person excluded from jury service.\(^{67}\) The Court reasoned that although an individual juror sub-

\(^{57}\) *Powers*, 449 U.S. at 414.
\(^{58}\) *Id.*
\(^{59}\) *Id.* at 416.
\(^{61}\) *Id.* at 616.
\(^{62}\) *Id.*
\(^{63}\) *Id.* at 617.
\(^{64}\) *Id.*
\(^{65}\) *Id.* at 618.
\(^{66}\) *Id.* at 616.
\(^{67}\) *Id.* at 629.
jecteted to a discriminatory peremptory exclusion would have the right to bring suit on his or her own behalf, barriers to bringing such a suit would be daunting. Also, because racial discrimination in the exercise of peremptory challenges casts doubt on the integrity of the judicial process as a whole and on the proceeding’s fairness, a litigant can adequately demonstrate that he or she suffered a concrete, redressable injury caused by the race-based exclusion of jurors. The Court noted that a civil proceeding can implicate “significant rights and interests” and that “[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.” Moreover, the Court extended to civil proceedings the procedural approach set forth by Batson, pursuant to which race-neutral explanations are required for peremptory challenges after a prima facie case for discrimination has been established.

C. J.E.B. v. ALABAMA

In J.E.B. v. Alabama, the United States Supreme Court extended the Batson principles to sex-based or gender-based discrimination in jury selection. In a paternity and child support suit, J.E.B. made a Batson challenge to opposing counsel’s removal of male jurors rendering the panel all female. His objections were set aside and the jury found him to be the father of the child. Alabama appellate courts affirmed.

The Supreme Court ruled that discrimination on the basis of gender or sex violates the Equal Protection Clause. Such intentional discrimination was based on, and reinforced by, unfounded stereotypes that undermined the trial process—notably that men would be more sympathetic to the alleged-father and that women would be more sympathetic to the mother. The Court found that this form of discrimination has a similar effect as racial discrimination and thus warrants a similar protection. As a result, the Court overruled the appellate court and remanded the case accordingly.

68. Edmonson, 500 U.S. at 629.
69. Id. at 629-30.
70. Id. at 630.
71. Id. at 631.
73. Id. at 129.
74. Id.
75. Id. at 129-30.
76. Id. at 130-31.
77. Id. at 135-46.
78. Id. at 144-46.
79. Id. at 146.
D. UNITED STATES v. MARTINEZ-SALAZAR

In United States v. Martinez-Salazar, the United States Supreme Court appeared to expand Batson beyond race and gender to prohibit discrimination in jury selection based on ethnic origin. The Court addressed the procedural use of peremptory challenges during voir dire. The district court refused to excuse for cause a potential juror who stated that he would probably favor the prosecution. The defendant then used a peremptory challenge to strike the juror. The Ninth Circuit Court of Appeals, finding that the failure to remove the juror violated the defendant's Fifth Amendment due process right by forcing him to use a peremptory challenge, reversed his conviction.

The Supreme Court reversed the Ninth Circuit, finding that the loss of a peremptory challenge does not amount to a constitutional violation. Further rejecting the claim, the Supreme Court ruled that there is no denial of the constitutional guarantee of a fair trial by an impartial jury when a defendant uses a peremptory strike on a juror that should have been excused for cause. Rather, the peremptory challenge helps secure a fair trial and impartial jury, since the biased juror was excused from jury duty thus giving the defendant what the law provided. The government argued that a defendant should be required to use a peremptory challenge to strike a juror that should have been challenged for cause. However, the Supreme Court stated that the only substantive limitation on peremptory challenges is Batson's prohibition against discrimination based upon "the juror's gender, ethnic origin, or race." The Court thus reversed the Ninth Circuit's judgment.

An important edict made by the Supreme Court in Martinez-Salazar relative to peremptory challenges was that the Equal Protection Clause, in addition to preventing a party from exercising a peremptory challenge to remove a potential juror solely on the basis of the potential juror's race or

81. Martinez-Salazar, 528 U.S. at 308-09.
82. Id. at 309.
83. Id. at 309-10. The appellate court did note that there was no violation of the 6th Amendment right to impartial jury since the potential biased juror was removed. Id. at 309.
84. Id. at 313.
85. Id. at 317.
86. Id. at 315-16.
87. Id. at 314.
88. Id. at 315.
89. Id. at 317.
gender, also prevented a party from removing a juror solely on the basis of the potential juror's ethnic origin. While the Court had previously prevented peremptory challenges based solely on the juror's race and gender, the Court had never previously made this statement relative to ethnicity. When the Court in Martinez-Salazar stated that the Equal Protection Clause prevents a party from exercising a peremptory challenge to remove a potential juror solely on the basis of the juror's ethnic origin, it cited Hernandez v. New York. In Hernandez, the Court stated that it specifically was not addressing the ethnicity issue because the prosecutor in Hernandez did not rely on the potential juror's ethnicity, without more, to exclude the potential juror. In other words, although the defendant in Hernandez argued that it was a violation of the Equal Protection Clause to exercise a peremptory challenge on the ground that a Latino potential juror speaks Spanish (ethnicity), the Court did not address the issue. However, it is important to note that the Court, while not expressly deciding the issue, has stated that the Equal Protection Clause also prevents a party from removing a potential juror solely on the basis of the potential juror's ethnic origin.

III. ALEX v. RAYNE CONCRETE SERVICE

In Alex v. Rayne Concrete Service, the Louisiana Supreme Court discussed the Batson/Edmondson principles as they apply to civil cases in Louisiana. The court granted consolidated writs to resolve a split among the Louisiana courts regarding the appropriate procedure for appealing a trial judge's ruling on a Batson/Edmonson challenge. While some appellate courts allowed a direct appeal following a trial on the merits, others had held that Batson/Edmonson rulings were appealable only by supervisory writ. Harold Alex, a concrete worker, was injured while assisting in the installation of a swimming pool at a residence in Rayne, Louisiana. He brought a personal injury lawsuit against Rayne Concrete Service and its insurer, and against his employer, Louisiana Concrete Specialist. The case was tried three times to a jury. The first trial on December 1, 1998

93. Id. at 360, 371-72.
94. Alex v. Rayne Concrete Serv., 05-1457, 05-2344, 05-2520, p.1 (La. 1/26/07); 951 So. 2d 138, 141.
95. Id.
96. Id. at 141.
97. Id. at 142.
98. Id.
99. Id.
resulted in a mistrial when the jury failed to reach a verdict on the liability issue. The second trial was held on December 18, 2000, with the jury returning a verdict in favor of Alex. After the court of appeal affirmed Alex’s motion for a new trial based on insufficient apportionment of fault and insufficient damages, the third trial was held from July 12-15, 2004.

During voir dire, Alex made a Batson/Edmonson challenge objecting to the striking of four potential African-American jurors. The trial court rejected Alex’s challenge, and the trial began because Alex did not seek immediate review of the decision by writ application. The jury returned a verdict awarding Alex damages totaling $76,000 after apportioning 45% of the fault to Alex, 50% to Rayne Concrete Service, and 5% to Alex’s employer, Louisiana Concrete Specialist. Alex appealed again alleging, inter alia, that the trial court committed manifest error in denying his Batson/Edmonson challenge. The Louisiana Court of Appeal for the Third Circuit accepted the matter for hearing en banc to determine whether a party must seek review of a ruling on a Batson/Edmonson challenge by supervisory writ application or whether the party can wait until the trial ends to seek appellate review of the ruling. After considering the split among the Louisiana courts of appeal, the third circuit found that the “precepts of judicial economy and fundamental fairness would be better served by allowing a party to a civil suit to have [the] Batson/Edmonson challenge heard on appeal, rather than solely on application for supervisory writ.” Finally, the third circuit held that the trial court erred in denying Alex’s Batson/Edmonson challenge to Rayne Concrete’s systematic exclusion of African-Americans from the jury. Realizing that the parties had conducted three jury trials in the matter, the third circuit conducted a de novo review rather than remanding the case for a new trial. After reapportioning the fault among the parties (increasing the percentage of fault to Rayne Concrete and decreasing the percentage of fault to Alex), the third circuit

100. Alex, 951 So. 2d at 142.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. Id. at 143.
110. Id.
slightly increased the amount awarded to Alex.\footnote{111}

Both Alex and Rayne Concrete applied for supervisory writs to the Louisiana Supreme Court.\footnote{112} Rayne Concrete alleged that the court of appeal erred in reversing the trial court’s \textit{Batson/Edmonson} ruling in failing to conduct a harmless error analysis regarding the improperly excluded juror and in increasing the amount of fault to Rayne Concrete.\footnote{113} Alex applied for supervisory writs alleging that the court of appeal erred in conducting a \textit{de novo} review in its \textit{Batson/Edmonson} ruling on two additional excluded African-American jurors and in its apportionment of fault to Alex.\footnote{114}

The Louisiana Supreme Court granted and consolidated the writ applications.\footnote{115} The primary legal issue considered by the court was the proper procedural mechanism by which a party may seek review of a \textit{Batson/Edmonson} challenge in a civil case in Louisiana.\footnote{116} Since a ruling on a jury challenge is an interlocutory judgment or order, as it “does not determine the merits but only preliminary matters in the course of the action,” the court noted that “[t]here is no question that . . . an intermediate court of appeal can review a trial court’s ruling on a \textit{Batson/Edmonson} ruling upon supervisory writ application.”\footnote{117}

A. \textit{BATSON/EDMONSON} RULING IN CIVIL CASES MAY BE REVIEWED BY AN APPELLATE COURT BY SUPERVISORY WRIT OR ON APPEAL

According to the Louisiana Second and Fourth Circuit Courts of Appeal, judicial economy, procedural due process, and equal protection all mandate that a party in a civil case can seek appellate review of a \textit{Batson/Edmonson} challenge only on supervisory writs and not on appeal after trial.\footnote{118} However, while the two appellate courts had earlier expressed the view that proceeding to trial with an already existing error that could nullify

\begin{thebibliography}{99}
\footnotesize
\bibitem{111} Alex, 951 So. 2d at 143.
\bibitem{112} \textit{Id.} at 143-44.
\bibitem{113} \textit{Id.} at 143.
\bibitem{114} \textit{Id.} at 143-44.
\bibitem{115} \textit{Id.}
\bibitem{116} \textit{Id.} at 144.
\bibitem{117} \textit{Id.} at 144-45 (citing \textit{LA. CODE CIV. PROC. ANN.} arts. 2201, 2083 (2007)).
\bibitem{118} \textit{Id.} at 145 (citing Freeman v. Humble, 27,419, p. 2 (La. App. 2 Cir. 9/27/95), 661 So. 2d 652, 654; Phillips v. Winn Dixie Stores, Inc., 94-0354, p. 6 (La. App. 4 Cir. 2/23/95), 650 So. 2d 1259, 1263, \textit{writ denied}, 95-0748 (La. 4/28/95); 653 So. 2d 599; Cooke v. Allstate Ins. Co., 93-1057, p. 4 (La. App. 4 Cir. 4/14/94); 635 So. 2d 1330, 1333, \textit{writ denied}, 94-1257 (La. 9/2/94); 659 So. 2d 496; White v. Touro Infirmary, 93-1617, p. 6 (La. App. 4 Cir. 2/11/94); 633 So. 2d 755, 760; Holmes v. Great Atl. & Pac. Tea Co., 622 So. 2d 748, 760 (La. Ct. App. 1993), \textit{writ denied}, 629 So. 2d 1178 (La. 1993)).
\end{thebibliography}
the entire proceeding is a tremendous waste of judicial time and resources, they nevertheless reviewed *Batson/Edmonson* challenges on appeal. Contrary to the Second and Fourth Circuits, which have not always been clear about when a *Batson/Edmonson* challenge may be made, the Louisiana First and Third Circuit Courts of Appeal have unequivocally stated that trial court rulings on a party’s *Batson/Edmonson* challenge can be reviewed on appeal as well as under their supervisory jurisdiction.

In holding that a party is allowed to seek review of a trial court’s rulings on a *Batson/Edmonson* challenge on appeal as well as under supervisory jurisdiction, the Louisiana Supreme Court examined Louisiana practice in criminal cases. The court noted that it had reviewed *Batson* challenges in criminal cases on appeal and that it routinely reviews *Batson* challenges in capital cases on direct appeal. Thus, reviewing *Batson/Edmonson* challenges on appeal in civil cases was not inconsistent with Louisiana procedure in criminal cases. The court also noted that challenges for cause in civil cases are also reviewed on appeal in Louisiana. Additionally, the court recognized that federal courts routinely review both peremptory and for cause challenges on appeal. Finally, the court stated that because the United States Supreme Court’s decision in *Miller-El v. Dretke* allows a defendant to rely on “all relevant circumstances” to raise an inference of purposeful discrimination, and not just the reasons proffered by the State in making peremptory challenges, it seemed reasonable, if not necessary in some cases, for a party to wait until the conclusion of trial to seek review of peremptory challenges. An example given by the court was that comments that made in a closing argument could be relevant under the *Miller-*

119. *Alex*, 951 So. 2d at 146 (citing *Matthews v. Arkla Lubricants*, Inc., 32,121, pp. 19-20 (La. App. 2 Cir. 8/18/99); 740 So. 2d 787, 800-01; *Freeman*, 661 So. 2d at 654; *Smith v. Lincoln Gen. Hosp.*, 27,133, pp. 22-23 (La. App. 2 Cir. 6/21/95); 658 So. 2d 256, 270-71, *writ denied*, 95-1808 (La. 10/27/95); 662 So. 2d 3; *Cooke*, 635 So. 2d at 1330).

120. *Id.* at 143. (citing *Masse-Richardson v. Samudia*, 05-987 (La. App. 3 Cir. 3/15/06); 925 So. 2d 722; *Grayson v. R.B. Ammon & Assocs.*, Inc., 99-2597, pp. 4-6 (La. App. 1 Cir. 11/3/00); 778 So. 2d 1, 7-9, *writs denied*, 00-3270, 00-3311 (La. 1/26/01); 782 So. 2d 1026, 1027; *Lee v. Magnolia Garden Apartments*, 96-1328, pp. 5-11 (La. App. 1 Cir. 5/9/97); 694 So. 2d 1142, 1146-49, *writ denied*, 97-1544 (La. 9/26/97); 701 So. 2d 990; *Hurts v. Woodis*, 95-2166, pp. 4-5 (La. App. 1 Cir. 6/28/96); 676 So. 2d 1166, 1172; *Richard v. St. Paul Fire & Marine Ins. Co.*, 94-2112, pp. 3-6 (La. App. 1 Cir. 6/23/95); 657 So. 2d 1087, 1089-91).

121. *Id.*

122. *Id.* at 146.

123. *Id.*

124. *Id.*

125. *Id.*


127. *Alex*, 951 So. 2d at 146.
El analysis to prove a party’s racial motive in making an earlier peremptory challenge. While the court acknowledged that judicial economy may be better served in some cases by requiring a party to seek review of a peremptory challenge by supervisory writ, it held “that a party is not required to proceed that way, and may seek review by appeal after the conclusion of the trial.” After the court decided the procedural issue, it then turned to the issue of whether the trial court committed legal error when it granted Rayne Concrete’s peremptory challenge to three African-American prospective jurors in violation of *Batson/Edmonson*.

**B. WHEN A HUNCH JUST WON’T SUFFICE DURING VOIR DIRE**

During jury selection of the third trial in *Alex*, four African-Americans were part of voir dire at the beginning of the process. One of the African-Americans was excluded for cause, and Rayne Concrete used three of its peremptory challenges to exclude the remaining three African-Americans. Thereafter, Alex’s counsel made a *Batson/Edmonson* challenge arguing that the removal of the African-American jurors would cause Alex to have his case tried without a jury of his peers. The real focus of the Louisiana Supreme Court’s attention was the third circuit’s holding with regard to prospective juror Reva Charlot, a black female who was excluded by Rayne Concrete because of a “gut feeling” about her. Rayne Concrete’s counsel used a peremptory challenge to exclude Charlot because he did not get “good vibes” from her, and because, based on his personal observations and his gut feeling, she simply did not like him, but liked Alex.

In essence, the Louisiana Supreme Court was left to determine if a lawyer’s hunch or gut feeling in exercising a peremptory challenge against a prospective juror, without any articulation to the trial judge on the record,

---

128. *Alex*, 951 So. 2d at 146. One could also envision other important phases of the trial where comments or questions could be relevant under the *Miller-El* analysis, such as during opening statement, direct or cross-examination of a witness, or during argument to the court on evidentiary issues. See id.
129. *Id.* at 147.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 150. The Louisiana Supreme Court found that the appellate court did not err in finding that Rayne Concrete presented plausible and persuasive reasons for using its peremptory challenges against two of the prospective jurors, and thus properly exercised peremptory challenges as to those two prospective jurors. *Id.*
135. *Id.* at 148, 150.
violates the intention of the *Batson/Edmonson* rule.\(^{136}\) To make this determination, the court, citing the *Batson* case, stated that the Equal Protection Clause of the United States Constitution prohibits parties from engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges.\(^{137}\) The court then reviewed a recent United States Supreme Court decision, *Rice v. Collins*,\(^{138}\) and stated its understanding of the three-step *Batson* process that guides a court's examination of peremptory challenges for constitutional infirmities:

A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensive reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.\(^{139}\)

Finally, the court noted that the United States Supreme Court's decision in *Miller-El v. Dretke*\(^{140}\) expanded on the type and quantum of evidence considered in *Batson*'s third step by refocusing attention on *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination, and to the trial judge's duty under *Batson* to assess the plausibility of the prosecutor's proffered reason for striking a potential juror in light of all relevant evidence bearing on that reason.\(^{141}\) This renewed focus on "all relevant circumstances" is in recognition of the fact that *Batson*'s weakness is its very emphasis on the particular

\(^{136}\) *Alex*, 951 So. 2d at 150.

\(^{137}\) Id.

\(^{138}\) *Rice v. Collins*, 546 U.S. 333 (2006) (holding that although a trial court may have reason to doubt a prosecutor's motive for dismissing a juror, the trial court is not compelled to automatically reject the prosecutor's race-neutral justifications).

\(^{139}\) *Alex*, 951 So. 2d at 150-51 (citing Rice v. Collins 546 U.S. 333 (2006); State v. Snyder, 98-1078 (La. 9/6/06); 942 So. 2d 484).


\(^{141}\) *Alex*, 951 So. 2d at 151.
reasons a prosecutor might give in striking a potential juror, the fact that some of those reasons are false, and that a court may not be sure of this fact unless it looks beyond the case at hand. In other words, on some occasions a court may be able to determine that a prosecutor’s stated reasons for challenging a potential juror are false from the four corners of a given case. On other occasions, however, a court may not be sure that those reasons are false unless it looks beyond the four corners of the case.

After reviewing the United States Supreme Court’s most recent interpretations of Batson, the Louisiana Supreme Court examined its own recent decisions to determine whether it had specifically addressed the question of “gut feelings” in the context of the Batson/Edmonson rule. None of the court’s previous decisions had expressly addressed the issue. The court also surveyed decisions of lower Louisiana appellate courts and found that the Second, Third, and Fourth Circuits, had held that a “gut feeling” is not a sufficiently neutral explanation. Moreover, the court noted that federal courts and an Alabama court had held that a prosecutor’s “feeling” about a potential juror is not a legitimate explanation under Batson.

With its review of appellate jurisprudence complete, the Louisiana Supreme Court held that while “gut feelings” may factor into the decision to exercise a peremptory challenge, this reason, taken alone, does not constitute a race-neutral explanation. Gut feelings, according to the court, are most ambiguous and inclusive of discriminatory feelings and “fall [ ] short of an articulable reason that enables the trial judge to assess the plausibility of the proffered reason for striking a potential juror.” If a lawyer has a “gut feeling” while exercising a peremptory challenge, the court stated that the reason behind the gut feeling should be explained to the trial court on the record so that the proffered reason can be properly evaluated. This is in accordance with Batson’s requirement that a neutral reason be one that is “clear, reasonably specific, legitimate and related to the particular case at

142. Alex, 951 So. 2d at 151Id. (citing Miller-El, 545 U.S. at 240-42).
143. Id.
144. Id. at 151-52.
145. Id. at 152-53 (citing State v. Givens, 04-0765 (La. App. 4 Cir. 10/27/04); 888 So. 2d 329, writ denied, 04-2919 (La. 3/18/05); 896 So. 2d 1003, cert. denied 546 U.S. 867 (2005); State v. Miller, 95-857 (La. App. 3 Cir. 1/31/96); 670 So. 2d 420; State v. Ford, 94-26,422 (La. App. 2 Cir. 9/21/94); 643 So. 2d 293).
146. Id. at 152.
147. Id. at 153.
148. Id.
149. Id.
Before examining Rayne Concrete's challenge to Reva Charlot in the case on appeal, the court elaborated the procedure to be utilized when a party makes a *Batson/Edmonson* challenge during voir dire in a Louisiana trial court. First, the party making the challenge must be afforded a full and fair opportunity to demonstrate pretext in the explanation of the party's exercising the peremptory challenge. Next, so that the trial court can exercise its role under *Batson/Edmonson* to assess the plausibility of the proffered reason for striking a potential juror in light of all relevant circumstances, the proponent of the peremptory challenge must fully articulate his reasons as best he can. In performing its role under *Batson/Edmonson*, the court may not simply rubber stamp approval of any race neutral explanation, no matter how whimsical or fanciful, for this would destroy *Batson* and *Edmonson*’s objectives of ensuring that no citizen is disqualified from jury service because of his race. Furthermore, if judges were required to rubber-stamp any non-racial explanation, the court noted that only those who admitted point-blank that they excluded veniremen because of their race would be found to have violated the Fourteenth Amendment’s guarantee of equal protection. Finally only after the race-neutral reasons for the peremptory challenge have been presented may the trial court assess the weight and credibility of the explanation in order to determine whether the challenge involved purposeful discrimination.

Since the trial court in *Alex* did not assess the weight and credibility of the “gut feelings” justification by Rayne Concrete’s attorney, and simply accepted the explanation because it was race-neutral on its face, the trial court failed to perform the third step in the *Batson/Edmonson* analysis and its ruling was manifestly erroneous. However, despite the error, the court did not find it necessary to remand the case to the trial court for a hearing on the *Batson/Edmonson* issue and for application of the correct standard because Rayne Concrete’s sole reliance on its “gut feeling” was insufficient to rebut the prima facie showing of discrimination. This was because *Alex* not only voiced a challenge to Rayne Concrete’s rejection of prospec-

---

150. *Alex*, 951 So. 2d at 153.
151. *Id.*
152. *Id.*
153. *Id.* at 153-154.
154. *Id.* at 154 (citing State v. Collier, 553 So. 2d 815, 821 (La. 1989)).
155. *Id.* at 154.
156. *Id.*
157. *Id.*
tive juror Chalot on a peremptory challenge, but also refuted Rayne Concrete’s proposed racially neutral reason by articulating that the voir dire examination showed that Charlot could be fair and impartial just like the other non-black jurors. The court also noted that while there is no requirement that a party question a prospective juror during voir dire, case law holds that the lack of questioning or mere cursory questioning before excluding a juror by peremptory challenge is evidence that the justification offered is a sham and a pretext for discrimination. The Louisiana Supreme Court articulated that lower courts “should consider both the quantity and quality of either party’s examination of the challenged venire member and to view the use of this tool as a means for the judiciary to ferret out sham justifications for peremptory strikes.” In sum, the court affirmed the judgment of the third circuit and held that the trial court was manifestly erroneous in granting a peremptory challenge against prospective juror Charlot. It was clear to the court that the failure of Rayne Concrete’s counsel to question Charlot at all, when coupled with his “gut feeling” that Charlot did not like him, was further evidence that his explanation was a sham and a pretext for discrimination. The court then remanded the case to the trial court for a new trial.

IV. LOUISIANA VOIR DIRE PROCEDURE AFTER ALEX v. RAYNE CONCRETE SERVICE

After Alex v. Rayne Concrete Service, it is clear that the Batson/Edmonson principles apply to voir dire in civil cases in Louisiana. That is, a party to a civil action may not exercise a peremptory challenge based on race during jury selection in Louisiana. As the United States Supreme Court stated in Edmonson v. Leesville Concrete Company:

The harms we recognized in Powers are not limited to the criminal

158. Alex, 951 So. 2d at 154.
160. Alex, 951 So. 2d at 154.
161. Id.
162. Id.
163. Although the case was remanded for a new trial, the parties decided to settle their disputes through mediation with this Author serving as mediator.
164. Id. at 138.
165. The Supreme Court in Powers v. Ohio stated:

The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for
sphere. A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.  

Furthermore, it is now established that the Batson/Edmonson principles apply during jury selection in criminal trials in Louisiana. The Louisiana Legislature codified the Batson ruling in Louisiana Code of Criminal Procedure article 795(C), and the Louisiana Supreme Court specifically acknowledged the Batson case as controlling in jury selection in Louisiana criminal trials in State v. Thompson. Thus the Batson/Edmonson principles should be applicable to the actions of all parties in voir dire in both civil and criminal trials in Louisiana. The principles should prevent any party during voir dire—whether the plaintiff or defense in a civil case, or the prosecution or defense in a criminal action, or any other party—from exercising peremptory challenges based on race, gender and ethnic origin. This section will discuss how lawyers, trial courts, and appellate courts in Louisiana should properly apply the Batson/Edmonson principles as interpreted by the United States Supreme Court, the Louisiana Supreme Court, and the Louisiana courts of appeal.

Batson and Edmonson left it to the trial courts to develop eviden-
tiary and procedural rules for implementing the principles outlined in these cases. Although the voir dire procedure in criminal trials in Louisiana that will satisfy the Batson equal protection principles is well established, Louisiana law has not developed procedures for handling Batson/Edmonson challenges in civil cases. However, because of the myriad of decisions by the Louisiana Supreme Court addressing Batson issues in criminal cases, we can examine the procedures in criminal cases and extrapolate from those cases the necessary guidelines and requirements so that lawyers, clients, and judges alike will have a roadmap to guide them as Batson/Edmonson challenges are made in civil jury trials in Louisiana.

The purpose of voir dire is to first convey a favorable impression to the jury of counsel and the theory of the case. Secondly, voir dire is an opportunity for parties to eliminate clearly unfavorable jurors from the panel and to gather enough information to exercise peremptory challenges intelligently. In criminal cases in Louisiana where the penalty is death or mandatory imprisonment at hard labor, each defendant is allowed twelve peremptory challenges, and the state is allowed twelve for each defendant. In all other cases, each defendant is entitled to six peremptory challenges, and the state is entitled to six. In civil cases, if the case is before a jury of six, each side is allowed three peremptory challenges. When there is more than one party on each side, the trial judge may allow each

---

we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case... or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire... Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1985) (internal citations omitted).


173 LA. CODE CRIM. PROC. ANN. art. 795(C) (2007) (codifying the Batson procedure in criminal cases). See also State v. Thompson, 516 So. 2d 349 (La.1987) (addressing the Batson case as it applies to criminal cases.).

174 See, e.g., State v. Juniors, 03-2425 (La. 6/29/05); 913 So. 2d 291; State v. Ball, 00-2277 (La. 1/25/02); 821 So. 2d 1089; State v. Duncan, 99-2615 (La. 10/16/01); 802 So. 2d 533, State v. Tilley, 99-0569 (La. 7/6/00); 767 So. 2d 6; State v. Seals, 95-0305 (La. 11/25/96); 684 So. 2d 368; State v. Green, 94-0887 (La. 5/22/95); 655 So. 2d 272.


176 BERRIGAN, supra note 175, at 359.

177 LA. CODE CRIM. PROC. ANN. art. 799 (2007).

178 Id.

179 Id. at art. 1764(A).
side additional peremptory challenges, not to exceed two.\textsuperscript{180} If the case is tried to a jury of twelve, each side is allowed six peremptory challenges.\textsuperscript{181} If any side has more than one party, the court may allow each side additional peremptory challenges, not to exceed four.\textsuperscript{182} In all cases, each side is entitled to an equal number of peremptory challenges, and where the parties on a side are not able to agree upon the allocation of peremptory challenges among themselves, the court determines the proper allocation before voir dire begins.\textsuperscript{183}

In criminal cases, the accused has a constitutional right to a full voir dire examination of prospective jurors.\textsuperscript{184} Because the defendant’s right to full voir dire examination has a constitutional basis, the trial court should grant wide latitude to the defendant so that the defendant can test the prospective jurors’ competency and impartiality.\textsuperscript{185} Additionally, in criminal cases, the court, the state, and the defendant have the right to examine prospective jurors, and the scope of examination is in the sound discretion of the court.\textsuperscript{186} In civil cases, the court initially has a duty to examine prospective jurors about their qualifications and may conduct additional examination that it deems appropriate.\textsuperscript{187} According to article 1763(B) of the Louisiana Code of Civil Procedure, although the parties or their attorneys in civil cases have the right to individually conduct voir dire examination of prospective jurors as each party deems necessary, the court may control the scope of the examination to be conducted by the parties or their attorneys.\textsuperscript{188}

Voir dire examination of prospective jurors in Louisiana state courts is done in open court in front of other prospective jurors.\textsuperscript{189} The trial judge will usually introduce himself and his staff members, state the name of the attorneys and parties, have the parties’ witness lists read to the prospective jurors, and inquire as to whether any of the prospective jurors know or are known to any of the attorneys, parties, or witnesses.\textsuperscript{190} 

\textsuperscript{180} LA. CODE CRIM. PROC. ANN. art. 1764(A)  
\textsuperscript{181} Id. at art. 1764(B).  
\textsuperscript{182} Id.  
\textsuperscript{183} Id.  
\textsuperscript{184} LA. CONST. art. 1, § 17 (A).  
\textsuperscript{185} State v. James, 431 So. 2d 399, 403 (La. 1983).  
\textsuperscript{186} State v. Williams, 457 So. 2d 610, 613 (1984) (citing LA. CODE CIV. PROC. ANN art. 786 (2007)).  
\textsuperscript{187} LA. CODE CIV. PROC. ANN. art. 1763(A) (2007).  
\textsuperscript{188} Id. at art 1763(B).  
\textsuperscript{189} See HON. BILLIE COLOMBARO WOODWARD, JOHN W. DEGRAVELLES, & DAVID R. FROHN, LOUISIANA CIVIL TRIAL PROCEDURE, § 3.82 (West Group 2006). In some states, after the general introductions and questions by the judge, individual questioning of jurors is done outside the presence of other jurors. See, e.g., CONN. GEN. STAT. ANN. §§ 51-240, 54-82(f) (2007) (civil cases).
familiar with any of the people identified. Next, the court will usually instruct the prospective jurors to state their names and information about themselves such as where they live, work, whether they are married and whether their spouses are employed. The prospective jurors may also be told general information about the nature of the case, for example whether it is a criminal or civil case, how long the trial might last, and about the concept of for cause and peremptory challenges. The court might additionally question the jurors about any number of other miscellaneous matters.

To satisfy the goal of Louisiana constitutional and statutory laws regarding voir dire, namely to grant the parties a full and fair opportunity to question prospective jurors so that they can explore each juror individually, trial courts are encouraged to allow the parties to conduct thorough and detailed questioning of prospective jurors. It is not sufficient for the court to conduct or to allow the parties or their lawyers to conduct only voir dire of the whole panel without individual questioning of the prospective jurors. If the trial judge does not allow a full voir dire examination of individual jurors, this could constitute reversible error.

After the court’s introductions, introductory remarks, and initial questioning of the prospective jurors, lawyers are allowed to question the potential jurors. Following this questioning, the lawyers usually approach the...
beneath to communicate to the court their cause and peremptory challenges. Judges usually allow lawyers to exercise their cause challenges first. Then lawyers exercise their peremptory challenges. When exercising peremptory challenges, a party or his lawyer should remember that he ordinarily is entitled to exercise peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried. Additionally, parties are allowed to exercise peremptory challenges until the entire jury panel has been sworn. 195 Furthermore, it is important to note that the Equal Protection Clause of the United States Constitution prevents a party from challenging potential jurors solely on account of their race, ethnicity, gender, or on the assumption that these jurors as a class will be unable to impartially consider the case at bar. 196 To comply with these Batson/Edmonson principles, it is wise to examine the procedural guidelines developed by the Louisiana Supreme Court and the lower appellate courts for use when Batson/Edmonson challenges are raised during voir dire.

A. TIMELINESS IN MAKING A BATSON CHALLENGE

A party making a Batson/Edmonson challenge must make a timely and specific objection on the record. 197 A timely objection places the trial

195. See LA. CODE CIV. PROC. ANN. art 1766(C) (2007); LA. CODE CRIM. PROC. ANN. art 799.1 (2007). In criminal cases, the practice of back-striking jurors is allowed. Back-striking of prospective jurors is a party's exercise of peremptory challenges of previously accepted jurors prior to the entire panel being sworn. See also State v. Crotwell, 00-2551 (La. App. 1 Cir. 11/9/01); 818 So. 2d 34, 44 (stating that "peremptory challenges are exercisable at any time before the jury panel is sworn"); State v. Watts, 579 So. 2d 931 (La. 1991) ("A juror accepted and temporarily sworn in [] may nevertheless be challenged peremptorily prior to the swearing of the jury panel . . . ."). However, in civil cases, parties do not have the absolute right to back-strike previously selected jurors because the right to back-strike is left within the sound discretion of the trial judge, who ultimately has the responsibility for orderly conduct of the trial. See Riddle v. Bickford, 00-2408, pp. 9-10 (La. 5/15/01); 785 So. 2d 795, 801-02.


197. In support of this principle, Louisiana law recognizes that:

The evidentiary rules governing the contemporaneous objection rule and the offer of proof, contained in Louisiana Code of Evidence art. 103(A)(1) and (2), also lend support to this principle. The essence of the contemporaneous objection rule and the right to make an offer of proof is that if a party does not make a timely and specific objection when a trial court makes a ruling relative to admitting or excluding evidence at trial, the objection is waived and cannot be raised on appeal. The timely and specific objection requirement also allows the
court on notice that a problem exists and gives the trial court a chance to correct the alleged error before it infects the entire proceeding. Moreover, a timely Batson/Edmonson challenge preserves the trial record for appellate review. It is insufficient for a party making a Batson/Edmonson challenge to merely note, after an unsuccessful cause challenge, that an excluded potential juror was “black” without expressly objecting to the dismissal.

The Louisiana Supreme Court, citing Batson, has held that “[i]n order to preserve the complaint that the prosecutor’s use of a peremptory exception was based on race, the defense must make an objection before the entire jury panel is sworn.” To avoid a reversal, the court also suggested that the trial court’s ruling on such an objection must be made before swearing of the jury panel. Moreover, the Louisiana Supreme Court has held that a party waives a Batson challenge by failing to renew the claim of discrimination relative to subsequent peremptory challenges after the party has made an unsuccessful Batson claim as to an earlier exercise of peremptory challenges. Presumably, similar logic should apply to the timeliness of a Batson/Edmonson challenge in a civil proceeding.

**B. BATSON/EDMONSON HEARINGS IN LOUISIANA**

Peremptory challenges during voir dire in Louisiana trial courts are made and communicated to the court in a side bar conference that appears on the record. These challenges should be communicated in such a manner that only the court and the attorneys (or the parties if they are self-represented) are aware of the challenges made until the court announces the

---

198. State v. President, 97-1593, p. 17 (La. App. 3 Cir. 7/15/98); 715 So. 2d 745, 753 (holding that the defendant’s failure to contemporaneously object to the dismissal of a black juror waived any Batson problems with the dismissal).
199. Id.
201. Id.
202. State v. Juniors, 03-2425, p. 28 (La. 6/29/05); 915 So. 2d 291, 316.
204. Side bar refers to a position at the side of a judge’s bench where counsel can confer with the judge outside the jury’s hearing. Black’s Law Dictionary (8th ed. 2004).
205. LA. CODE CIV. PROC. ANN. art. 1766(D) (2007) (civil cases); id. at art. 795(B)(2) (criminal cases); LA CTS. APP. UNIF. R. 2-1.9 (requiring record in criminal cases on appeal to contain the voir dire examination of prospective jurors).
challenges, without reference to any party or attorney in the case. In civil cases, the trial judge is required to conduct the side bar conference on the record and "out of the presence of the prospective jurors." Interpreted literally, the term "out of the presence of the prospective jurors" requires the side bar conference to be held in a room different from that in which the prospective jurors sit. That is, either the judge and the lawyers or the jurors must leave the courtroom before the side bar conference begins. The side bar conference can then take place on the record in the judge’s chambers, with the prospective jurors remaining in the courtroom.

Alternatively, the trial judge could excuse the jurors from the courtroom and conduct the side bar conference on the record in the courtroom. Another interpretation of the phrase "out of the presence of the prospective jurors" is that the side bar conference could be held at the bench with the lawyers approaching the bench and the discussions taking place away from the prospective jurors so that the prospective jurors cannot hear the discussions between the judge and the lawyers. Requiring the side bar discussions to take place in a room different from that where the prospective jurors is more time-consuming and will prolong jury trials. The choice as to which procedure is better for a particular judge should be within the court’s discretion.

In criminal cases, the trial judge is not required to conduct the side bar conference out of the presence of the prospective jurors. Thus, while the prospective jurors in criminal cases may remain in the courtroom during the discussions among the judge and the lawyers, this discussion should take place out of the hearing of the jurors. Furthermore, the trial judge should have the discretion to remove the prospective jurors from the courtroom during the Batson hearing. Alternatively, the trial judge in criminal cases could also conduct the Batson hearing on the record in his chambers. When an objection to peremptory challenges has been made, the trial judge must determine whether the objecting party has made a prima facie showing of discriminatory purpose and, if so, whether the party exercising the peremptory strikes has established a neutral explanation for challenging the jurors. This procedure is described below.

C. THREE STEP INQUIRY

The principles of Batson and Edmonson provide for a three-step in-
quetry to determine whether a party has purposefully discriminated in jury selection. First, a party objecting to a peremptory challenge should make a prima facie showing of purposeful discrimination in jury selection by demonstrating that another party exercised peremptory challenges to remove from the venire members of a specific race, gender, or ethnic origin. Second, if the objecting party makes a prima facie showing of discrimination, the burden shifts to the party exercising the peremptory challenge to provide a neutral explanation for challenging the prospective jurors. Third, the trial court must determine that the complaining party has established purposeful discrimination.

1. **STEP ONE: ESTABLISHING A PRIMA FACIE CASE OF DISCRIMINATION**

The party making the *Batson/Edmonson* challenge carries the burden of proof during the hearing. To establish a prima facie showing of purposeful discrimination, the challenging party must prove that the party exercised a peremptory challenge to purposefully discriminate based on race, gender or ethnicity. Essentially, the moving party must show that the totality of relevant facts gives rise to an inference of discrimination. To satisfy this requirement, the moving party need only produce “evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” The mover may offer any facts relevant to the question of the excluding party’s discriminatory intent to satisfy its burden. Such facts include, but are not limited to, a pattern of strikes by the excluding party against members of a suspect class, statements or actions of the excluding party which support an inference that the exercise of peremptory strikes was motivated by impermissible considerations, the composition of the venire and of the jury finally empaneled, and any other disparate impact upon the suspect class which is alleged to be purposeful discrimination. It should be noted that in *Alex v. Rayne Concrete Service*, the Louisiana Supreme Court indicated that comments made during trial, even in closing arguments, could be relevant to prove a party’s rationale in making earlier dis-

209. Alex v. Rayne Concrete Serv., 05-1457, 052344, 05-2520, p. 15 (La. 1/26/07); 951 So. 2d 138, 150; State v. Snyder, 98-1078, p. 7 (La. 9/6/06); 942 So. 2d 484, 489.

210. *Id.* at 150-51.

211. *Id.* at 151.

212. *Id.*

213. *Id.* at 150-51.


215. State v. Elie, 05-1569, p. 6 (La. 7/10/06); 936 So. 2d 791, 796 (citing Johnson, 545 U.S. at 170).

216. State v. Green, 94-0887, p. 24 (La. 5/22/95); 655 So. 2d 272, 277-278.

217. *Id.* at 288.
When making a Batson/Edmonson challenge, it is good practice to articulate in detail the nature of the challenge. Counsel should describe the number of people in the jury venire, the class (race, gender, and ethnicity) of the person or persons improperly excluded, the name or names of the excluded members of the jury venire, the specific nature of the challenge, and any other information relevant to the challenge. This provides sufficient information for the trial court to make an appropriate determination. Furthermore, these details adequately preserve the record for appellate purposes. In other words, sufficient details of the alleged discriminatory conduct must be articulated on the record so that the trial and appellate courts will have a sufficient understanding of the dynamics of jury selection in order to determine whether discrimination did or did not occur.

Because this first step in the process places a burden of production or of "going forward" on the mover, if the mover fails to make a prima facie case of racial, gender, or ethnic discrimination, the Batson/Edmonson challenge fails and it is unnecessary for the party exercising the peremptory challenge to articulate neutral explanations for the strikes.

2. STEP TWO: PROVIDING A NEUTRAL EXPLANATION

If a prima facie case of discrimination is made, the burden shifts to the party exercising the peremptory challenge to present a neutral explanation (race, gender, or ethnic neutral) in striking the juror in question. However, the ultimate burden of persuasion as to purposeful discrimination in exercising a peremptory challenge rests with, and never shifts from, the opponent of the peremptory challenge. The explanation given by the party exercising the peremptory challenge does not have to be persuasive or even plausible as long as the reason is not inherently discriminatory. It will be deemed neutral unless a discriminatory motive is inherent in the explanation. Essentially, a neutral explanation for exercising a peremptory challenge in jury selection "is one that is based on some factor other than the race," gender, or ethnicity of the juror excused.

218. Alex, 951 So. 2d at 146.
219. Id at 150-51.
220. Id.
221. State v Snyder, 98-1078, p. 6 (La. 9/16/06); 942 So. 2d 484, 489 (citing State v. Tyler, 97-0338, p.3 (La. 9/9/98); 723 So. 2d 939, 942).
222. Id.
223. Id.
224. Grayson v. R.B. Ammon & Associates, Inc. made this statement relative to race. See 99-
As previously discussed, \(^{225}\) though "gut feelings" often factor into the decision to utilize a peremptory challenge, a "gut feeling" taken alone does not constitute a race neutral explanation because a "gut feeling" alone is overly ambiguous and "inclusive of discriminatory feelings."\(^{226}\) Moreover, such an explanation "falls far short of an articulable reason that enables the trial judge to assess the plausibility of the proffered reason for striking a potential juror . . . . [T]he [reason] must be one which is clear, reasonably specific, legitimate and related to the particular case at bar."\(^{227}\) Moreover, "[though] there is no requirement that a litigant question a prospective juror during voir dire . . . lack of questioning or mere cursory questioning before excluding a juror peremptorily is evidence that the explanation is a sham and a pretext for discrimination."\(^{228}\) Thus, parties exercising peremptory challenges should consider that trial and appellate courts will likely consider the "quantity and quality" of a party’s examination of a venire member in order to "ferret out sham justifications for peremptory strikes."\(^{229}\)

### 3. Step Three: The Court Determines Whether the Moving Party Has Carried the Burden of Proving Purposeful Discrimination

The trial judge must consider all relevant circumstances when addressing the question of discriminatory intent.\(^{230}\) The trial judge should assess the credibility of the challenger’s justification in light of all evidence and should closely scrutinize the challenged jurors as they compare to members of the venire who expressed similar views and/or shared similar backgrounds.\(^{231}\) A trial judge must consider whether the excluding party articulated "verifiable and legitimate" explanations for striking other panel members similarly situated.\(^{232}\) Moreover, if a reason stated by the challenger proves implausible, its pretextual significance does not fade because a trial judge or an appeals court can imagine a credible reason for striking the potential juror.\(^{233}\) Nonetheless, the failure of one or more of the challenging

---

\(^{225}\) This Author is advocating that the same should hold true for gender and ethnicity.

\(^{226}\) See supra Part III.B.

\(^{227}\) Alex v. Rayne Concrete Serv., 05-1457, 05-2344, 05-2520, p. 19 (La. 1/26/07); 951 So. 2d 138, 153.

\(^{228}\) Id.

\(^{229}\) Id. at 154.

\(^{230}\) Id.

\(^{231}\) Id. at 151.

\(^{232}\) Id.

\(^{233}\) Id., 936 So. 2d at 796. (citing "Miller-El v. Dretke", 545 U.S. 231, 252 (2005)).
party’s articulated reasons for striking a prospective juror does not compel a trial judge to automatically dismiss other race-neutral justifications.\footnote{234}{Elie, 936 So. 2d at 796.}

Examples of satisfactory race-neutral reasons that have been acknowledged by Louisiana appellate courts include the following: the challenged jurors knew the defendant;\footnote{235}{State v. Hall, 549 So. 2d 373, 382-83 (La. Ct. App. 1989); State v. Stubbs, 544 So. 2d 90, 91 (La. Ct. App. 1989).} the prospective juror had a criminal record;\footnote{236}{Stubbs, 544 So. 2d at 91; State v. Jackson, 548 So. 2d 29, 34 (La. Ct. App. 1989).} the prospective juror worked with retarded and disturbed children and the defense in the case was insanity;\footnote{237}{Jackson, 548 So. 2d at 33.} the prospective juror stated that she did not want to serve;\footnote{238}{State v. Rose, 606 So. 2d 845, 850 (La. Ct. App. 1992).} the prospective juror did not appear to understand the legal insanity defense and due to work with mental patients, appeared overly sympathetic;\footnote{239}{Id. at 851.} the prospective juror had misdemeanor convictions and family members with convictions;\footnote{240}{Id. Much of Louisiana case law on peremptory challenges deals with the prosecutor’s use of the challenges, and accordingly Batson initially applied only to the state and was only later extended to the defense and to gender based challenges. See BERRIGAN, supra note 175, at 371-75. Thus, the race neutral reasons in these cases were given by the prosecutor. See BERRIGAN, supra note 175, at 371-75.} the prospective juror appeared to be preoccupied with how jury service would interfere with her job;\footnote{241}{State v. Collier, 553 So. 2d 815, 820 (La. 1989).} and finally, the prospective juror was believed to be the lone holdout on a previous jury that acquitted the defendant.\footnote{242}{Id. See also, BERRIGAN, supra note 175, at 372.}

Examples of asserted race neutral reasons that were found to be pretexts for purposeful discrimination include: prospective black jurors would be partial to a black defendant because of race; prospective black jurors were Baptists, in a case where other accepted jurors were also Baptists;\footnote{243}{State v. Collier, 553 So. 2d 815, 820 (La. 1989).} and a prospective black juror served on a prior jury that acquitted a defendant, in a case where white jurors who had similarly rendered an acquittal were allowed to serve.\footnote{244}{Id.} Moreover, when the state exercised peremptory challenges against prospective black jurors, resulting in a black defendant being tried by an all white jury, the court found a Batson violation.\footnote{245}{State v. Young, 551 So. 2d 695, 700 (La. Ct. App. 1989).}

Because Batson and Edmonson accord broad discretion to the trial
judge in ruling on the fact-intensive question of whether race, gender, or ethnicity was significant in the exercise of peremptory challenges, appellate courts should not substitute their evaluation of the record for that of the trial judge. The great deference given to the trial judge is based on the fact that the trial judge’s findings are based largely on credibility evaluations. The trial court has the advantage of observing the demeanor of the attorney and prospective jurors and is in the best position to decide whether a discriminatory objective underlies the peremptory challenges.

D. WHAT HAPPENS IF THERE IS A BATSON/EDMONSON VIOLATION?

Louisiana Code of Criminal Procedure article 795, the article that codified the Batson decision in criminal cases, states that those jurors who have been peremptorily challenged and for whom no satisfactory racially neutral reason is apparent or given may be ordered returned to the panel, or that the court may take such other corrective action as it deems appropriate under the circumstances. The article also requires that the court make specific findings regarding each such challenge. This practice, is applicable in criminal cases, should also apply in civil cases.

If an objection to peremptory challenges proves to be well-founded, the Batson decision suggests that the trial court correct the discriminatory challenge by denying the challenge, by reinstating any challenged jurors, or by dismissing the venire and selecting a new jury. The suggestion, of course, assumes that an objection is made before the jury panel is sworn. The Batson decision, explained, nonetheless:

In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors re-

246. State v. Elie, 05-1569 (La. 7/10/06); 936 So. 2d 791, 795 (citing Hernandez v. New York, 500 U.S. 352, 364 (1991)).
247. See State v. Gant, 06-232, p. 7 (La. App. 5 Cir. 9/26/06); 942 So. 2d 1099, 1118; Collier, 553 So. 2d at 815.
248. Gant, 942 So. 2d at 1118.
250. Id.
Due to the United States Supreme Court’s lack of implementation instructions, and the guidance provided by article 795 of the Louisiana Code of Criminal Procedure, Louisiana courts are encouraged to follow the procedures outlined in that article in both civil and criminal cases.

E. BATSON/EDMONSON VIOLATIONS ON APPEAL

In both civil and criminal cases, a Louisiana appellate court has supervisory jurisdiction over cases that arise within its circuit. Thus, if a party is aggrieved with a district court’s ruling relative to a Batson/Edmonson issue, the party could apply for supervisory writs from the appropriate court of appeal. Moreover, even if a party’s application for supervisory writs is denied by the appellate court, the Batson/Edmonson issues can still be reconsidered on appeal after a trial on the merits.

Even if the party alleging a violation does not seek supervisory writs during the trial, the Louisiana Supreme Court stated in Alex v. Rayne that parties in both civil and criminal cases can seek review on Batson/Edmonson rulings on appeal after a full trial on the merits. This practice was found by the court to be consistent with the procedure already utilized in criminal cases in Louisiana trial courts as well as with the practice regarding challenges for cause in civil cases and the practice in federal courts. However, a reviewing court owes deference to the trial court’s rulings regarding discriminatory intent and should not reverse those rulings absent a finding of manifest error.

V. SUGGESTIONS FOR LEGISLATIVE REFORM

Louisiana law has not yet fully developed procedural rules for asserting Batson challenges in civil cases. Rather, courts and practicing attor-
ney must seek instruction from the Code of Criminal Procedure and cases addressing *Batson* challenges in the criminal context. Essentially, courts weigh the right to a fair and impartial jury against prospective harm to venire members excluded on the basis of improper discriminatory strikes. Some have argued that rather than forcing courts to engage in case-by-case analysis of peremptory challenges and subjecting courts and litigants to an often unpredictable system of jury selection that can be difficult to administer, peremptory challenges should be entirely abandoned as inherently discriminatory.  

Such a drastic approach is, however, not necessary. Rather, the Louisiana Legislature could increase predictability and ease of administration in the jury selection process by enacting procedural rules that more clearly govern *Batson* challenges in both criminal and civil cases. Though article 795 of the Louisiana Code of Criminal Procedure codifies the holding of *Batson v. Kentucky*, the article addresses only racially-motivated peremptory challenges, not those exercised on the basis of gender and/or ethnic origin. Thus, legislation similar to article 795 that also addresses gender and ethnic origin could be enacted and added to the Code of Criminal Procedure, thereby clarifying the procedural roles of judges and attorneys and heightening predictability in the jury selection process in criminal cases. Additionally, similar legislation that modifies the Louisiana Code of Civil Procedure would do the same for voir dire in civil cases.

This action by the Louisiana Legislature would be beneficial to the administration of justice because judges are usually reticent to create principles or laws without direction from the legislature. Laws should be enacted by legislatures, not by judges. A pronouncement by the Louisiana Legislature that parties in Louisiana state courts cannot exercise peremptory challenges based on race, gender, and ethnic origin would indicate to citizens of Louisiana that the will of the Legislature is not to have invidious

---


264. Id.
discrimination during jury selection. This enactment would be similar to the Louisiana Legislature’s enactment of laws prohibiting discrimination in the workplace or in public accommodations.  

Moreover, the legislative process allows for extensive debate, public hearings, and testimony from both experts and citizens on the propriety of specific legislation. If the Louisiana Legislature modified the Louisiana Code of Criminal Procedure to expressly prohibit discrimination during voir dire in criminal trials based on gender and ethnic origin as well as expanded the Louisiana Code of Civil Procedure to prohibit discrimination in jury selection based on race, gender, and ethnic origin, this would bring more legitimacy to the notion that discrimination will not be allowed during jury selection in Louisiana courts. With the suggested changes to the Louisiana Code of Criminal Procedure and the Louisiana Code of Civil Procedure, it will be clear to Louisiana’s citizens, as well as to judges, lawyers, and litigants who appear in a Louisiana state courts, that no party in a civil or criminal case in a Louisiana state court can discriminate in jury selection based on the race, gender, or ethnic origin of a prospective juror.

VI. CONCLUSION

Batson/Edmonson hearings are now routine in criminal and civil trials in Louisiana. The Louisiana Supreme Court has stated that the Batson/Edmonson principles apply in both criminal and civil cases. Additionally, the Louisiana Legislature has codified the Batson decision thereby prohibiting racial discrimination during jury selection in criminal trials in Louisiana.  

These developments by the Louisiana Supreme Court and the Louisiana Legislature are part of an ongoing battle to stem the tide of racism, sexism, and discrimination during jury selection. However, these efforts are not enough. New amendments to the Louisiana Code of Criminal Procedure and the Louisiana Code of Civil Procedure outlawing discrimination during jury selection based on race, gender, and ethnicity would make it explicit that discrimination will not be tolerated in Louisiana courts.

---

265. See, e.g., LA. REV. STAT. ANN. § 23:301 (2007) (detailing Louisiana Employment Discrimination Law); § 23:312 (prohibiting age discrimination in employment); § 23:323 (prohibiting employment discrimination based on disability); § 23:332 (prohibiting intentional discrimination in employment based on race, color, religion, sex, or national origin); § 23:352 (prohibiting sickle cell trait discrimination); § 23:341 (prohibiting discrimination based on pregnancy); § 2247.1 (prohibiting discrimination against breastfeeding in public accommodations).

266. Alex v. Rayne Concrete Serv., 05-1457, 05-2344, 05-2520, p. 1 (La. 1/26/07); 951 So. 2d 138, 141; State v. Thompson, 516 So. 2d 349 (La. 1987).

267. LA. CODE CRIM. PROC. ANN. art. 795(C) (2007).