COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Appeal from the District Court of Arapahoe County Division 207, Honorable Judge Marilyn Leonard Antrim Case No. 10 CR 1193	▲ **COURT USE ONLY** ▲
THE PEOPLE OF THE STATE OF COLORADO, **Plaintiff-Appellant,** v. **ADRIAN DEON LARKINS,** **Defendant-Appellee.**	Case Number: **11CA1029**
Prosecuting Attorney(s), 18th Judicial District: DAVID C. JONES, Senior Deputy, for CAROL CHAMBERS, District Attorney 6450 S. Revere Pkwy. Centennial, CO 80111 Phone: (720) 874-8500 Fax: (720) 874-8501 Atty. Reg. #(s): Chambers 14948, Jones 23246	
OPENING BRIEF	

Court of Appeals, State of Colorado 101 West Colfax Ave., Suite 800 Denver, CO 80202 Name of Lower Court(s): District Court of Arapahoe County Trial Court Judges(s): Honorable Judge Marilyn Leonard Antrim Case Number(s): 10 CR 1193 **THE PEOPLE OF THE STATE OF COLORADO,** **Plaintiff-Appellant,** v. **ADRIAN DEON LARKINS,** **Defendant-Appellee.**	▲ **COURT USE ONLY** ▲
Prosecuting Attorney(s), 18th Judicial District: DAVID C. JONES, Senior Deputy, for CAROL CHAMBERS, District Attorney 6450 S. Revere Parkway Centennial, CO 80111 Phone: (720) 874-8500 Fax: (720) 874-8501 Atty. Reg. #(s): Chambers 14948, Jones 23246	Case Number: **11CA1029**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☐ It contains _____ words.

☒ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☒ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.____, p.____), not to an entire document, where the issue was raised and ruled on.

☒ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

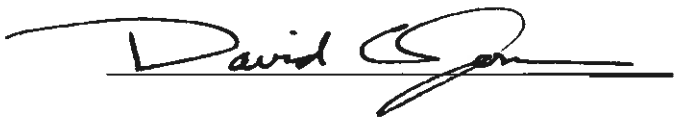

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Defendant-Appellee, Adrian Larkins, will be referred to as "defendant", or Mr. Larkins. Plaintiff-Appellant, The People of the State of Colorado, will be referred to as "the People" or the prosecution. Appellant cites to the record as follows: "Vol. 1, pp. ll." for the court volumes and "Cd., pp. ll." for the transcripts.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The District Court erred as a matter of law when it sustained the defendant's *Batson* challenge. A prosecutor's concern about a juror's acknowledged racial bias is a "race-neutral" reason for exercising a peremptory challenge under the second step of *Batson v. Kentucky*.

STATEMENT OF THE CASE AND FACTS

This is an appeal brought by the People of the State of Colorado. The People ask the court to disapprove the district court's ruling sustaining a *Batson* challenge against the prosecution. The district court found that that a juror's own, acknowledged racial-bias is not a facially race-neutral reason to exercise a peremptory challenge to a black juror. The district court was wrong.

Mr. Larkins was tried on the charge of Robbery of an At-Risk Adult. (Vol. 2, p. 305) Mr. Larkins is black and the victim and the identifying witness are both white. (CD p. 501, ll. 13-14) During *voir dire* the prosecution used two of its six peremptory challenges on Jurors 1 and 5, both of whom were black. (CD p. 784, ll. 22-24) After both parties had exercised all their challenges, the court called counsel to the bench and asked whether the defense wanted to raise a *Batson* challenge. (CD p. 784, ll. 17-21) Given that invitation, the defense then raised a *Batson* challenge on the prosecution's challenges to Jurors 1 and 5. (CD p. 784, ll. 22-25; p. 785, ll. 1-7) The court correctly denied the challenge to Juror 1 without requesting a race-neutral reason for the peremptory challenge. (CD p. 785, ll. 8-10) However, without finding the defendant had made a *prima facie* showing of racial discrimination, the court asked for a response from the prosecution as to Juror 5—

apparently asking for a race-neutral reason for the challenge to Juror 5. (CD p. 785, l. 11)

The prosecutor stated that her reason for excusing the juror was that the juror had expressed a bias based on race. (CD p. 785, ll. 12-25; p. 786, ll. 1-2) The defense responded that racial bias is not a race-neutral reason under *Batson* and asked that their objection be sustained. (CD p. 786, ll. 3-9) The court agreed and found that the prosecution had not articulated a race-neutral reason for the challenge and sustained the defendant's *Batson* challenge. (CD p. 786, ll. 10-16; p. 787, ll. 9-15) The last juror who had been seated, Juror 39, was excused and Juror 5 was reseated on the jury. (CD p. 788, ll. 2-5)

The next morning the prosecutor asked to supplement the record and requested that the court complete the *Batson* analysis by making the three findings necessary to grant such a challenge. (CD p. 862, ll. 18-21) The prosecutor again noted that the juror had expressed a concern that the juror might have a racial bias. (CD p. 863, ll. 5-19) She further argued that her peremptory challenge was based on the juror's bias and was thus based on something other than the race of the juror. (CD p. 864, ll. 14-21) Further the prosecutor reminded the court that in order to sustain a *Batson* challenge the trial court must make a finding of purposeful discrimination based on race—a finding the court did not make on the

previous day—and asked the court to articulate such a finding, if it could. (CD p. 864, ll. 8-13) The court refused to do so. (CD p. 867. ll. 3-8)

Ultimately, the case was completed with Juror 5 as a member of the jury. The jury acquitted Mr. Larkins. (Vol. 2, p. 320)

SUMMARY OF THE ARGUMENT

During the jury selection the defense raised a *Batson* challenge to two of the prosecution's peremptory challenges. The District Court correctly denied the objection as to one juror but incorrectly sustained the objection as to the second. The court ruled that the prosecutor had not provided a race-neutral explanation for the second strike. But the prosecutor had explained during step two of *Batson* that the reason for her strike was the juror had acknowledged racial bias in favor of the defendant, which is a race-neutral basis for exercising a peremptory challenge. Further, the court failed to follow the analysis outlined in *Batson* combining steps two and three. This shifted the burden to the prosecutor to prove she did not have a discriminatory intent in excusing the juror. And it caused the court to skip step three's requirement that the court determine whether the defendant had proven by a preponderance of the evidence that the prosecutor had engaged in purposeful discrimination. The District Court's *Batson* ruling should be disapproved.

ARGUMENT

I. The District Court erred as a matter of law when it sustained the defendant's *Batson* challenge. A prosecutor's concern about a juror's acknowledged racial bias is a "race-neutral" reason for exercising a peremptory challenge under the second step of *Batson v. Kentucky*.

a. Standard of Review

The issue presented here requires the court to review the district court's order sustaining the defendant's *Batson* challenge. The district court based its ruling on a belief that the prosecution had failed to provide a race-neutral reason for the peremptory strike of a prospective juror. Under *Batson v. Kentucky*, 476 U.S. 79 (1986) the trial court must conduct a three step analysis when a defendant raises such a challenge—the requirement that the prosecution provide a race-neutral explanation is step two. A *de novo* standard is applied when reviewing the second step of a trial court's *Batson* analysis. *People v. Montez*, 2010 WL 961652, at *8 (Colo. App. 2010); *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998).

The issue was preserved by the prosecutor in the trial court when she argued her race-neutral rationale for excusing Juror 5 during the court's *Batson* discussion (CD p. 786, ll. 17-25; p. 787, ll 1-8), and when the prosecutor readdressed the issue the next day, before the trial resumed. (CD p. 862, ll. 14-25; pp. 863-864; p. 865, ll. 1-6)

b. *Batson* and Step Two—the prosecution's race-neutral explanation

The Equal Protection Clause of the United States Constitution forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the People's case against a black defendant. *Batson*, 476 U.S. at 97. When a defendant raises a *Batson* challenge to the prosecutor's peremptory strike of a juror, the defendant has the burden of proving the existence of purposeful discrimination. *Id.* at 93. Under *Batson*, discriminatory purpose or purposeful discrimination implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker selected a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. *People v. Robinson*, 187 P.3d 1166, 1171 (Colo. App. 2008) (citing *Hernandez v. New York*, 500 U.S. 352, 360 (1991)).

Trial courts must apply a three step process in evaluating a *Batson* challenge. *Montez*, 2010 WL 961652, at *1. First, the defendant must make a *prima facie* case of racial discrimination. Second, if the defendant meets that requirement, the burden of production shifts to the prosecution to offer a race-neutral explanation for the peremptory challenge. Third, if the prosecutor produces that explanation, the defendant must have the opportunity to rebut the prosecutor's explanation, and

the trial court must determine whether the defendant has proved that the prosecutor engaged in purposeful racial discrimination. *Id.*; *Snyder v. Louisiana*, 552 U.S. 472, 476-477 (2008).

The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the party raising the objection—usually, as here, the defendant. *Robinson*, 187 P.3d at 1172 (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995)); *cf. Georgia v. McCollum*, 505 U.S. 42 (1992)(holding that the Equal Protection Clause also prohibits a defendant from engaging in purposeful discrimination on the basis of race during jury selection).

At the first step of *Batson* the court must determine if the party objecting to the strike has established a *prima facie* case of purposeful discrimination by the party making the strike. *Montez*, 2010 WL 961652, at *1. However, once the prosecutor has offered a race-neutral reason for the strike and the court has ruled, the preliminary issue of whether the defendant had established a *prima facie* case is moot. *Hernandez*, 500 U.S. at 359 (once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question the preliminary issue of whether the defendant had made a prima facie showing becomes moot). Because the prosecutor did not ask the court to

make this finding and instead moved to offering her reasons for excusing the juror, step one of the *Batson* analysis is not an issue in this appeal.

Batson's second step is implicated in this appeal however. In the second step of the *Batson* analysis, the prosecutor must provide an explanation for the strike based on something other than the race of the juror, and unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. *People v. Cerrone*, 854 P.2d 178, 190 (Colo. 1993). "In evaluating the race neutrality of an attorney's explanation, a court must determine whether, *assuming the proffered reasons for the peremptory challenges are true*, the challenges violate the Equal Protection Clause as a matter of law." *Hernandez*, 500 U.S. at 359 (emphasis added); *People v. Gabler*, 958 P.3d 505, 508 (Colo. App. 1997). The prosecution need not provide an explanation that is persuasive or even plausible, so long as the reason is facially race-neutral. *Purkett*, 514 U.S. at 769; *Robinson*, 187 P.3d at 1172 (rejecting the objective verification test for evaluating a race-neutral explanation). It is not until the third step that the persuasiveness of the justification becomes relevant. *Robinson*, 187 P.3d at 1173.

No evidence should be considered at step two, that is reserved for step three.

At step three—the step the district court failed to address—the court must review the evidence to decide whether the defendant has shown, by a

preponderance of the evidence, that the proponent of the strike sought to exclude a potential juror for a racially discriminatory reason—one that constituted purposeful discrimination. *Craig v. Carlson*, 161 P.3d 648, 654 (Colo. 2007). The court must look at all the relevant evidence, both direct and circumstantial, to determine whether the prosecutor's race-neutral explanation is to be believed or whether it is just a pretext. *People v. McCoy*, 944 P.2d 577, 580 (Colo. App. 1996); *Valdez*, 966 P.2d at 590 (Colo. 1998). Only if the court believes the defendant proved by a preponderance of the evidence that the prosecutor engaged in purposeful racial discrimination in striking a juror should the court sustain a *Batson* challenge. *Valdez* at 590 (citing *Cerrone*, 854 P.2d at 191).

c. Application

Here, when the prosecutor was asked to provide a race-neutral explanation for the peremptory challenge, the prosecutor indicated that she was excusing Juror 5 because the juror had indicated she was unsure she could be fair to the prosecution because of the defendant's race.

> I challenge her for cause previously and for the reason's she's indicated on her questionnaire. She was unsure if she could be fair. She said it would depend on how she would - - how she could relate to her situation in life.
>
> She came in here and said that she had a bias because she thinks too many African Americans are being prosecuted, that there is an unequal number.

> She indicated - - when I asked her during a break if this was the right case for her and she said that it was not, she said that her husband was arrested for apparently defending himself against racial threats. This is a topic that she has reiterated several times.
>
> For all of those reasons – Your Honor, I initially thought it was for cause, but those are the reasons I am using any peremptory.

(CD p. 785, ll. 12-25; p. 786, ll. 1-2)

The defense responded that racial bias is not a race-neutral reason under *Batson* and that their objection should be sustained and the juror reseated:

> All the reasons asserted by Ms. McCallin are race reasons as to why she is excusing this juror. These are not race neutral. These are specifically talking about race.
>
> The prosecution has to establish a race neutral reason. We would ask to have Juror Number 5 to be reseated.

(CD p. 786, ll. 3-9)

The court agreed, indicating that a juror's racial bias does not amount to a race neutral reason to exercise a peremptory strike.

> Yeah, there is no reason – neutral reason here. This juror came in and spoke to us privately during the lunch hour, and indicated that she could be fair; that if you met your burden she would find the Defendant guilty. Even though he is African-American, you have not stated a race natural (sic) reason that I can support.

(CD p. 786, ll. 10-16)

The district court was wrong as a matter of law for two reasons. First, the court found that the prosecutor's explanation was not facially race-neutral—it was.

And second, the district court failed to conduct the third step required by *Batson v. Kentucky*.

Here, when the district court conducted step two, the prosecutor gave a race-neutral reason for exercising the peremptory challenge—the juror's self-acknowledged racial bias. Unless the prosecutor's discriminatory intent is inherent in the explanation for the strike, the reason must be deemed race neutral. *Purkett*, 514 U.S. at 768. And like the wearing of a beard in *Purkett*, a juror's bias against either the state or the defendant based on race is not a characteristic that is peculiar to any individual race. *See Purkett v. Elem*, 514 U.S. at 769 *citing EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 190 n. 3 (3rd Cir 1980) ("The wearing of beards is not a characteristic that is peculiar to any race."). There are people who hold biases based on race in every racial group.

The purpose of *Batson* is to prevent the exclusion of an individual juror on account of his or her race, and to "impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are *fair*." *Georgia v. McCollum*, 505 U.S. 42, 48-49 (1992) (emphasis added). It was not intended to conflict with a State's legitimate interest in using peremptory challenges in its effort to secure a fair and impartial jury. *See J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994). The court here

has held that a prosecutor cannot excuse a juror who is part of a protected class, even peremptorily, if the only basis for excusing the juror is the juror's self-acknowledged racial bias. Such a ruling is contrary to the purposes of jury selection—a fair and unbiased jury—and the district court's interpretation of "race-neutral" should be rejected. The prosecutor's race-neutral reason for exercising her peremptory challenge on Juror 5 was not facially discriminatory.

The district court compounded its error by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step not only be neutral but also at least minimally persuasive, *i.e.*, a plausible basis for believing the person's ability to perform his or her duties as a juror will be affected. The U.S. Supreme Court specifically rejected an analysis that combines steps two and three as the district court did here. *Purkett v. Elem*, 514 U.S. at 768.

The reason the two cannot be combined is it improperly shifts the burden of proof to the prosecution to demonstrate it did not have a discriminatory purpose. Unlike when a prosecutor challenges a juror for cause, the ultimate burden of persuasion always rests with, and never shifts from, the party objecting to the peremptory strike—here the defendant. *Id.* at 767 (recognizing that at step two only the burden of *production* shifts to the prosecution).

The district court placed a burden of persuasion on the prosecution at step two of the analysis. And because the juror had represented she could be fair (a factor relevant to a strike for cause but not for a peremptory strike) the court found that the prosecution had not satisfied step-two and sustained the defendant's challenge. This not only shifted the burden of proof to the prosecution but changed the standard under which a *Batson* challenge may be sustained. Under the district court's analysis, if the prosecution uses a peremptory challenge on a black juror for reasons that do not also support a challenge for cause the prosecution has violated *Batson*. The district court's analysis is wrong. *Batson*, 476 U.S. at 97 (emphasizing that the prosecutor's explanation for a strike need not rise to the level justifying a challenge for cause). In order for the court to sustain a *Batson* challenge the court must find purposeful discrimination. Its failure to conduct step three of the *Batson* analysis eliminated the defendant's burden to demonstrate that racism guided the prosecutor's decision to excuse a juror—a burden the defense could not meet considering the record that existed here.

CONCLUSION

Lower courts need guidance on how to conduct a *Batson* analysis where the prosecutor's stated reason for exercising a peremptory challenge is the juror's own, acknowledged racial bias. The district court here erred when it sustained the defendant's *Batson* challenge at step two and without determining whether the prosecutor had engaged in purposeful discrimination. Its ruling sustaining the challenge should be disapproved.

Respectfully submitted,

CAROL CHAMBERS,
District Attorney

December 20, 2011
Date

BY: 
DAVID C. JONES #23246
Senior Deputy District Attorney

CERTIFICATE OF MAILING

On December 20, 2011, I served a copy of the above OPENING BRIEF upon the below listed person(s) at the below indicated location(s) by depositing the copy in the United States Mail, sufficient postage pre-paid, and properly addressed.

LYNN NOESNER
Deputy State Public Defender
1290 Broadway, Suite 900
Denver, CO 80203

HONORABLE JUDGE MARILYN LEONARD ANTRIM
Arapahoe County Combined Court
7325 South Potomac Street
Centennial, Colorado 80112

SHERRIE O'BRIEN
Appeals Clerk
Arapahoe County Combined Court
7325 South Potomac Street
Centennial, Colorado 80112

Certifying Secretary