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# People v. Guardino: Examined on Appeal in People v. Hecker

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# *People v. Guardino*: Examined on Appeal in *People v. Hecker*

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> *The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.*[1]

Trial by jury is a fundamental right—one that is enshrined in the U.S. Constitution.[2] The Sixth Amendment requires that a jury be "impartial."[3] However, during jury selection, parties may exclude jurors they consider undesirable by exercising a limited number of peremptory challenges.[4] Lawyers need not offer a reason for excluding a juror unless the opposing party makes a prima facie case that the challenge was used to discriminate against that juror on the basis of race, ethnicity, or sex.[5] Although peremptory challenges provide lawyers with discretion in selecting a jury, lawyers have abused their discretion to challenge by excluding women and minorities from jury participation.[6] Such abuse has become a widespread problem in the U.S. criminal justice system.[7] The system is intended to be fair and unbiased; yet the use of peremptory challenges, an integral element of trial procedure, can lead to abuse and injustice.

In *People v. Guardino*, the Appellate Division of the Supreme Court of New York, First Department, addressed whether the prosecution peremptorily challenged a group of African American female jurors for discriminatory reasons.[8] On appeal in *People v. Hecker*, the New York Court of Appeals ("Court of Appeals") was asked whether a party opposing a peremptory challenge may rely solely on the existence of numerical evidence to demonstrate a prima facie case of discrimination.[9] Applying the U.S. Supreme Court's *Batson v. Kentucky* three-prong test,[10] the Court of Appeals

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1. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

2. U.S. Const. art. III, § 2, cl. 3.

3. *Id.* amend. VI.

4. Hiroshi Fukurai & Richard Krooth, Race in the Jury Box: Affirmative Action in Jury Selection 136 (2003). In New York, each party is allowed the following numbers of peremptory challenges:

   > (a) Twenty for the regular jurors if the highest crime charged is a class A felony, and two for each alternate juror to be selected; (b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, and two for each alternate juror to be selected; (c) Ten for the regular jurors in all other cases, and two for each alternate juror to be selected.

   N.Y. Crim. Proc. § 270.25 (McKinney 2010).

5. *See* Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 Harv. L. Rev. 2121, 2134–35 (2006).

6. *See id.* at 2123–24.

7. *Id.* at 2132.

8. 880 N.Y.S.2d 244, 246 (1st Dep't 2009), *aff'd sub nom.* People v. Hecker, 15 N.Y.3d 625 (2010).

9. 15 N.Y.3d at 644. On appeal to the Court of Appeals, the case name changed from *People v. Guardino* to *People v. Hecker.*

10. *See infra* text accompanying notes 43.

affirmed the First Department's holding that the trial court properly denied Guardino's *Batson* claim because the numerical evidence argument raised by Guardino was insufficient to demonstrate a prima facie case of purposeful discrimination.[11]

This case comment contends that the New York Court of Appeals construed the first prong of the *Batson* test too narrowly, muddled existing precedent, and made it increasingly more difficult to succeed on a *Batson* claim in New York. By holding that Guardino's numerical evidence argument did not demonstrate proof of a prima facie case of discrimination under *Batson*'s first prong, the Court of Appeals has created an unreasonably high threshold for establishing a claim of jury discrimination.

Defendant Anthony Guardino was the business manager for Local 8 of the United Union of Roofers, Waterproofers & Allied Workers ("Local 8").[12] The prosecution alleged that Guardino and eight co-defendants, including Local 8, extorted more than $2 million from roofing contractors through racketeering and mob influence.[13] Though Local 8 and four other defendants entered guilty pleas, Guardino proceeded to trial.[14]

A panel of twenty-six potential jurors was chosen at random for oral questioning.[15] At this first stage, twenty-five jurors were eliminated through peremptory challenges, leaving only one juror.[16] A second panel of twenty-six potential jurors was then questioned.[17] After the prosecution used peremptory challenges against four of six female African American potential jurors, Guardino raised a *Batson* claim.[18] He argued that the prosecution's peremptory challenges resulted in a nearly all-white jury.[19] In total, thirty-seven prospective jurors, including twenty-five from the first round and twelve from the second round, were subject to peremptory challenges.[20] Of all the prospective jurors subjected to peremptory challenges on both panels, fifteen were male and twenty-two were female.[21] The prosecution used twelve of its fifteen peremptory challenges and struck eleven of the twenty-two women.[22] The record demonstrated that, of the prosecution's twelve peremptory challenges, eleven

11. *Hecker*, 15 N.Y.3d at 643–44; *Guardino*, 880 N.Y.S.2d at 246.

12. *Guardino*, 880 N.Y.S.2d at 246.

13. *Id.*; *see also* Thomas L. Lueck, *Roofing Union Charged With Scheme to Extort $2 Million*, N.Y. Times, July 28, 2004, at B3. Additionally, the prosecution alleged that some co-defendants were members of the Genovese crime family. *Id.*

14. *Guardino*, 880 N.Y.S.2d at 246.

15. *Hecker*, 15 N.Y.3d at 642.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

were made against women, with four of the eleven specifically dismissing African American women.[23]

The trial court denied Guardino's *Batson* claim on the basis that Guardino had not presented sufficient facts to make out a prima facie case and that he failed to present a pattern of the purposeful use of peremptory challenges against a "recognizable group."[24] Guardino's trial proceeded with a jury comprised of seven men and five women.[25] In assessing the final jury composition, defense counsel stated that "they bounced every African American female."[26] The final jury included only one "black female," who was from the Republic of Suriname.[27]

On December 12, 2006, the jury began deliberations and, on December 18, 2006, they delivered a guilty verdict.[28] Judgment was rendered on February 6, 2007, as amended on February 7, 2007, convicting Guardino of, inter alia, enterprise corruption and grand larceny in the third and fourth degrees.[29]

On appeal, Guardino argued that the prosecution impermissibly used its peremptory challenges to remove a group of potential jurors due to the fact that they were African American women.[30] To support the contention that the prosecution's peremptory challenges were discriminatory, Guardino used the concept of intersectional status of race (here, African American) and gender (here, women).[31] Distinct from purposeful discrimination based on only race or only gender, purposeful intersectional discrimination targets a particular combination of the two protected

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23. *Id.*

24. People v. Guardino, 880 N.Y.S.2d 244, 248 (1st Dep't 2009) (Catterson, J., dissenting), *aff'd sub nom. Hecker*, 15 N.Y.3d 625. For purposes of determining whether jurors fall within a "recognizable group," the U.S. Supreme Court, and subsequently New York courts, have held that "[t]he first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." Castaneda v. Partida, 430 U.S. 482, 494 (1977). Additionally, the First Circuit has held:

> [A] defendant must show that (1) the group is definable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas or experiences runs through the group, and (3) a community of interests exists among the group's members, such that the group's interest cannot be adequately represented in the group is excluded from the jury selection process.

Murchu v. United States, 926 F.2d 50, 54 (1st Cir. 1991).

25. *Hecker*, 15 N.Y.3d at 642.

26. *Guardino*, 880 N.Y.S.2d at 248 (Catterson, J., dissenting) (internal quotation marks omitted).

27. *Id.*

28. *Id.* at 246.

29. *Id.* at 245.

30. *Id.* at 248 (Catterson, J., dissenting).

31. *Id.* at 249. The question of whether the class of "African American" excludes an immigrant of African decent is one that was not addressed by the court. For an interesting discussion of race and peremptory challenges, see Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 Harv. C.R.-C.L. L. Rev. 63 (1993).

classes.[32] Guardino claimed that the jurors were not discriminated against based on either their sex or race alone, but rather based on their identity as African American women.[33] Guardino argued that, because four out of six African American women were struck from the jury, the numerical evidence was sufficient to establish a prima facie case of discrimination under *Batson*.[34] Guardino further argued that the trial court violated his equal protection rights by failing to request that the prosecution offer race-neutral reasons for its peremptory challenges under the second prong of the *Batson* test.[35] Guardino offered no other evidence beyond such numerical evidence in support of his claim.[36]

The prosecution argued that the defense failed to make a prima facie showing that the prosecution's peremptory challenges were discriminatory.[37] The prosecution additionally argued that the numerical evidence supplied by Guardino was unreliable because it was "purely statistical and based on an intersectional status (race and gender)."[38]

The *Batson* claim framework used in *Guardino* stems from the landmark 1986 U.S. Supreme Court decision of *Batson v. Kentucky*, in which the Court held that lawyers are prohibited from using peremptory challenges to dismiss potential jurors on the basis of race.[39] As a result of the Supreme Court's decision in *Batson*, individuals are now permitted to file *Batson* claims in order to question any peremptory challenges that they believe are discriminatory.[40] The Court explained that such a prohibition is necessary for two reasons: (1) to protect individual defendants from a violation of their equal protection rights,[41] and (2) to protect the right of U.S. citizens to participate in the judicial process as a juror without unlawful discrimination.[42] The

32. *See* Jean Montoya, *"What's So Magic[al] About Black Women?" + Peremptory Challenges at the Intersection of Race and Gender*, 3 MICH. J. GENDER & L. 369, 392 (1996).

33. *Guardino*, 880 N.Y.S. at 249.

34. *Id.* at 246.

35. *See id.* at 248–49 (Catterson, J., dissenting).

36. *Id.* at 246–47 (majority opinion).

37. *Id.* at 249 (Catterson, J., dissenting).

38. *Id.*

39. 476 U.S. 79, 89 (1986) ("[T]he State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause. Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (footnote omitted)).

40. *See* Anthony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 158–59 (2005).

41. *Batson*, 476 U.S. at 86 ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.").

42. *Id.* at 87 ("[B]y denying a person participation in jury service on account of his or her race, the state unconstitutionally discriminate[s] against the excluded juror.").

*Batson* court established a three-prong test that a party opposing a peremptory challenge must satisfy in order to succeed on such a claim.[43] First, a party opposing a peremptory challenge as discriminatory must establish a prima facie case of discrimination, with consideration of all relevant circumstances.[44] The Supreme Court specified, as an example, that a "'pattern' of strikes" against potential African American jurors would give rise to an inference of discrimination.[45] The Supreme Court did not expound on what exactly constitutes a "pattern." This has led many courts to use numerical evidence in their analyses.[46] Next, the party who exercised the peremptory challenges at issue must offer race-neutral reasons to justify its challenges.[47] After that party produces a race-neutral reason, the trial court must "decide . . . whether the opponent of the strike has proved purposeful racial discrimination."[48]

The First Department affirmed Guardino's conviction,[49] holding that the numerical evidence was insufficient on its own, without other factual assertions or comparisons, to establish a prima facie case of discrimination.[50] While conceding that "a purely numerical argument may give rise to a prima facie showing of discrimination," the First Department nevertheless held that "numbers alone may not automatically establish such a showing."[51] To support its holding, the First

43. Purkett v. Elm, 514 U.S. 765, 767 (1995).

44. *Batson*, 476 U.S. at 93–94.

45. *Id.* at 97.

46. Ramona L. Paetzold & Stephen L. Willborn, The Statistics of Discrimination, Using Statistical Evidence in Discrimination Cases § 11.04, at 20–21 & n.16 (1994); Brian J. Serr & Mark Maney, *Criminal Law: Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1, 27 (1988). However, Judge Arthur L. Burnett, Sr., described an early warning by the *Batson* dissent regarding the three-prong test and, specifically, regarding the difficulties in establishing a prima facie case of discrimination, as follows:

> Justice Thurgood Marshall, in his concurring opinion in *Batson*, . . . suggested that the three-step process enumerated by the Supreme Court could not ferret out all of the subtle ways clever lawyers could take race into consideration and yet give plausible explanations to defeat a claim of pretext. He first noted that defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. He concluded that this means that, in those states where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. Simply put, there will not be sufficient numbers to establish a pattern or other factual basis for a prima facie case.

Arthur L. Burnett, Sr., *Abolish Peremptory Challenges, Reform Juries to Promote Impartiality*, 20 Crim. Just. 26, 29 (2005) (citing *Batson*, 476 U.S. at 105).

47. *Batson*, 476 U.S. at 94.

48. *Purkett*, 514 U.S. at 767.

49. People v. Guardino, 880 N.Y.S.2d. 244, 245 (1st Dep't 2009), *aff'd sub nom.* People v. Hecker, 15 N.Y.3d 625 (2010).

50. *Id.* at 247 (citing People v. Brown, 743 N.Y.S.2d 347, 379 (2002)).

51. *Id.* at 246.

Department explained that Guardino failed to offer additional factors beyond numbers, such as factual assertions or comparisons, to establish that the prosecution peremptorily challenged jurors for impermissible purposes.[52] Rather than specifically addressing the pattern-of-strikes argument referenced by Guardino, the First Department explained that the court had "considered defendant's remaining arguments" but found them "unavailing."[53] The First Department held that, because Guardino failed to provide other factors beyond the numerical argument presented, he failed to establish a prima facie case of discrimination.[54]

Justice Catterson, in his dissent, argued that Guardino had sufficiently made a prima facie showing of discrimination.[55] He explained that the prosecution's "pattern of strikes" against four out of the six African American females was, in and of itself, sufficient to establish a prima facie case of discrimination and thus satisfied the first prong of the *Batson* test.[56] Justice Catterson reasoned that the class of African American women was sufficient because "the intersectional status at issue here should be treated the same way race and gender are treated under equal protection analysis."[57] After concluding that Guardino established a prima facie case of jury discrimination based solely on numerical evidence alone, the dissent explained that the matter should be remitted to the trial court in order for the prosecution to complete the second prong of the *Batson* analysis by presenting race-neutral reasons for its challenges.[58]

On November 30, 2010, the New York Court of Appeals affirmed the First Department's decision in *People v. Hecker*, holding that "the numerical arguments alone advanced by Guardino did not give rise to a prima facie case of impermissible discrimination."[59] The court reasoned that, because the facts lacked a "wholesale exclusion" of all African American women on either jury panel,[60] Guardino was required to adduce "other factors" in order to make a prima facie claim of jury discrimination.[61] The court juxtaposed two companion cases to demonstrate the

52. *Id.* at 247.

53. *Id.*

54. *Id.*

55. *Id.* at 249 (Catterson, J., dissenting). In explaining why the intersectional status argument was, in fact, preserved for review, Justice Catterson explained that "the spirit of *Batson* and its progeny requires this Court to recognize peremptory challenges exercised against individuals because of *both* their race and their sex." *Id.* at 250. Furthermore, Justice Catterson argued that, with respect to establishing a pattern-of-strikes argument, "[i]t is well-settled that numerical evidence of discrimination is sufficient to raise a prima facie case under *Batson*." *Id.*

56. *Id.* at 250.

57. *Id.*

58. *Id.*

59. 15 N.Y.3d 625, 654 (2010).

60. *Id.* at 653.

61. *Id.* at 653–54 ("In cases where we have sustained a prima facie showing of purposeful discrimination absent a 100% exclusion rate of a cognizable group, the moving party has placed other factors on the record to meet the step one burden.").

application of the "other factors" requirement.[62] Looking first to *People v. Bolling*, the court noted that "the defendant not only highlighted this statistical argument to the trial court, but augmented his showing by noting that two of the four excluded jurors had pro-prosecution tendencies with 'ties to law enforcement.'"[63] Second, the court cited *People v. Steele*, in which the court found that the defendant's numerical evidence of jury discrimination—specifically, that 75% of the prosecution's peremptory challenges were used to eliminate 50% of the potential African American jurors—was insufficient by itself to meet the first prong.[64] The court added that an additional factor to consider "is whether a defendant is a member of the same cognizable group the People are aiming to exclude."[65]

Legal precedent established by both the U.S. Supreme Court and the Court of Appeals clearly demonstrates that a numerical argument can establish a "pattern of strikes" against a recognized group, and may generally be sufficient to meet the first prong of the *Batson* test—despite the absence of a wholesale exclusion.[66] Following this precedent, the Court of Appeals should have ruled that Guardino's numerical evidence argument was sufficient to meet the first prong of the *Batson* test, without requiring the demonstration of additional evidence. Through *People v. Hecker*, the Court of Appeals has created an unreasonably high threshold for establishing a discrimination claim based on peremptory challenges under *Batson*, a result not compatible with Supreme Court precedent and contrary to prior Court of Appeals decisions.

The first *Batson* prong requires a prima facie showing of discrimination in a party's use of peremptory challenges.[67] In *Batson*, the Supreme Court held that the challenging party must first prove the objective fact that the dismissed juror is a member of a cognizable racial group.[68] Additionally, the challenging party must show that the combination of all the relevant facts and circumstances raises an inference that discrimination has occurred.[69]

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62. *Id.*

63. *Id.* at 654 (quoting People v. Bolling, 79 N.Y.2d 317, 322 (1992)).

64. *Id.* (citing *Bolling*, 79 N.Y.2d at 325).

65. *Id.* (citing Powers v. Ohio, 499 U.S. 400, 416 (1991)).

66. *See, e.g.*, People v. Hawthorne, 80 N.Y.2d 873, 874 (1992) (holding that the peremptory challenge of four of the six African American members was sufficient to establish a prima facie showing of discrimination); People v. Jenkins, 75 N.Y.2d 550, 556 (1990) (explaining that a "pattern of strikes" was established when seven of ten peremptory challenges were used against blacks); *see also* Johnson v. California, 545 U.S. 162, 169 n.5 (2005) (explaining that a defendant may satisfy his prima facie burden by relying on the specific facts of a case as opposed to requiring a showing of pattern and practice of discrimination); People v. Rosado, 846 N.Y.S.2d 165 (1st Dep't 2007) (holding that a numerical argument was sufficient, without any other evidence, to raise an inference of discrimination).

67. Batson v. Kentucky, 476 U.S. 79, 93–94 (1986).

68. *Id.* at 96.

69. *Id.*

In establishing this rule, the Supreme Court implied the need for a broad interpretation of the prima facie test for jury discrimination. For example, in *Georgia v. McCollum*, the Supreme Court explained: "The *Batson* Court held that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury based solely on the prosecutor's exercise of peremptory challenges at the defendant's trial."[70] Furthermore, a "'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."[71] In 1994, the Supreme Court in *J.E.B. v. Alabama* continued to broadly apply the *Batson* test by extending *Batson* to cover gender as well as race.[72] In *Powers v. Ohio*, a white defendant was charged with murder and brought a *Batson* claim, arguing that the prosecution used its peremptory challenges to remove blacks from the jury.[73] The Court held that, regardless of race, "[b]oth the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom. . . . This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror."[74] Thus, the Supreme Court made clear that a criminal defendant can raise a peremptory challenge regardless of whether the defendant and the excluded juror share the same race.[75]

In recent cases, the Supreme Court reiterated the need to broadly define the first prong of the *Batson* test. In *Johnson v. California*, the Court clarified:

> [W]e assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.[76]

70. 505 U.S. 42, 47 (1992) (citing *Batson*, 476 U.S. at 87).

71. *Batson*, 476 U.S. at 97. However, the *Batson* Court did not resolve the question of how many strikes are needed to demonstrate a "pattern," and courts have been inconsistent in their analysis. *See supra* note 66.

72. 511 U.S. 127, 140–41 (1994) ("In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures. . . . [T]his right extends to both men and women.").

73. 499 U.S. 400, 402 (1991).

74. *Id.* at 413–14.

75. *Id.* at 402 ("[W]e hold that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races.").

76. 545 U.S. 162, 170 (2005).

Thus, the Supreme Court has made clear that this first prong should remain broadly construed.[77]

The Court of Appeals has similarly provided a broad interpretation for establishing a prima facie case for discrimination in the State of New York. Most recently, in *People v. Smocum*, the defendant raised a *Batson* claim after one Hispanic and two African American women were peremptorily challenged.[78] The court explicitly stated that, "[a]lthough as part of their prima facie case parties often rely on numbers to show a pattern of strikes against a particular group of jurors, a prima facie case may be made based on the peremptory challenge of a single juror that gives rise to an inference of discrimination."[79] Similarly, in *People v. Childress*, the Court of Appeals clarified that the first prong of the *Batson* test "may be established by a showing that members of the cognizable group were excluded while others with the same relevant characteristics were not."[80] Finally, the Court of Appeals warned that courts "should also take into consideration the fact that the mere existence of a system of peremptory challenges may serve as a vehicle for discrimination by those with racially motivated inclinations."[81]

Prior to *Hecker*, New York case law clearly established that a numerical argument on its own could establish a "pattern of strikes," and thus a prima facie case of discrimination under the first prong of the *Batson* test. In *People v. Hawthorne*, the Court of Appeals held that the defendant made a prima facie showing of racial discrimination when the prosecutor challenged four out of six African American potential jurors.[82] It did not require, nor even mention, the need for any additional evidence, finding the numerical evidence sufficient by itself.[83]

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77. Indeed, some jurisdictions are now using a "bright-line rule" to establish a prima facie case of jury discrimination. James R. Gadwood, Note, *The Framework Comes Crumbling Down: Juryquest in a* Batson *World*, 88 B.U. L. Rev. 291, 299 (2008). The Supreme Court of South Carolina, for example, has held that simply raising a *Batson* challenge is sufficient to establish the first prong of the *Batson* test. *Id.*

78. 99 N.Y.2d 418, 221–22 (2003) (holding that the trial court should have decided whether the defense met the burden of establishing a prima facie case of discrimination under *Batson*).

79. 99 N.Y.2d at 221–22; *see also* People v. Brown, 97 N.Y.2d 500, 515–16 (2002).

80. 81 N.Y.2d 263, 267 (1993) (citing People v. Bolling, 79 N.Y.2d 317, 324 (1992)). The *Childress* court held that the defense counsel failed to "articulate a sound factual basis for his claim during the *Batson* colloquy. His perfunctory statements in support of the defense motion for *Batson* relief plainly did not establish the existence of facts . . . sufficient to raise an inference that the prosecutor had used his peremptory challenges to exclude individuals because of their race." *Id.* at 268.

81. *Id.* at 267 (citing Batson v. Kentucky, 476 U.S. 79, 96 (1986)). Additionally, the Court of Appeals has also cautioned against the use of peremptory challenges more generally. In her concurrence to *People v. Brown*, former Chief Judge Kaye stated that "[t]his Court stands as one in its recognition of the prized right of Americans to serve on juries, in its denunciation of invidious discrimination in jury selection and in its commitment to apply the law to assure that objective." *Brown*, 97 N.Y.2d at 508. She added, "My nearly 16-year experience with *Batson* persuades me that, if peremptories are not entirely eliminated (as many have urged), they should be very significantly reduced." *Id.* at 509.

82. 80 N.Y.2d 873, 874 (1992).

83. *Id.*; *see also* People v. Allen, 86 N.Y.2d 101, 109 (1995) (explaining that the defendant met his burden "when he protested the prosecutor's use of 14 peremptory challenges" used against men).

In *Hecker*, the Court of Appeals ignored well-established precedent and created an unreasonably high threshold for establishing claims of jury discrimination through its narrow application of the first prong of the *Batson* test.[84] Here, the numerical evidence revealed that, of the twelve peremptory challenges made by the prosecution, eleven challenges were made against women, four of which were made against African American women.[85] This evidence alone demonstrates the existence of a "pattern of strikes" as explained in *Batson* and in subsequent New York cases such as *Smocum*.[86] However, neither the Court of Appeals in *Hecker* nor the First Department majority opinions in *Guardino* even mention the existence of this well-established pattern-of-strikes analysis.[87]

The argument offered by the Court of Appeals—that only wholesale exclusion of a class will allow a defendant to allege juror discrimination on the basis of statistical evidence alone—goes against Supreme Court precedent. The Supreme Court has held that, to the contrary, a statistical disparity less than wholesale exclusion can establish a prima facie case of discrimination under *Batson* without additional evidence. In *Meller-El v. Cockrell*, the Court reversed a state court's holding that statistical evidence did not support a prima facie case of jury discrimination when ten of the prosecution's fourteen peremptory challenges were used against African Americans, leaving only one African American on the jury.[88] The Court explained:

> In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.[89]

The Court, quoting *Batson*, explained that "[i]f these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause would be but a vain and illusory requirement."[90]

It is difficult to reconcile this Supreme Court precedent with the Court of Appeals' reasoning in *Hecker*. Not only is it clear that the *Hecker* court's distinction between cases of wholesale exclusion and those of partial exclusion is erroneous, but the facts of *Hecker* support the argument that the prosecution's use of peremptory

84. *See supra* notes 59–65 and accompanying text.

85. People v. Hecker, 15 N.Y.3d 625, 642 (2010).

86. People v. Smocum, 99 N.Y.2d 418, 419 (2003).

87. *See Hecker*, 15 N.Y.3d 625; People v. Guardino, 880 N.Y.S.2d 244 (1st Dep't 2009), *aff'd sub nom. Hecker*, 15 N.Y.3d 625. In fact, the only mention of the pattern-of-strikes test in the First Department's opinion arises in the dissent. *See Guardino*, 880 N.Y.S.2d at 250 (Catterson, J., dissenting) ("I agree with the defendant that a 'pattern of strikes' against black females was established prima facie. It is well-settled that numerical evidence of discrimination is sufficient to raise a prima facie case under *Batson*.").

88. 537 U.S. 322, 342–43, 347 (2003).

89. *Id.* at 342.

90. *Id.* at 347 (quoting Batson v. Kentucky, 476 U.S. 79, 98 (1986)) (internal quotation marks omitted).

challenges against women, and African American women in particular, was similarly not due to "happenstance," [91] and thus could be sufficient to establish a prima facie case for jury discrimination.

Furthering this point, some circuits have construed the first prong of the *Batson* test expansively, as instructed by the Supreme Court.[92] The Eleventh Circuit has held, "under *Batson*, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown."[93] Similarly, the Sixth Circuit has held that "[s]ubstantial underrepresentation, as a result of purposeful discrimination, is as much a constitutional violation as total exclusion."[94]

The Court of Appeals also erred by basing part of its reasoning on the fact that Guardino, a white male defendant, was not of the same "cognizable group" as the stricken jurors. In direct contrast to the words of caution used by the Supreme Court in *Powers v. Ohio*, the Court of Appeals reasoned that an additional factor to consider when determining whether a party has asserted a prima facie claim of discrimination is "whether a defendant is a member of the same cognizable group the People are aiming to exclude."[95] The court wrongly cited Supreme Court precedent by claiming that "the Supreme Court, nevertheless, emphasized that [whether defendant is of the same cognizable class as those who suffered jury discrimination] remains a factor in evaluating whether the totality of the circumstances gives rise to a showing of purposeful discrimination" by citing to Justice Scalia's dissenting opinion in *Powers*.[96]

The Supreme Court stated in *Powers* that the "[r]acial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype," but then cautioned, "to say that the race of the defendant may be relevant to discerning bias in some cases does not

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91. *Id.* at 342.

92. *See, e.g.*, Jordan v. Lefevre, 206 F.3d 196, 201 (2d Cir. 2000) ("[T]he judge declared it was not then necessary that the prosecutor provide a race neutral basis for his challenges, but asked him to provide one in order to save time."); United States v. Scott, 26 F.3d 1458, 1465 (8th Cir. 1994) (explaining how the district court required the government to justify its use of peremptory strikes "without expressly finding that [the defendant] had made a prima facie showing that the government had exercised its peremptory strikes on the basis of race"); United States v. Johnson, 941 F.2d 1102, 1108 (10th Cir. 1991) ("Because the Government offered a race-neutral explanation for its peremptory challenge of the two black jurors, and because the trial court ruled on the ultimate question of intentional discrimination, the preliminary issue of whether Defendant actually made a prima facie showing of discrimination is now moot."); State v. Spivey, 874 So. 2d 352, 361 (La. Ct. App. 2004) (observing that, although a party need not give an explanation for its use of a peremptory challenge if the trial court has not found that the movant has made a prima facie case, "many trial courts require [an explanation] to create a complete record").

93. United States v. David, 803 F.2d 1567, 1571 (11th. Cir. 1986); *see also* Snyder v. Louisiana, 552 U.S. 472, 478 (2008) ("Because we find that the trial court committed clear error in overruling petitioner's *Batson* objection with respect to [one juror], we have no need to consider petitioner's claim regarding [a second juror].").

94. Abdul v. Lane, 588 F.2d 1178, 1179 (1978) (citing Castaneda v. Partida, 430 U.S. 482, 493 (1977)).

95. People v. Hecker, 15 N.Y.3d 625, 652 (2010) (citing Powers v. Ohio, 499 U.S. 400, 416 (1991)).

96. *Id.* (citing *Powers*, 499 U.S. at 429 (Scalia, J., dissenting)).

mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms."[97] By this formulation, the Supreme Court intended that race only become a factor to assist a defendant in proving discrimination, not to be a factor for the prosecution to disprove discrimination. This is made clear through the Supreme Court's consistently broad interpretation of *Batson* and the underlying purposes of those decisions: *Batson* claims, at their foundational root, are meant to ferret out discrimination in jury selection for the protection of both the defendant and potential juror, not to hide discrimination under meaningless distinctions between the defendant and the juror discriminated against.[98]

The Court of Appeals should have reached the same conclusion as it reached in *People v. Hawthorne*.[99] In both cases, the prosecution challenged four out of six potential jurors of a particular class.[100] This numerical evidence should have been found sufficient in *Hecker*, as it was in *Hawthorne*, to establish a prima facie case of discrimination under *Batson*'s first prong, "even though it was not accompanied by any other evidence."[101]

Guardino could have also argued that the prosecution's use of peremptory challenges against women was sufficient to establish a prima facie case of discrimination. Ten out of the eleven prosecutorial peremptory challenges were against women—over ninety percent of the challenges made by the prosecution.[102] Analogously, in *J.E.B. v. Alabama*, the Supreme Court found that the defendant sufficiently established a prima facie case of discrimination after demonstrating that nine out of the ten peremptory challenges by the prosecution were used to strike men.[103] While it might be argued that the presence of five women on the jury in Guardino's case limits this argument, the resulting jury make-up is no excuse for challenges made with a discriminatory motive.[104]

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97. *Powers*, 499 U.S. at 416.

98. Batson v. Kentucky, 476 U.S. 79, 87–90 (1986). "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial." *Id.* at 87.

99. 80 N.Y.2d 873, 874 (1992).

100. *Compare id.* ("[T]he prosecutor peremptorily challenged four of the six African American members of the venire."), *with* People v. Guardino, 880 N.Y.S.2d 244, 246 (1st Dep't 2009) ("Of the six black women in question, four were peremptorily challenged by the People . . . ."), *aff'd sub nom. Hecker*, 15 N.Y.3d 625.

101. People v. Rosado, 846 N.Y.S.2d 165, 166 (1st Dep't 2007).

102. *Guardino*, 880 N.Y.S.2d at 251 (Catterson, J., dissenting).

103. 511 U.S. 127, 129–31 (1994).

104. *See, e.g.*, People v. Jenkins, 75 N.Y.2d 550, 557 (1990) ("A *Batson* violation is not avoided, however, simply because notwithstanding the discriminatory use of peremptory strikes, the prosecutor leaves some blacks on the jury panel and those left are enough to form a petit jury containing a percentage of blacks not significantly lower than the percentage of blacks in the local community."); *cf.* Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding that peremptory challenges based solely on race are unconstitutional regardless of whether the excluded jurors are or are not of the same race as the defendant).

Though it has been said that the first prong of the *Batson* test is a fairly easy standard to meet,[105] the Court of Appeals' holding has improperly heightened the standard. As the Supreme Court itself warned in *Johnson*, the first prong of the *Batson* test should not be so onerous as to make the defendant prove that it is more likely than not that there was discrimination.[106] Regardless of whether Guardino's *Batson* claim would have ultimately succeeded, the Court of Appeals failed to grant such an opportunity. In effect, the Court of Appeals held that numbers are simply not enough without complete exclusion of a protected class from the jury, and that a party in such a situation must search for factors beyond numbers to identify an impermissible discriminatory motive.[107] Further, if New York continues to follow the holding in *Hecker*, otherwise valid *Batson* claims will be less likely to succeed if defendants are not of the same race and sex as the jurors being discriminated against. Not only does this go beyond the required "pattern of strikes" analysis established by the U.S. Supreme Court, but it also makes it increasingly more difficult to succeed on a *Batson* claim in New York.

Some studies suggest that African Americans receive a statistically lower rate of protection under *Batson* than that of other classes of individuals, including whites.[108] A study by Kenneth J. Melilli regarding peremptory challenges revealed that, from 1986 to 1993, African Americans were the targets in *Batson* claims 87% of the time, whereas whites were the targets in only 1% of *Batson* claims.[109] During this period, African American defendants "succeeded in only 17% of their claims, while white [defendants] succeeded in 53% of their claims."[110] Such discrimination is problematic because it fails to promote diversity on the jury.[111] Diversity of race, ethnicity, and sex in the jury selection system is necessary to create a racially equitable and diverse tribunal necessary to render fair and legitimate jury verdicts.[112] Perhaps more significantly, as the Supreme Court acknowledged in *Batson*, "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."[113] In light of such statistics, it is all the more important for defendants to be able to raise *Batson* claims on behalf of themselves and jurors discriminated against, which in

105. *See* Note, *supra* note 5, at 2134.

106. Johnson v. California, 545 U.S. 165, 170 (2005).

107. *See* People v. Hecker, 15 N.Y.3d 625, 653–54 (2010); Fukurai & Krooth, *supra* note 4, at 136.

108. Note, *supra* note 5, at 2135.

109. *See id.* (citing Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 462 tbl.E-1 (1996)).

110. *Id.* (citing Melilli, *supra* note 109, at 463 tbl.E-2).

111. *See Batson*, 476 U.S. at 87–88; *see also* Melilli, *supra* note 109, at 500 ("The value of the jury largely depends upon the representation of various group beliefs, which itself diminishes the impact of any unfair biases.").

112. *See* Note, *supra* note 5, at 2142; *see also* Fukurai & Krooth, *supra* note 4, at 17.

113. *Batson*, 476 U.S. at 86.

turn makes the *Hecker* court's higher standard for the first *Batson* prong even more detrimental to the rights of defendants.

Thus, in establishing that Guardino's particular numerical argument was insufficient, the Court of Appeals has made it more difficult to establish the first prong of the *Batson* test. In doing so, the Court of Appeals ignored Supreme Court precedent and seemingly reversed some of its own. Both courts have consistently held in favor of a lower evidentiary standard to establish the first prong of the *Batson* test.[114] Thus, the Court of Appeals should have construed this test more broadly and held that the numerical evidence was sufficient to establish a prima facie case of discrimination despite the lack of complete exclusion or additional evidence of discrimination. If numerical evidence is insufficient on its own, then the ability of a defendant to succeed in proving jury discrimination in a New York State court is significantly reduced. Such difficulty in establishing a jury discrimination claim hinders the ability of defendants to obtain a fair trial with a representative jury of their peers.

114. *See supra* text accompanying notes 66–80.