

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 **STEVEN LAWRENCE DIXON,** }

4 Appellant, }

5 v. }

6 **STATE OF NEVADA,** }

7 Respondent. }

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Jan 14 2019 04:06 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Docket No. 77535
District Court No. 18-6963

8 **FAST TRACK RESPONSE**

9 **1. Name of party filing this fast track response: State of Nevada.**

10 **2. Name, law firm, address, and telephone number of attorney**
11 **submitting this fast track response:** Max Stovall, Esq. #14284, Humboldt
12 County Deputy District Attorney, Humboldt County District Attorney's
13 Office, P.O. Box 909, Winnemucca, NV 89446. 775-623-6360.

14 **3. Name, law firm, address, and telephone number of appellate**
15 **counsel if different from trial counsel:** same

16 **4. Proceedings raising same issues. List the case name and docket**
17 **number of all appeals or original proceedings presently pending before**
18 **this court, of which you are aware, which raise the same issues raised in**
19 **this appeal:** None.

1 **5. Procedural history. Briefly describe the procedural history of the**
2 **case only if dissatisfied with the history set forth in the fast track**

3 **statement:** The State adopts Appellant's procedural history

4 **6. Statement of facts. Briefly set forth the facts material to the issues**
5 **on appeal only if dissatisfied with the statement set forth in the fast track**
6 **statement (provide citations for every assertion of fact to the appendix, if**

7 **any, or to the rough draft transcript):** After the jury was seated, Appellant

8 and Respondent were afforded one final preemptory challenge for the final,

9 alternative juror without any challenges. (Appellant's Appendix (AA) 16:14-

10 17:9.) Respondent preempted Mr. Raul Lara, one of the final three potential

11 alternates. (AA 17:10-12.) Appellant made a *Batson* challenge to the

12 preemption, to which Respondent made a brief statement regarding gender

13 and gave a race and gender-neutral reason for striking Mr. Lara. (AA 17:21-

14 18:5.) Respondent briefly explained its reasoning—it knew the two remaining

15 females and felt they would be better jurors. (AA 18:2-5.) Respondent did

16 not know Mr. Lara and accordingly struck him in favor of the two preferable

17 jurors. (*Id.*) The record does not show a protracted silence, but it may be

18 inferred from the dialog. (AA 17:18-21.) Regardless, Respondent asked the

19 court to slow down jury selection prior to this exchange due to it being the

1 Respondent's attorney's first time in a jury trial, (AA 13:17-24,) and
2 Respondent answered with a race and gender-neutral answer, (AA 18:2-5.)
3 Respondent's silence, no matter how prolonged, did not acquiesce to
4 Appellant's *Batson* challenge, based on the district court judge's final ruling
5 on this matter. (AA 19:5-8.) The district court judge found the reason
6 provided by the state was a "[neutral]"¹ explanation that was clear and
7 reasonably specific." (AA 19:6-8.) Finally, the record provided by Appellant
8 does not demonstrate the final disposition of the alternative juror, Ms. Shelly
9 Graham because she did not deliberate with the jury nor have any influence
10 on its deliberations.

11 **7. Issues on appeal. State concisely your response to the principal**
12 **issue(s) in this appeal:** Respondent objects to Appellant's statement of the
13 issues on appeal and notes the issues on appeal as follows:

14 I. Whether the district court erred by applying the dual motivation
15 doctrine under *Batson*.

16 II. Whether trial cures any *Batson* challenge error when a *Batson*
17 challenge is issued to only the alternate juror and that alternate juror does not
18

19 ¹ The appendix uses the word "mutual" but the district court meant "neutral," which makes sense in the context of a *Batson* challenge.

1 deliberate with the jury.

2 **8. Legal argument, including authorities:**

3 **1. A mixed response suffices when at least one reason provided is race-
and gender-neutral.**

4 Appellant challenged Respondent's preemptory challenge of a Latino
5 alternative juror, Mr. Raul Lara, based on *Batson v. Kentucky*, 476 U.S. 79, 89,
6 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Respondent provided a succinct answer
7 that mentioned a gender-based reason for striking the juror as well as a race-
8 and gender-neutral reason for striking Mr. Lara.² Respondent stated he did
9 not have sufficient information to know whether Mr. Lara would make a
10 good juror, but stated he thought both remaining female jurors would make
11 good jurors. Accordingly, Respondent struck the juror on which he did not
12 have sufficient information.

13 *Batson* challenges require a three-step process:

14 First, the opponent of the preemptory challenge must
15 make out a prima facie case of discrimination. The
16 production burden then shifts to the proponent of the
17 challenge to assert a neutral explanation for the
challenge. Finally, the trial court must decide whether
the opponent of the challenge has proved purposeful

18 ² While *Batson* prohibits race-based preemptory challenges, the United States Supreme Court later prohibited
19 gender-based preemptory challenges in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-43, 114 S.Ct. 1419, 128
L.Ed.2d 89 (1994). Claiming *Batson* as prohibiting both race- and gender-based preemptory challenges
appears to be a misnomer in the local legal community. See AA 19:6-7. This *Response* will use *Batson*
throughout, but recognizes the distinction between the two United States Supreme Court cases.

1 discrimination.

2 *Watson v. State*, 130 Nev. 764, 774–75, 335 P.3d 157, 165 (2014) (citations,
3 quotation marks, and brackets omitted). The appellate court grants “great
4 deference” to the lower court’s finding regarding a *Batson* violation. *Id.* at
5 775. The appellate court’s standard of review is whether the district court
6 “clearly erred.” *Id.* at 779.

7 This issue of first impression in the *Batson* context involves what some
8 courts call the “Dual Motivation Doctrine.” See *Howard v. Senkowski*, 986 F.2d
9 24 (2d Cir.1993) (applying the dual motivation doctrine announced by the
10 United States Supreme Court in other equal protection cases to the *Batson*
11 framework). This doctrine examines whether the party who struck a juror for
12 an impermissible reason would have done so even in the absence of the
13 impermissible reason. *Id.* at 30; see also *McCormick v. State*, 803 N.E.2d 1108,
14 1112 (Ind. 2004).

15 Here, the record provides both an impermissible and permissible
16 reason to strike a juror. Respondent emphasized the importance of the
17 permissible reason to strike the alternative juror: he knew more about the
18 female alternatives rather than Mr. Lara. The district court heard Appellant’s
19 argument regarding race- and gender-based reasons for striking a juror and

1 decided the Respondent's reason for striking Mr. Lara was not
2 discriminatory. Because the district court heard argument on race and
3 gender reasons, the judge found the distinction neutral. Accordingly, this
4 Court should affirm the district court's decision because Appellant failed to
5 demonstrate clear error.

6 **2. The alternative juror did not deliberate with the jury, which**
7 **consequently cured any error.**

8 The record fails to demonstrate how denying Appellant's *Batson*
9 challenge affected the trial. The alternative juror was the only juror on which
10 Appellant challenged Respondent's preemptory strikes. If there was error by
11 the district court, which Respondent does not concede, it was subsequently
12 cured by a trial without deliberation by the alternative juror.

13 This second issue of first impression requests this Court to hold that
14 *Batson* challenges do not apply to alternative jurors that ultimately do not
15 deliberate with the other jurors. This holding is echoed by other jurisdictions.
16 *Carter v. Kemna*, 255 F.3d 589, 592 (8th Cir. 2001) (in a habeas corpus decision,
17 this court agreed in *dicta* that when no alternative juror serves, a court could
18 "reasonably believe the improper exclusion of an alternate juror is not a
19 structural error because it is clear the error never affected the makeup of the
petit jury that decided to convict the defendant."); *Nevius v. Sumner*, 852 F.2d

1 463, 468 (9th Cir. 1988); *State v. Carter*, 889 S.W.2d 106, 109 (Mo.App.1994)
2 (Eastern District) (when no alternative jurors deliberate, "*Batson* does not
3 stand for the proposition there is a Constitutional right to be an alternate
4 juror."); *People v. Stephens*, 255 A.D.2d 532, 532-33, 682 N.Y.S.2d 398, 398
5 (1998).

6 One interesting case this Court should adopt as Nevada's test comes
7 from the Supreme Court of Minnesota. *State v. Ford*, 539 N.W.2d 214, 229
8 (Minn. 1995). In this short, ninety-five word disposition, the Minnesota
9 Supreme Court held the appellant had to show that "*actual prejudice*
10 *resulted from the failure to dismiss*" pursuant to a successful *Batson* challenge.
11 *Id.* (emphasis in original). In that case, the stricken juror was an alternate and
12 the record did not show he could have played any role in deciding the
13 defendant's verdict.

14 Respondent does not show any "actual prejudice" in the district court
15 denying the *Batson* challenge. On one hand, the stricken juror, Mr. Lara,
16 never served on the jury—even as an alternate. On the other hand, the
17 alternative juror who replaced Mr. Lara never served in deliberation either.
18 As per the analysis used in *Ford*, "the alternate 'could have' engaged in
19 discussions with jurors, no evidence exists that [s]he did." *Id.* In essence,

1 trial cured any error that existed.

2 The State does not advocate parties should not make *Batson* challenges
3 for an alternate juror. On the contrary, a party should make a *Batson*
4 challenge when that party believes the opposing party struck an alternate
5 juror for race- or gender-related reasons. The State argues an appeal over a
6 denied *Batson* challenge regarding an alternate juror should be dismissed
7 where the appellant cannot show actual prejudice resulting from the district
8 court's denial of the *Batson* challenge.

9 **3. Conclusion**

10 Accordingly, because Respondent fails to show actual prejudice based
11 on the district court denying the *Batson* challenge, and the alternative juror
12 never deliberated with the jury who decided Appellant's guilt, this Court
13 should affirm the lower court's judgment of conviction and dismiss this
14 appeal.

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9. Preservation of issues. State concisely your response to appellant's position concerning the preservation of issues on appeal: Appellant preserved the issue appropriately by objection.

Dated January 4, 2019

Michael Macdonald, Esq.
Humboldt County District Attorney

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VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This fast track response has been prepared in a proportionally spaced typeface using Word 2013 in 14-pt Book Antiqua; or

[] This fast track response has been prepared in a monospaced typeface.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 1748 words; or

[] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[X] Does not exceed 11 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I

1 therefore certify that the information provided in this fast track response is
2 true and complete to the best of my knowledge, information and belief.

3 Dated January 4, 2019.
4 Michael Macdonald, Esq.
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Mr. J. J. J. J. J.