

<p>COURT OF APPEALS, STATE OF COLORADO</p> <p>Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203</p>	
<p>Arapahoe District Court Honorable Marilyn L. Antrim Case Number 10CR1193</p>	
<p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>Plaintiff-Appellant</p> <p>v.</p> <p>Adrian Larkins</p> <p>Defendant-Appellee</p>	<p>σ COURT USE ONLY σ</p>
<p>Douglas K. Wilson Colorado State Public Defender Lynn Noesner, #39209 1300 Broadway, Suite 300 Denver, CO 80203</p> <p>(303) 764-1400 (Telephone) appellate.pubdef@coloradodefenders.us</p>	<p>Case Number: 11CA1029</p>
<p style="text-align: center;">ANSWER BRIEF OF DEFENDANT-APPELLEE</p>	

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<p>CERTIFICATE OF COMPLIANCE</p>	

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

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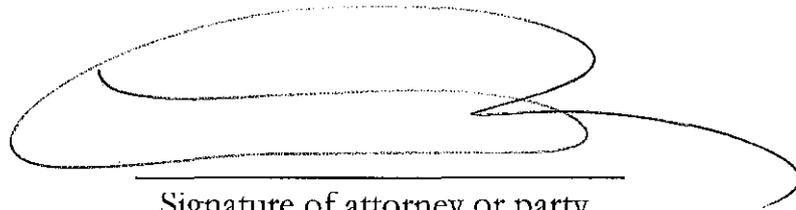
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Signature of attorney or party

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INTRODUCTION

Defendant-Appellee was the defendant in the trial court and will be referred to by name or as the Defendant. Plaintiff-Appellant, the State of Colorado, will be referred to as the prosecution or the State. Electronic transcripts will be referenced by the date of the hearing, as well as the PDF page number.

STATEMENT OF THE ISSUES PRESENTED

1. Whether this People's appeal should be dismissed because it fails to present a question of law?
2. Whether the district court properly exercised its discretion in sustaining a *Batson* challenge after the prosecution failed to articulate a race-neutral reason for its peremptory strike against a juror of color?

STATEMENT OF THE CASE AND FACTS

The State charged Mr. Larkins with robbery of an at-risk adult.(v1,p30-32) The jury acquitted Mr. Larkins of all charges.(v2,p320)

Nevertheless, the People appeal the district court's ruling during voir dire sustaining the defense's *Batson* challenge. Specifically, after the State used two of its six peremptory challenges to remove African-American jurors, the court inquired whether the defense wanted to make a *Batson* challenge.(4/26/11,p219-

20,222/PDF,p781-82,784) The defense responded with the following *Batson* argument:

Judge, [the prosecutor] has used her peremptory challenges on the two African-American individuals that were left here.

Our client is African-American. African Americans are part of a protected class. It's our position that a pattern has been established as to potential race-based purposes in terms of using peremptory challenges, so it's our position that at this point there needs to be a race neutral reason as to African individuals that are left as potential jurors. They were 5 and 1.

(4/26/11,p222-23/PDF,p784-85) As to Juror 1, the court denied the *Batson* challenge because "he indicated he did not want to here."(4/26/11,p223/PDF,p785) As to Juror 5, the court turned to the prosecution for a race neutral reason, and the prosecution stated:

Your Honor, I challenged her for cause previously and for the reasons 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.

(*Id.*) The defense asked the court to reseal Juror 5 on the basis that the prosecution had failed to offer a race-neutral rationale for the strike; the defense argued that all of the prosecution's reasons were race-related.(4/26/11,p224/PDF,p786)

The court agreed to reseal the juror.(4/26/11,p224-25/PDF,p786-87) The court found the prosecution failed to establish a race-neutral basis for the peremptory strike.(*Id.*) The court rejected the prosecution's argument that the juror was racially-biased, finding "[t]his 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."(*Id.*)

SUMMARY OF THE ARGUMENT

This People's appeal should be dismissed because it does not present a pure question of law as required by section 16-12-102(1), C.R.S.

The district court properly sustained the defense's *Batson* challenge. The prosecution failed to meet its burden at the second step. The prosecution only offered a facially-improper, race-based rationale that suggested discriminatory motive. Even though Juror 5 had stated that she could be fair and impartial, the prosecution assumed because she was African-American she would be biased in favor of the defendant. *Batson* was designed to prevent exactly this type of racially-motivated use of peremptory strikes.

ARGUMENT

I. This People’s Appeal Should be Dismissed Because It Fails to Present a Question of Law as Required by Section 16-12-102(1), C.R.S.

The People appeal the court’s ruling sustaining the defense’s *Batson* challenge and reseating Juror 5, who the People sought to strike.

The law limits the type of appeals the State may pursue. Specifically, section 16–12–102(1), C.R.S. sets out the following limitations:

(1) The prosecution may appeal any decision of the trial court in a criminal case upon any question of law... Nothing in this section shall authorize placing the defendant in jeopardy a second time for the same offense.

With regards to the *Batson* analysis, the ultimate question of whether the prosecutor’s motivation was related to race largely turns on a credibility evaluation. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991); *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (*Miller-El I*); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*); *People v. Collins*, 187 P.3d 1178, 1182 (Colo.App.2008). A finding on this issue is generally reviewed for clear error because “evaluation of the prosecutor’s state of mind based on demeanor and credibility lies ‘particularly within a trial judge’s province.’” *Hernandez*, 500 U.S. at 365; *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). Thus, the district court’s ultimate decision regarding whether to overrule or sustain a *Batson* challenge involves an issue of fact reviewed only for clear error. *Valdez v.*

People, 966 P.2d 587, 590 (Colo.1998) (“It is well settled that the trial court’s determination in the third step of the *Batson* analysis of actual racial discrimination is an issue of fact to which we afford due deference and review only for clear error.”).

Although the People assert error in the manner in which the district court conducted the *Batson* test, the People are essentially contesting the district court’s decision to sustain the *Batson* challenge. That decision involved the district court making a factual credibility determination regarding the plausibility of the prosecution’s actions and rationale. It did not involve a question of law but rather merely an assessment of the circumstances bearing on racial purpose and animosity. Review of such a factual determination is not appropriate under section 16–12–102(1). *See People v. Tharp*, 746 P.2d 1337, 1339 (Colo.1987) (an appeal that merely raises factual and evidentiary questions well within the discretion of the district court should be dismissed). Accordingly, the People’s appeal should be dismissed.

II. The District Court Properly Sustained the *Batson* Objection.

A. Standard of Review

Mr. Larkins agrees that the parties below preserved this issue as described above in the Statement of Case and Facts.

The applicable standard of review for a *Batson* challenge depends upon which step of the *Batson* analysis is at issue. *Valdez*, 966 P.2d at 590. Here, the People

concede (OB,p8-9), and Mr. Larkins agrees, that only the second and third steps are at issue in this case. Mr. Larkins agrees with the People that the second step of the *Batson* analysis – the facial validity of the reason articulated by the prosecution – is reviewed *de novo*. *Id.* at 590. However, regarding the third step, the district court’s determination is an issue of fact to which appellate courts must afford deference and can only review for clear error. *Id.*

B. Law and Analysis

The Equal Protection Clauses prohibit the State from discriminating on the basis of race in jury selection. U.S. Const. amend., XIV; Colo. Const. art. II, §§ 16, 25; *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986). The exercise of a single peremptory challenge on the basis of race violates the Fourteenth Amendment. *Snyder v. Louisiana*, 552 U.S. at 478; *J.E.B. v. Alabama*, 511 U.S. 127,142 n.13 (1994).

In *Batson*, the United States Supreme Court outlined a three-step process for evaluating claims of racial discrimination in jury selection under the Equal Protection Clause. 476 U.S. at 97-98. While the burden of persuasion is always on the party who alleges discrimination in jury selection, the burden of production shifts between the parties. *See Valdez*, 966 P.2d at 589-90.

Once the defendant makes a *prima facie* case of discrimination, “the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for

exercising the challenge.” *Miller-El II*, 545 U.S. at 239; *Batson*, 476 U.S. at 98. With regards to the second step, *Batson* expressly holds “the prosecutor may not rebut the defendant’s *prima facie* case of discrimination by stating merely that he challenged jurors of the defendant’s race on the assumption-or his intuitive judgment-that they would be partial to the defendant because of their shared race.” *Batson*, 476 U.S. at 97-98. Nor can the prosecution meet its burden by merely denying a racially discriminatory motive. *Valdez*, 966 P.2d at 950. Rather, the prosecution must articulate a facially race-neutral explanation. *Id.*

A discriminatory purpose “implies that the [prosecutor]...selected...a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects on an identifiable group.” *Hernandez*, 500 U.S. at 360; *accord*, *Cerrone v. People*, 900 P.2d 45, 53 (Colo.1995); *Collins*, 187 P.3d at 1181-1182; *see also* *Robinson v. United States*, 878 A.2d 1273, 1284 (D.C.Cir. 2005) (“[E]ven if the prosecutor acted from mixed motives, some of which were non-discriminatory, his actions deny equal protection and violate *Batson* if race or gender influenced his decision. A peremptory challenge may not be based even partially on an unlawful discriminatory reason.”); *Payton v. Kearse*, 495 S.E.2d 205, 210 (S.C.1998) (same); *accord*, *State v. Lucas*, 18 P.3d 160, 163 (Ariz.App.Div.1 2001).

The ultimate question of whether the prosecutor's motivation was related to race requires the district court to make a credibility evaluation. *See Hernandez*, 500 U.S. at 365; *Miller-El I*, 537 U.S. at 339; *Collins*, 187 P.3d at 1182. In assessing the credibility of the proponent of the strike, the court should consider the proponent's demeanor, how reasonable or improbable the proponent's explanations are, and whether the proffered rationale has some basis in accepted trial strategy. *See Craig v. Carlson*, 161 P.3d 648, 654 (Colo.2007); *Collins*, *supra*; *see also Miller-El I*, 537 U.S. at 338-339 ("the critical question in determining whether a [defendant] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike").

In this case, when the court prompted the prosecution for a race-neutral explanation for their peremptory of Juror 5, the prosecution indicated they believed Juror 5 was biased and could not be fair because she thought "too many African Americans [were] being prosecuted."(4/26/11,p223/PDF,p785) On appeal, the People contend that the proffered explanation (relating to the juror's alleged racial bias) should be deemed racially-neutral because people in all different groups have different biases. The People try to suggest that bias, like a beard, is not a characteristic that is peculiar to any race. However, the prosecution did not strike Juror 5 because of a general bias that could transcend across all different races. No,

the prosecution struck Juror 5 specifically because of her race and their fear she would be biased or overly sympathetic to the defendant, another African-American, despite the fact that Juror 5 repeatedly stated that she would be fair to both sides.

The record undercuts the People's rationale that Juror 5 was biased and could not be fair, providing further evidence that the prosecution's intent was discriminatory. The record shows that Juror 5 repeatedly stated that she could be fair to both sides.(4/26/11,p76,78-80/PDF,p638,640-42) Although Juror 5 admitted she had "an issue with sometimes the unfair number of African Americans that are brought to trial," when the court and parties questioned her further, she consistently answered that she could be fair and that she would "absolutely" find the defendant guilty if the State met its burden.(4/26/11,p75-80,130/PDF,p637-42,692) She stated she would "absolutely not" reach a not guilty just to send a message.(4/26/11,p79-80/PDF,p641-42) Throughout voir dire, she also responded appropriately to a variety of questions and in line with many other of jurors.(4/26/11,p126-27,130,146-47/PDF,p688-69,692,708-09)

The court denied the prosecution's challenge for cause because the court found that Juror 5 was capable of putting aside any bias, being fair, and reaching a guilty verdict if the State met its burden.(4/26/11,p81-82/PDF,p643-44) The People do

not appeal the court's denial of their challenge for cause or otherwise assert that the district court erred in its denial of the challenge for cause.

On its face, the prosecution's explanation for the strike was insufficient to meet the State's burden because the prosecution's proffered rationale was tied to the juror's race. It was not race-neutral but race-based. The prosecution's race-based explanation failed to rebut the *prima facie* inference of discrimination that the defense established. Contrary to the People's contention, the district court did not improperly shift any burden to the prosecution. The district court simply held the prosecution to their burden at the second step.

The fact that the prosecution could not articulate a racially-neutral explanation and instead articulated a racially-motivated rationale provided evidence of discriminatory purpose, which the court could consider in deciding whether to sustain or overrule the *Batson* challenge. In fact, some courts have held that failure to articulate race-neutral explanation or meet the requirements of the second step violates *Batson* and warrants a remedy for the proponent of the *Batson* challenge. *See e.g., Payton*, 495 S.E.2d at 210 (where counsel sought to strike a juror because she was a "redneck," counsel's explanation was "facially discriminatory" and violated *Batson* without the third step being addressed); *State v. Lucas*, 18 P.3d 160, 163 (Ariz.App. 2001) (counsel's non-neutral reason for striking the only African American panel

member required reversal); *McCrea v. Gberaibeh*, 669 S.E.2d 333, 335 (S.C.2008) (counsel's explanation that the juror's dreadlocks caused him "uneasiness" was insufficient to satisfy the race-neutral requirement in the second step of the *Batson* analysis and "carrie[d] with it an inherently discriminatory intent"); *State v. Walker*, 453 N.W.2d 127, 136 (Wis.1990) (prosecutor's failure to adequately explain the racial exclusion left the prima facie case of purposeful discrimination unrebutted and required reversal); *Moeller v. Blanc*, 276 S.W.3d 656, 666 (Tex. App. 2008)(where party failed to articulate a sufficient race-neutral reason for striking juror at the second step of the *Batson* analysis, trial court abused its discretion in failing to sustain the *Batson* objection and reversal was required).

The People contend that the court failed to reach the third step. Generally, at the third step, the court makes a credibility determination regarding the proffered race-neutral reason. *See Miller-El I*, 537 U.S. at 339-340 ("court must evaluate the proponent's credibility as to the proffered neutral explanation"). However, here, the prosecution failed to offer a race-neutral explanation. The prosecution used their peremptory challenges to remove the only two African-American jurors, and then the prosecution was unable to rebut the *prima facie* inference of discrimination by offering a race-neutral rationale regarding Juror 5. Under these circumstances, extensive findings were not necessary.

Moreover, the court did reach the ultimate issue. In sustaining the *Batson* challenge and reseating Juror 5, the court implicitly found purposeful discrimination. The court did not have to accept the prosecution's rationale that this juror would be unfair to the State based on her alleged racial bias. Rather, the court discredited the prosecution's explanation and reiterated its finding that the court believed the juror would be fair based on her answers during voir dire. (4/26/11, p224/PDF, p786) The court was in the best position to make this credibility determination regarding both the juror and the prosecutor. *See Hernandez*, 500 U.S. at 365 (determinations of credibility and demeanor lie "peculiarly within a trial judge's province"); *see also Snyder*, 552 U.S. at 477 ("trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor"). Just because the People disagree with the court's credibility determination does not mean that the court erred or that the issue is even appealable.

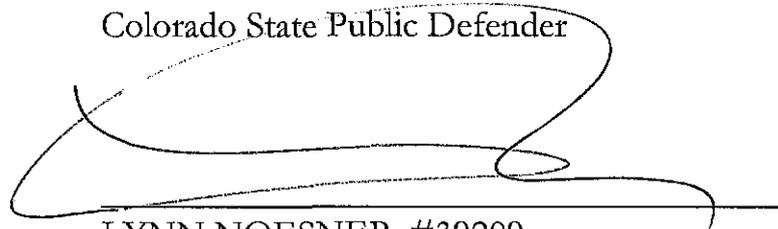
The record provides more than adequate support for the court's ultimate finding of discriminatory intent including: the prosecution's attempted exclusion of the only African-American jurors; Juror 5's repeated assurances that she would be fair that the court found credible; and the prosecution's inability to articulate a single race-

neutral explanation for the peremptory strike. Accordingly, this Court should defer to the district court's findings.

CONCLUSION

Mr. Larkins respectfully request this Court to dismiss the People's appeal, or alternatively, Mr. Larkins requests this Court to approve of the district court's ruling.

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Colorado State Public Defender

A large, stylized handwritten signature in black ink, appearing to read 'LYNN NOESNER', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that, on May 14, 2013, a copy of this Answer Brief of Defendant-Appellee was placed in the United States Mail, to the attention of:

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